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The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

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Abstract

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is the first complaint mechanism of a core human rights treaty to specify a standard of review to be used in the assessment of alleged violations—providing for a 'reasonableness' test in Article 8(4). Questions remain as to how the Committee on Economic, Social and Cultural Rights will approach the provision, which was one of the most controversial elements in the drafting of the Optional Protocol and is bound to be a contentious focal point in the dialogue between the Committee and States. This article examines the drafting history of Article 8(4), its key differences from the other 'reasonableness' tests alluded to during negotiations, how the Committee should apply the provision, and the normative obligations under the Covenant that must guide its application.

Keywords: economic, social and cultural rights – margin of appreciation – 'reasonableness' test – standard of review – Optional Protocol to the International Convenant on Economic, Social and Cultural Rights

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1. Introduction

On 10 December 2008, the United Nations (UN) General Assembly (GA) adopted without a vote the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR or 'Optional Protocol'),[1] exactly 60 years after the Universal Declaration of Human Rights (UDHR).[2] As belated as it was symbolic, the Optional Protocol ended an historic imbalance in the international protection afforded 'civil and political' (CP) and 'economic, social and cultural' (ESC) rights.

Beginning with the division of the rights proclaimed in the UDHR into twin Covenants,[3] there has been a lingering disparity in the remedies available for violations of the two treaties, making later affirmations that all human rights were 'universal, indivisible and interdependent and interrelated'[4] seem to ring hollow. Unlike the ICESCR, the ICCPR was adopted alongside an optional protocol (OP-ICCPR)[5] empowering victims to hold States accountable for failing to meet their ICCPR obligations. Since entering into force, the first OP-ICCPR has produced more than 1,960 communications,[6] including claims of civil and political rights violations deeply connected to economic and social conditions that have lacked equal international oversight and protection.[7] Worldwide, there are an estimated one billion people living in extreme poverty,[8] and comparable numbers living without adequate access to potable water[9]

1 GA Res 63/117, 10 December 2008, A/RES/63/117. As of 24 March 2011, the Optional Protocol had 35 signatories and three parties (Ecuador, Mongolia and Spain); it will enter into force three months after the tenth ratification, per Article 18(1).

2 GA Res 217A (III), 10 December 1948, A/810 at 71.

3 The International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 (ICESCR or 'the Covenant'); and the International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR). See GA Res 543(VI), Preparation of Two Draft International Covenants on Human Rights, 5 February 1952, A/2119.

4 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, A/CONF.157/23, at para 5, endorsed by GA Res 48/121, 20 December 1993, A/RES/48/121.

5 First Optional Protocol to the ICCPR 1966, 999 UNTS 302. Alston notes the OP-ICCPR 'was proposed and adopted only at the very end of a protracted drafting process and came almost as an afterthought, once the precedent had been set in the 1965 Convention on the Elimination of All Forms of Racial Discrimination.' See Alston, 'No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant', in Eide and Helgesen (eds), *The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address. Essays in Honour of Torkel Opsahl* (Oslo: Norwegian University Press, 1991) at 83.

6 As at July 2010, see Report of the Human Rights Committee, GA sixty-fifth session, Supplement No 40, A/65/40 (Vol. 1) at para 80.

7 For instance, *S.W.M. Broeks v The Netherlands* (172/84), CCPR/C/29/D/172/1984 (1987).

8 Report of the independent expert on the question of human rights and extreme poverty, 13 August 2008, A/63/274 at para 3.

9 UN-Habitat, 2(3) *Urban World: Ten Years into the Millenium*, 1 June 2010, at 19, available at: http://www.unhabitat.org/pmss/listItemDetails.aspx?PublicationsID=2980 [last accessed 20 April 2011].

and in urban slums,[10] some two million of whom are forcibly evicted every year.[11] The examples go on.

Now, more than 40 years since the adoption of the Covenant, the Optional Protocol is a reality. Theoretical questions of the lack of 'justiciability' of ESC rights have been answered by the Committee on Economic, Social and Cultural Rights (CESCR or 'Committee'),[12] as well as by national and international judiciaries, many key cases having been decided in the last couple of decades since the Committee's first call for a protocol.[13] Debates have moved from arguments over whether States have obligations to implement ESC rights, to which aspects of them can be legally protected, and finally to how complaints should be heard.

The Optional Protocol provides a few novel features, but largely resembles parallel protocols and procedures of other UN treaties—including individual communications, inter-State communications, and an inquiry procedure. The Committee will examine individual complaints in closed-door proceedings, 'in light of all documentation submitted to it,' as well as that 'emanating from other United Nations bodies . . . and other international organizations, including regional human rights systems'.[14] It will then transmit its non-binding views and recommendations to the complainant and State concerned, which the State is to disseminate widely.[15]

Crucially, however, the Optional Protocol is the first complaints procedure to impose a standard of review on the treaty-monitoring body entrusted to receive communications, stemming from some States' ongoing discomfort with the adjudication of ESC rights. Article 8(4) reads:

> 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.

The Optional Protocol thus provides for the Committee to assess the 'reasonableness' of steps taken by States to fulfil their Covenant obligations, which various 'policy measures' may satisfy. This language came out of some of the most heated debates in the drafting of the Optional Protocol, and was only

10 Ibid. at 4.
11 UN Special Rapporteur on the right to housing, Fact Sheet 21, The Human Right to Adequate Housing, at 20–1, available at: http://www.unrol.org/files/FactSheet21en.pdf [last accessed 24 March 2011].
12 For the mandate of the CESCR, see ECOSOC Res 1985/17, 28 May 1985, S/RES/1985/17.
13 See CESCR, Towards an Optional Protocol to the ICESCR, 11 December 1992, A/CONF.157/PC/62/Add.5.
14 Article 8 OP-ICESCR.
15 Articles 9 and 16 OP-ICESCR.

finalised in the last two days of negotiations.[16] Numerous States reserved their positions on the final text,[17] continuing to debate the justiciability of Covenant rights and the scope of review permitted by Article 8(4) even as they recommended the Optional Protocol for adoption by the General Assembly.[18]

Ongoing disputes about the potential application of Article 8(4) are at the heart of challenges that will face the Committee when the Optional Protocol enters into force. What does it mean to apply a 'reasonableness' test to assess alleged violations of Covenant rights? At what level of detail should the Committee scrutinise State policy measures, and recommend actions to remedy abuses? Will such an assessment conform to the Committee's past interpretations of Covenant rights, and provide meaningful redress to complainants for injuries they have endured?

To answer these questions, the drafters of the Optional Protocol as well as advocates have looked at how national and regional judiciaries have used 'reasonableness' standards of review. As Porter recently wrote:

> 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.[19]

Judiciaries at all levels of course turn to each other for guidance in the application of legal principles and review standards. The recognition in Article 8(4) of a 'range of possible policy measures' available to States to fulfil their Covenant obligations in fact comes almost verbatim from the most famous ESC rights case to be decided by a national court through a 'reasonableness' test.[20] Nonetheless, the Committee as well as the drafters of the Optional Protocol have clearly enunciated that any application of Article 8(4) must conform to the scope and nature of Covenant obligations—and will not be defined by precedent from other bodies.[21]

16 Vandenbogaerde and Vandenhole, 'The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process' (2010) 10 *Human Rights Law Review* 207 at 216–7.

17 See infra n 202.

18 GA Third Committee, Summary record of the 40th meeting, 19 February 2009, A/C.3/63/SR.40 at paras 23 (UK) and 33 (Canada), *inter alia*.

19 Porter, 'The Reasonableness of Article 8(4) – Adjudicating Claims from the Margins' (2009) 27 *Nordic Journal of Human Rights* 39 at 40.

20 *Grootboom and Others v Oostenberg Municipality and Others* (2000) 3 BCLR 277 (CC) at para 41.

21 See Sections 3 and 5.

With that in mind, Section 2 of this article examines the legal obligations imposed by the Covenant, which define what policy measures are appropriate to satisfy them. Section 3 details the drafting history of Article 8(4), showing why the 'reasonableness' test was included and how efforts to undermine its effectiveness were ultimately defeated. Section 4 surveys relevant jurisprudence from the two national judiciaries employing 'reasonableness' tests to which repeated reference was made during negotiations, underscoring not only what lessons have been learned from those systems, but also how 'reasonableness' reviews differ according to the legal standards being assessed. Finally, in light of the above, Section 5 looks at how Article 8(4) should be applied in keeping with the scope and content of Covenant obligations, and what legal consequences the finding of violations may entail.

2. Obligations under the ICESCR

The drafting and ultimate adoption of the Optional Protocol have invigorated as much as resolved longstanding disputes about the nature of State obligations under the Covenant, and the scope, content and justiciability of the rights it provides. The debated inclusion of the 'reasonableness' standard of review—given greater depth in the next section—arose from State concerns over the extent to which their policymaking and budgetary choices would come under the Committee's magnifying glass, and whether the Committee would recommend costly measures to remedy harm caused to claimants by breaches of the Covenant.[22] Such concerns are not new, however, and have been largely addressed by the Committee in past clarifications of States' responsibilities.

Invoking the general obligations of States Parties, Article 8(4) stipulates that the 'reasonableness' of measures will be assessed 'in accordance with Part II of the Covenant.' The Optional Protocol importantly allows submissions of individual communications on the alleged violation of *any* Covenant right,[23] and in its preamble recites Article 2(1) of the ICESCR in its entirety—confirming that the examination of communications under the Optional Protocol must be consonant with the legal standards established by the Covenant. Those standards were raised throughout negotiations, so will be given more dimension here before turning in subsequent sections to the drafting history of Article 8(4), and how it should be applied to individual communications.

As a starting point, this Section maps out the content of Part II of the Covenant, particularly the obligations set out in Article 2(1), which the rest of Part II serves to qualify. The following analysis thus focuses more on the

22 See Section 3 at text accompanying infra nn 123–8, 136 and 145.
23 Article 2 OP-ICESCR.

prescribed implementation of the Covenant than on the content of specific rights, in order to delineate the parameters of the obligations the Committee is mandated to review, apropos of the new Optional Protocol. The end of the Section will focus on the obligations of States Parties to monitor and report to the Committee on their own progress in realising rights, offering insight into what aspects of policymaking may be considered under Article 8(4).[24]

Intertwined with that reporting process, the Committee's numerous General Comments are of vital importance. While non-binding, General Comments are persuasive interpretations of Covenant rights and duties, which ECOSOC and the General Assembly invited the Committee to draft 'with a view to assisting State parties in fulfilling their reporting obligations'.[25] In the absence of an Optional Protocol and a resulting body of jurisprudence, General Comments have complemented the Committee's concluding observations on State reports to shed light on the fundamental requirements of steps taken to implement the Covenant[26]—including the design of national strategies, the measurement of progress through indicators and benchmarks, the realisation of minimum standards, and the provision of judicial guarantees.

A. Article 2(1) ICESCR

Article 2(1) of the ICESCR reads:

> 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.

Article 2(1) is the keystone of the Covenant, laying out the principal obligations of States with respect to the rights subsequently enumerated. Essentially, it says that States have to take steps to implement their commitments as quickly and effectively as possible. Several notable works offer lengthier expositions on the drafting and nature of Article 2(1),[27] but the four constituent and

24 The Committee has indicated that the scope of its review of the 'reasonableness' of measures will be consistent with its methodology in the periodic State reporting process: see CESCR Statement, 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant', 10 May 2007, E/C.12/20071 at paras 1–2.

25 ECOSOC Res 1988/4, 24 May 1988, S/RES/1988/4, at para 13; GA Res 42/102, 7 December 1987, A/RES/42/102, at para 5; and Rule 65, CESCR, Rules of Procedure of the Committee, 1 September 1993, E/C.12/1990/4/Rev.1.

26 CESCR, supra n 13 at para 27.

27 Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Oxford: Intersentia, 2003); Alston and Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and

interrelated elements of the steps to be taken deserve special attention here, as they define the duties of States that the Committee is charged to monitor.

(i) 'undertakes to take steps'

As a whole, Article 2(1) commits States Parties to work towards progressive realisation of Covenant rights, but the obligation to 'take steps' is of immediate effect, requiring 'deliberate, concrete and targeted' measures to be adopted, before or 'within a reasonably short time after the Covenant's entry into force for the States concerned.'[28] The phrase to 'take steps' was included instead of one 'to promote' or 'to guarantee' Covenant rights,[29] but while that choice could be seen to impose a lesser obligation upon States, the undertaking must be gauged in light of the clauses that follow it.

(ii) 'with a view to achieving progressively the full realization of the rights recognized in the present Covenant'

In contrast with the immediate obligation to take steps, the concept of 'progressive realization' recognises that ESC rights 'will generally not be able to be achieved in a short period of time.'[30] That tension has provided ammunition for States to claim they are not obligated to ensure any given level of enjoyment of Covenant rights, but the Committee has cautioned that such flexibility 'should not be misinterpreted as depriving the obligation of all meaningful content.'[31] If progressive realisation is read in keeping with the 'overall objective, indeed the *raison d'être*' of the Covenant, Article 2(1) 'imposes an obligation to move as expeditiously and effectively as possible' towards the full realisation of Covenant rights.[32] While realisation may vary in pace according to local contexts, there is a 'strong presumption of impermissibility of any retrogressive measures'[33] in relation to any Covenant rights, meaning they represent *prima facie* violations,[34] which 'would need to be fully justified by reference to the

Cultural Rights' (1987) 9 *Human Rights Quarterly* 156 at 223–9 (see Annex – The Legislative Drafting History of Article 2(1) ICESCR); and Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995).

28 CESCR General Comment No 3: The nature of States Parties' obligations (art. 2, para 1), 14 December 1990, E/1991/23; 1-1 IHRR 6 (1994) at para 2; and CESCR General Comment No 14: The right to the highest attainable standard of health (art. 12), 11 August 2000, E/C.12/2000/4; 8 IHRR 1 (2001) at para 31.

29 Alston and Quinn, supra n 27 at 165–6.

30 General Comment No 3, supra 28 at para 9.

31 Ibid.

32 Ibid.

33 CESCR General Comment No 13: The right to education (art. 13), 8 December 1999, E/C.12/1999/10; 7 IHRR 303 (2000) at para 45. See also General Comment No 14, supra 28 at para 32.

34 Report of the High Commissioner for Human Rights on the implementation of economic, social and cultural rights, 8 June 2009, E/2009/90 at para 15. See also Courtis, *Courts and Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (International Commission of Jurists, 2008) at 29–30.

totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'[35]

(iii) 'to the maximum of its available resources,'

The presumed impermissibility of retrogressive measures is inextricably tied to the requirement of States to use the maximum of available resources to implement Covenant rights. Insomuch as resources are inevitably divided amongst competing demands, the Committee's above commentary importantly stresses that a balancing of the 'totality of rights' must guide the allocation of resources. The *travaux préparatoires* also make clear that States are obligated to use all resources *available* 'without sacrificing other essential services',[36] though the drafters rejected that such a balancing of rights could be used as a pretext to restrict the meaning of 'available resources' to those allocated by authorities 'for this purpose', as the United States sought to amend the provision.[37] Alston and Quinn observe that the Covenant thus involves a 'process requirement' for States to show the Committee that 'adequate consideration has been given to the possible resources available to satisfy each of the Covenant's requirements,' based on an 'obligation of conduct to ensure a principled policy-making process—one reflecting a sense of importance of the relevant rights.'[38]

As part of that process, the allocation of resources must reflect the prioritization of Covenant rights, and the use of resources must be optimised. Especially in times of severe resource constraints, there is a heightened obligation to protect vulnerable members of society, such as through low-cost targeted programmes,[39] and to ensure that policies and legislation are not 'designed to benefit already advantaged social groups at the expense of others.'[40] Accordingly, States must consider re-allocation of resources to avoid retrogressive measures,[41] including through the integration of State programmes to optimise the use of resources.[42]

35 General Comment No 3, supra 28 at para 9.
36 Alston and Quinn, supra n 27 at 178–9.
37 Ibid.
38 Ibid. at 180–1. See also Robertson, 'Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights' (1994) 16 *Human Rights Quarterly* 693 at 702.
39 General Comment No 3, supra 28 at para 12; CESCR General Comment No 5: Persons with disabilities, 9 December 1994, E/1995/22; 2 IHRR 261 (1995) at para 10; and CESCR General Comment No 6: The economic, social and cultural rights of older persons, 8 December 1995, E/1996/22; 3 IHRR 253 (1996) at para 17.
40 CESCR General Comment No 4: The right to adequate housing (art. 11(1)), 13 December 1991, E/1992/23; 1–1 IHRR 9 (1994) at para 11.
41 Ibid. See also Nolan and Dutschke, 'Article 2(1) ICESCR and States Parties' Obligations: Whither the Budget?' (2010) 3 *European Human Rights Law Review* 280 at 282–4.
42 Hunt, Report of the Special Rapporteur on the right to health – Addendum: Mission to Uganda, 19 January 2006, E/CN.4/2006/48/Add.2 at paras 56–61.

(iv) 'individually and through international assistance and co-operation, especially economic and technical,'

As developing countries have been quick to point out, the steps that States are required to take to the maximum of available resources include measures dependent on international assistance and cooperation. Those steps are not listed exhaustively, but the specific mentions of economic and technical efforts demonstrate that international assistance and cooperation are part of the resources considered to be available to States when they are fulfilling their Covenant obligations. As is clear from the *travaux préparatoires*, such resources are not restricted to budgetary appropriations[43] or economic aid, but also include optimisation efforts and other 'technical' approaches to maximising the use of available resources. The inclusion of international cooperation and assistance in the text of later Covenant Articles (11, 15, 22 and 23) further accentuates that States may need to solicit such resources in order to fulfil their obligations.[44] If States lack adequate domestic resources, it would thus constitute a *prima facie* violation of the Covenant to turn down international assistance,[45] which other States are in turn obligated to provide—prioritising the achievement of minimum standards of rights.[46] Since international assistance must be considered and sought out if necessary, States 'cannot escape the unequivocal obligation to adopt a plan of action on the grounds that the necessary resources are not available'.[47]

(v) 'by all appropriate means, including particularly the adoption of legislative measures.'

Article 2(1) closes with its only direct description of the steps to be taken by States—which must be 'appropriate' to realise Covenant rights. Some Articles specify measures States are required to adopt, but the Covenant does not include an exhaustive list of steps necessary to achieve each of its provisions. Despite that 'broad and flexible approach',[48] the Committee has held that 'the central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein',[49] and that 'the phrase "by all appropriate means" must be given its full and natural meaning', reaching far beyond

43 Alston and Quinn, supra n 27 at 178–9. See also CESCR General Comment No 2: International technical assistance measures (art. 22), 2 February 1990, E/1990/23; 1-1 IHRR 3 (1994).
44 General Comment No 3, supra 28 at paras 13–4.
45 Hunt, supra n 42 at paras 79–81.
46 General Comment No 14, supra 28 at para 45.
47 CESCR General Comment No 11: Plans of action for primary education (art. 14), 10 May 1999, E/1992/23; 6 IHRR 900 (1999) at para 9.
48 CESCR General Comment No 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24 at para 1.
49 Ibid.

legislative measures.[50] It is therefore up to States to decide what measures are appropriate to give effect to the Covenant in their local contexts,[51] based on available resources. While legislation may be required if existing laws or policies violate Covenant rights,[52] other 'appropriate means' may include 'administrative, financial, educational and social measures.'[53]

Whatever measures States adopt, their 'appropriateness' is demonstrated through their effectiveness in realising Covenant rights.[54] On that point, the Committee reserves for itself the role of assessing whether or not the means chosen satisfy State obligations,[55] noting that 'the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.'[56] Were States instead to monitor their own compliance with the Covenant's flexible language on steps to be taken to the maximum of available resources, Alston and Quinn rightly observe: 'An open-ended, self-evaluating obligation . . . would seem more characteristic of a declaration or a recommendation than of a convention or covenant.'[57]

Accordingly, a critical means to give effect to Covenant rights is the provision of domestic remedies, whether administrative or judicial—which an Optional Protocol is only meant to supplement in cases when they prove ineffective.[58] Citing the right to a remedy as provided by Article 8 of the UDHR, the Committee has stressed that 'appropriate means of redress, or remedies' are essential to give effect to all Covenant rights, violations of which are more likely to occur without government accountability and judicial review, particularly given the flexibility of Covenant requirements.[59]

While some States have long contested the justiciability of so-called 'positive' obligations to progressively realise ESC rights, the Covenant also engenders 'negative' obligations as integral aspects of the same provisions. The most prominent example of such a 'negative' obligation is that of States under Article 2(2) to guarantee the exercising of Covenant rights without discrimination—as when introducing and applying laws. Such negative obligations

50 General Comment No 3, supra 28 at para 4.
51 Ibid.
52 Alston and Quinn, supra n 27 at 167; Report of the United Nations High Commissioner for Human Rights (on progressive realisation), 25 June 2007, E/2007/82 at paras 30–3.
53 General Comment No 3, supra 28 at para 7. See also General Comment No 9, supra n 48 at para 6.
54 General Comment No 9, supra 48 at para 4.
55 Ibid.
56 General Comment No 3, supra 28 at para 4.
57 Alston and Quinn, supra n 27 at 178.
58 General Comment No 9, supra 48 at para 4. The Committee noted this in 1998 soon after completing its own first draft of an Optional Protocol to complement the ICESCR. See also General Comment No 3, supra 28 at para 5; and infra n 315.
59 General Comment No 9, supra 48 at paras 2–3.

require judicial protection of ESC rights,[60] as do 'positive' measures required to prevent or undo the effects of discrimination in violation of them.

B. The Principle of Non-Discrimination (Articles 2(2) and 3)

Occupying a central place in the Covenant, the principle of non-discrimination is enunciated in Articles 2(2) and 3[61] with regard to the enjoyment of all Covenant rights. Consequently, States have 'immediate and cross-cutting'[62] obligations to guarantee formal equality under State laws and policies, and to adopt measures to 'prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or *de facto* discrimination.'[63]

Thus, in addition to the obligation upon States not to discriminate, they must also adopt 'temporary special measures'[64] to remedy indirect or *de facto* discrimination in the exercising of Covenant rights, including in the private sphere.[65] Failure to act in good faith to do so would constitute a *prima facie* violation.[66]

The prohibited grounds of discrimination listed in Article 2(2) are: 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' The inclusion of 'other status' emphasises that the list is not exhaustive, and the Committee has since offered additional examples of prohibited grounds, such as: disabilities;[67] age;[68] nationality;[69] marital and family status;[70] sexual orientation and gender

60 See Abramovich, 'Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies' (2005) 2 *Sur – International Journal on Human Rights* 180 at 192–5.

61 For aspects of sex equality other than non-discrimination, see CESCR General Comment No 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), 11 August 2005, E/C.12/2005/4; 13 IHRR 1 (2006).

62 CESCR General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), 10 June 2009, E/C.12/GC/20; 16 IHRR 925 (2009) at para 7.

63 Ibid. at para 8. See also General Comment No 3, supra 28 at para 1; General Comment No 14, supra 28 at para. 30; and General Comment No 16, supra n 61 at paras 2–3.

64 General Comment No 20, supra n 62 at paras 38–9.

65 Ibid. at para 11.

66 Ibid. at para 14.

67 General Comment No 5, supra n 39 at para 5; and General Comment No 20, supra n 62 at para 28.

68 General Comment No 6, supra n 39 at para 12; and General Comment No 20, supra n 62 at para 29.

69 General Comment No 20, supra n 62 at para 30. The Committee footnotes that the prohibition of discrimination based on nationality is 'without prejudice' to Article 2(3) of the Covenant, which provides: 'Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.' The reference in Article 2(3) to human rights arguably confirms that States must similarly ensure at least minimum standards of Covenant rights to non-nationals.

70 Ibid. at para 31.

identity;[71] health status;[72] place of residence;[73] and economic and social situation.[74] The implicit prohibition of economic exclusion from services is notable, as it suggests that States Parties must guarantee at least minimum standards of all Covenant rights to every individual in their jurisdictions.[75]

C. *General Limitations (Articles 4 and 5)*

The flexible and contextual nature of obligations under the Covenant is matched in the parameters it sets for limiting rights. There is no derogation clause in the Covenant, and Article 4 moreover requires that any restrictions on rights must be 'determined by law' as well as 'compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.[76] As Courtis points out, allowing only restrictions that are 'compatible' with Covenant rights and that promote 'general welfare' entails the same kind of judgment as a 'reasonableness' test.[77] It is also consistent with the requirement for 'all appropriate means' to be adopted to realise the rights.

Article 5(1) further prohibits any 'limitation to a greater extent than is provided for in the present Covenant.' However, the Covenant does not always define the extent to which rights may be limited in keeping with their nature. Article 8(c) expressly allows the limitation of trade union rights, but only as prescribed by law and necessary 'in the interests of national security or public order or for the protection of the rights and freedoms of others'. In keeping with Courtis' assertion, the text of some other Covenant rights provides for a 'reasonableness' test outright, such as: '*reasonable* limitation of working hours' (Article 7); 'special protection . . . accorded to mothers during a *reasonable* period before and after childbirth' (Article 10.2); and 'progressive implementation, within a *reasonable* number of years, . . . of compulsory education free of charge for all' (Article 14). In other words, both the required steps to realise rights and their permitted limitation are context-sensitive and must be consistent with the overall objective of the Covenant.[78]

71 Ibid. at para 32.
72 Ibid. at para 33.
73 Ibid. at para 34.
74 Ibid. at para 35.
75 See also General Comment No 14, supra 28 at para 19.
76 Article 4 ICESCR.
77 Courtis, *Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Costa Rica/Geneva: Inter-American Institute of Human Rights/International Commission of Jurists, 2010) at 82, fn 67, available at: http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23080 [last accessed 24 March 2011].
78 See Article 2(1) ICESCR.

D. Minimum Core Obligations/Minimum Core Content

Allowing only those limitations that are compatible with the 'nature' of Covenant rights raises the broader question of what minimum essential levels States are required to ensure. While the Covenant specifies minimum levels for a few rights,[79] it is clearly not exhaustive, as evident in Article 9's spare provision of 'the right of everyone to social security, including social insurance.' Just as the Covenant cannot identify all appropriate means to realise the rights it provides, neither can it list every minimum standard for each provision, which may depend on context and change over time—such as with technological or medical developments.[80]

However, even if minimum standards are not expressly stipulated, the responsibility of the State is still engaged anytime they are not met.[81] In its privileged position to offer States guidance on appropriate measures to fulfil their Covenant duties,[82] the Committee has elaborated upon the 'minimum core content' intrinsic to numerous rights,[83] which is not subject to progressive realisation and States have an immediate obligation to satisfy. In cases where they fail to do so, States are *prima facie* in violation of the Covenant and have the burden of showing they have used all available resources (defined broadly, as noted above) to prioritise the fulfilment of those minimum essential levels.[84]

The Committee indicated in General Comment No 3 that States failing to secure core content can in some cases refute a presumed violation, when their resources are 'demonstrably inadequate', but pointedly asserts that the responsibility to move as expeditiously as possible towards realisation—and to monitor their progress in doing so—endures nonetheless.[85] So does the

79 For instance, Article 11 ('the right of everyone to be free from hunger') and Article 13 ('primary education shall be compulsory and available free to all'). See Report of the High Commissioner for Human Rights (on progressive realisation), 25 June 2007, E/2007/82 at para 21.

80 See Courtis, supra n 34 at 23.

81 Article 12, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (International Law Commission, 2001); endorsed by GA Res 56/83, 12 December 2001, A/Res/56/83. See also *B.E. Chattin (United States) v United Mexican States*, Vol. IV Reports of International Arbitral Awards at 287–8, and 295 (at paras 10, 11 and 29).

82 See analysis at supra nn 55 and 56.

83 General Comment No 4, supra 40 at para 8; General Comment No 13, supra 33 at para 57; General Comment No 14, supra 28 at paras 43–4; CESCR General Comment No 15: The right to water (arts. 11 and 12), 20 January 2003, E/C.12/2002/11; 10 IHRR 303 (2003) at paras 37–8; CESCR General Comment No 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary orartistic production of which he or she is the author (art. 15), 12 January 2006, E/C.12/GC/17; 13 IHRR 613 (2006) at paras 39–40; CESCR General Comment No 18: The right to work (art. 6), 6 February 2006, E/C.12/GC/18; 13 IHRR 625 (2006) at para 31; and CESCR General Comment No 19: The right to social security (art. 9), 4 February 2008, E/C.12/GC/19; 15 IHRR 605 (2008) at para 59.

84 General Comment No 3, supra 28 at para 10.

85 Ibid. at paras 10–11.

obligation to prioritise those at risk: 'even in times of severe resources constraints . . . vulnerable members of society *can* and indeed *must* be protected by the adoption of relatively low-cost targeted programmes.'[86]

In keeping with those optimisation requirements, the Committee recognised in General Comment No 14 an absolute requirement to satisfy the core content of the right to health and its determinants, noting that: 'a State party cannot, under any circumstances whatsoever, justify its non-compliance with the core obligations . . . , which are non-derogable.'[87] It should be noted that even putatively non-derogable core content provides States with considerable flexibility in the measures they elect to fulfil it, and is not as insensitive to context as some critics have argued.[88]

Exactly because minimum essential levels of rights must be guaranteed in a manner appropriate to local contexts, the Commission on Human Rights in 1994 invited States Parties to the ICESCR 'to identify specific national benchmarks designed to give effect to the minimum core obligation to ensure the satisfaction of the minimum essential levels of each of the rights.'[89] Despite their difference in strictness with regard to what constitutes a violation of the Covenant, both General Comments Nos 3 and 14 similarly stress that States are *always* under an immediate obligation to ensure minimum essential levels of Covenant rights, and to devise and implement a national plan of action to realise those rights in full, utilising indicators and benchmarks to monitor and report on their progress.[90]

86 Ibid. at para 12 (emphasis added).

87 General Comment No 14, supra 28 at paras 43 and 47. The Committee likewise recognised core content as non-derogable in General Comment No 15, supra n 83 at paras 40 and 42. On the other hand, General Comment No 3 (supra 28 at para 9) indicates States may be able to justify non-provision of minimum levels of food, shelter, and health care based on resource constraints—such that the standards established there and in General Comment No 14 are clearly at odds with one another. Nonetheless, the presumption that every State can typically guarantee the minimum core content of rights if it marshals and optimises its resources appropriately would make it difficult for a State to justify non-compliance. Beyond running counter to the 'nature' of subsistence rights, the International Court of Justice (ICJ) has recognised that restrictions, *inter alia*, on the right to health may also be difficult to justify as necessary 'for the purpose of promoting the general welfare in a democratic society', as required by Article 4 ICESCR: see *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, ICJ Reports 2004, 131 at paras 135–6.

88 For criticism of the concept of core content, see Craven, 'Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights', in Langford, Squires and Thiele (eds), *Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Sydney: University of New South Wales Press, 2005) at 39—42; and Porter, 'The Crisis of ESC Rights and Strategies for Addressing It', in ibid. at 48–9 and 52.

89 UN Commission on Human Rights (UNCHR) Res 1994/20, 1 March 1994, E/CN.4/1994/20 at para 11, quoted in supra n 79 at para 22.

90 CESCR General Comment No 1: Reporting by States Parties, 27 July 1981, E/1989/22; 1-1 IHRR 1 (1994) at para 7; General Comment No 3, supra 28 at para 11; and General Comment No 14, supra 28 at paras 57–8. Confirming that interpretation, the Covenant right to an adequate standard of living explicitly obligates States to ensure not only minimum levels of food, clothing and housing, but also 'the continuous improvement of living conditions.' See Article 11(1) ICESCR, noted in Report of the High Commissioner, supra n 34 at para 16.

E. Monitoring Implementation of State Obligations

As with all human rights, the Committee has said States Parties have a tripartite obligation to *respect*, *protect* and *fulfil* any right provided by the Covenant. The duty to *respect* prohibits States from interfering with the enjoyment of rights; the duty to *protect* entails the prevention of violations by third parties; and the duty to *fulfil* requires States to adopt legislative, administrative, budgetary, judicial and other policy measures to fully realise each right. As part of the obligation to *fulfil* rights, the Committee has said States have specific duties to *facilitate*, *provide* and *promote* each right.[91]

While this typology of rights is primarily a heuristic tool with origins outside the Covenant itself, the Committee—as with other international human rights bodies—has adopted it to provide helpful guidance to States in the crafting of steps to implement their obligations. It also importantly avoids the pitfalls of two-dimensional models of 'positive' and 'negative' rights, which have been exploited to equate CP rights with less expensive duties to respect and protect, and ESC rights with more costly obligations to fulfil. The obligation to fulfil Covenant rights has inevitably been the most nuanced and disputed of the three duties, as it lies at the heart of progressive realisation.

A critical component of States' immediate obligation to take 'deliberate, concrete and targeted'[92] steps to fulfil Covenant rights is the adoption of 'a detailed plan of action' that elaborates 'carefully targeted policies' and priorities.[93] Such plans should outline policies, programmes, legislation and 'appropriate budgetary provisions',[94] among other measures, and should 'identify the resources available to attain defined objectives, as well as the most cost-effective way of using those resources.'[95] States are obligated to report to the Committee on all those aspects of a principled policy-making process,[96] but to do so must first monitor their own implementation and achievement of rights through all the tools at their disposal.[97] As the OHCHR observed in a recent report:

> Implementation involves both process and outcome: measures adopted and results achieved. . . . Monitoring provides feedback for implementation: the evaluation of measures adopted and results achieved constitutes

91 For a deeper exploration of this tripartite typology, including its evolution from the writing of Eide and Shue to the Committee's current formulation, see Sepúlveda, supra 27 at 157–248.
92 See analysis at text accompanying supra n 28.
93 General Comment No 1, supra 90 at para 4.
94 General Comment No 5, supra n 39 at para 13.
95 General Comment No 14, supra 28 at para 53.
96 General Comment No 1, supra 90 at para 4; Article 16 ICESCR.
97 Of particular importance are disaggregated data, appropriate indicators and benchmarks: see General Comment No 1, supra 90 at para 7; General Comment No 13, supra 33 at para 37; General Comment No 14, supra 28 at paras 16 and 57–8; General Comment No 15, supra n 83 at para 53; and text accompanying infra n 98 at paras 37–44.

valuable information either to confirm the direction of some specific steps, or to correct them when necessary.[98]

In the contexts of monitoring and implementation, statistical human rights indicators and benchmarks are necessary to facilitate progressive realisation, as well as to satisfy immediate obligations of core content and non-discrimination.[99] Cognisant of the variable nature of conditions in different countries at different times,[100] the Committee will collaborate with States during the periodic reporting process on the 'scoping' of indicators and benchmarks tailored to their specific situations.[101]

Based on those benchmarks, budget appropriation bills are among the most critical 'legislative measures' States can adopt to realise Covenant rights.[102] Budget analysis accordingly plays a crucial role in the assessment of States' compliance with their 'process requirements'.[103] Though they may not necessarily represent the full range of resources available,[104] nor how effectively those resources have been used, budgets showcase the priorities and policy choices of States, as well as any manifest failures to adequately provide for certain rights, groups or regions.[105] Despite the discretion generally afforded to States in selecting realistic benchmarks and adopting their own means to implement their commitments, the Committee may examine budgets as well as other measures to determine whether States have done all they can to realise Covenant rights.[106]

In the negotiation and drafting of the Optional Protocol, the scope of the Committee's review and the 'margin of discretion' available to States took centre stage. However, the Committee has long been consistent in asserting that the breadth of that margin is the range of available policy measures *in compliance* with Covenant obligations, and cannot be used to excuse a State's failure to take all necessary steps.[107]

98 See Report of the High Commissioner, supra n 34 at para 8.
99 Ibid. at para 25; and Statement of the World Conference on behalf of the CESCR, 7 December 1992, A/CONF.157/PC/62/Add.5 at paras 12 and 16.
100 Hunt, 'State Obligations, Indicators, Benchmarks and the Right to Education', CESCR Day of Discussion, 16 July 1998, E/C.12/1998/11 at paras 6–7.
101 General Comment No 14, supra 28 at para 58; and General Comment No 15, supra n 83 at para 54.
102 Nolan and Dutschke, supra n 41 at 281; and Report of the High Commissioner, supra n 34 at para 74.
103 See analysis at text accompanying supra n 37.
104 See analysis at text accompanying supra n 43.
105 Report of the High Commissioner for Human Rights (on progressive realisation), supra n 79 at paras 64–5; see also Report of the High Commissioner, supra n 34 at paras 45–54 and 74.
106 Report of the United Nations High Commissioner for Human Rights (on progressive realisation), supra n 79 at paras 58–9.
107 CESCR General Comment No 12: The right to adequate food, E/C.12/1999/5; 6 IHRR 902 (1999) at para 21; General Comment No 14, supra n 28 at para 53; General Comment No 15, supra n 83 at para 45; General Comment No 16, supra n 61 at para 32; General Comment No 17, supra n 83 at para 47; General Comment No 18, supra n 83 at para 37; and General Comment No 19, supra n 83 at para 66.

3. The Drafting History of Article 8(4)

In the drafting history of the Optional Protocol as a whole, the history was much longer than the drafting. After initial discussions of a possible complaints procedure were considered 'too early',[108] the Committee began seriously to debate the question in 1991, after just a few years of monitoring and commenting on the implementation of Covenant rights. By 1992, the Committee had formally endorsed the drafting and adoption of an Optional Protocol to receive individual complaints,[109] which it proposed in an analytical paper submitted with its statement to the Vienna World Conference on Human Rights the following year, contending:

> [A] system for the examination of individual cases offers the only real hope that the international community will be able to move towards the development of a significant body of jurisprudence in this field. As the experience of the Human Rights Committee demonstrates, such a development is essential if economic, social and cultural rights are to be treated as seriously as they deserve to be.[110]

With broad support from the Secretary-General and delegations assembled at the World Conference to 'continue the examination'[111] of such a complaint mechanism, the Committee formulated a draft optional protocol soon after, completed in 1996.[112] It languished for the next four years, receiving few State comments,[113] until the Commission on Human Rights in 2001 appointed an Independent Expert on the Question of an Optional Protocol to the ICESCR,[114] who produced two fundamental reports on the topic. Based on his recommendations, the Commission established an Open-Ended Working Group ('Working Group') 'with a view to considering options regarding the elaboration of an optional protocol', to begin work in 2003.[115]

A decade after the Committee's initial call for a protocol, the Working Group thus began discussing options, but still had no clear mandate to begin drafting.

108 Craven, supra n 27 at 98.
109 CESCR, Report on the seventh session, E/1993/22-E/C.12/1992/2 at paras 233–7.
110 CESCR, see supra n 13 at paras 93–4.
111 Vienna Declaration and Programme of Action, supra n 4 at para 75.
112 Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a draft optional protocol for the consideration of communications in relation to the International Covenant on Economic, Social and Cultural Rights, 18 December 1996, E/CN.4/1997/105 at 2.
113 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' (2010) 32 *Human Rights Quarterly* 144 at 150.
114 UNCHR Res 2001/30, 20 April 2001, E/CN.4/2002/50.
115 UNCHR Res 2002/24, 22 April 2002, E/2002/23-E/CN.4/2002/200, chp 10; and UNCHR Res 2003/18, 22 April 2003, E/CN.4/2003/L.11/Add.3, chap. 10.

The question of whether it should have such a mandate was so divisive that—following its first session, focused largely on the nature and scope of ESC rights, including their disputed justiciability—the Working Group was unable to reach consensus on recommendations to the Commission on how to proceed. The Chairperson submitted only her personal proposal, based on which the Commission extended the mandate of the Working Group for two more years.[116]

The second session was dominated by interactive dialogues with special rapporteurs and guests from other treaty bodies. The Committee's earlier analytical paper and draft protocol served as a basis for discussions, but one delegation noted it 'needed to be updated and revised in light of developments since its elaboration and that some of the issues it raised were better dealt with in the rules of procedure.'[117] The representative of the Latin American and Caribbean regional bloc (GRULAC)—joined by other delegations—requested the Chairperson to draft an 'Elements Paper' for the third session, exploring 14 of the more contentious issues and procedures that an Optional Protocol would need to address.[118]

By the end of the third session, devoted almost entirely to discussing the Elements Paper, the conversation had turned towards more substantive matters and there was broader support to begin drafting, but still no consensus.[119] The decision was ultimately left to the newly established Human Rights Council,[120] which during its first session in June 2006 mandated the Working Group to meet for two more years 'to elaborate an optional protocol'.[121] As a basis for future negotiations, the Council asked the Chairperson to prepare a first draft including the points raised in her Elements Paper and 'all views expressed during the sessions of the Working Group'.[122] After 15 years of discussion, drafting was to begin.

Faithful to her instructions, the Chairperson's draft Optional Protocol included the varied—and in some cases very restrictive—views expressed during the first three sessions. In early negotiations, numerous delegates had shown forceful resistance to even the elaboration of a complaints procedure, voicing particular concerns over, *inter alia*: the justiciability of ESC rights at all, particularly of 'positive' obligations to fulfil them (such as through the judicious use of resources);[123] the appropriateness of reviewing the allocation

116 De Albuquerque, supra n 113 at 158–9.
117 Working Group, Report of the second session, 10 February 2005, E/CN.4/2005/52 at para 98.
118 Ibid. at paras 102 and 108; and de Albuquerque, supra n 113 at 162.
119 De Albuquerque, supra n 113 at 164–5.
120 Ibid.
121 Human Rights Council Res 1/3, 29 June 2006, A/HRC/RES/1/3 at para 2.
122 Ibid.
123 Working Group, Report of the first session, 15 March 2004, E/CN.4/2004/44 at para 65.

of resources, and the criteria for such an assessment;[124] potential interference with policymaking and budgetary decisions,[125] such as in health and education;[126] the Committee's overall competence to review State policies and determine potential violations of ESC rights;[127] and whether its non-binding recommendations would be interpreted as 'judicial' rulings domestically.[128]

Reflecting those apprehensions, the first draft included a range of proposals by delegates to limit the scope of the Optional Protocol and the purview of the Committee,[129] namely to cases on: discrimination;[130] 'core rights', their 'minimum contents', or 'serious violations';[131] and obligations to 'respect' and 'protect' rights, excluding or opting out of the duty to 'fulfil' them.[132] Several States also lobbied until the end for an 'à la carte' approach by which States could choose individually which Covenant rights would be justiciable,[133] a possibility raised early on and included in the Elements Paper,[134] but not in subsequent drafts of the Optional Protocol.

In addition to potential limitations on what rights to protect, the initial draft Optional Protocol included an unprecedented specification of the standard of review the Committee would apply in assessing complaints, in the form of Article 8(4).[135] As the Chairperson elaborated, in an explanatory memorandum accompanying the first draft:

> In paragraph 4, I have reflected a suggestion made by a number of delegates that an optional protocol should underline the need for the Committee to apply a standard of reasonableness in assessing questions

124 Ibid. at para 57; and Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 23 April 2007, A/HRC/6/WG.4/2. Explanatory Memorandum.
125 Ibid. at para 22.
126 Second Session Report, supra n 117 at para 32.
127 First Session Report, supra n 123 at para 19; and Working Group, Report of the third session, 14 March 2006, E/CN.4/2006/47 at para 91.
128 First Session Report, supra n 123 at para 54.
129 Explanatory Memorandum, supra n 124 at para 6.
130 Third Session Report, supra n 127 at paras 29 and 93.
131 Second Session Report, supra n 117 at para 88. Another proposal suggested limiting submissions to 'cases of "manifest errors"', see ibid. at para 92.
132 Second Session Report, supra n 117 at para 101; Third Session Report, supra n 127 at para 28; raised again in the fourth session (see Working Group, Report of the fourth session, 30 August 2007, A/HRC/6/8 at para 92).
133 First Session Report, supra n 123 at paras 24 and 65; Second Session Report, supra n 117 at paras 15, 17, 87, 101–2, 109; Third Session Report, supra n 127 at paras 30 and 111; Fourth Session Report, supra n 132 at paras 36–7; and Working Group, Report of the fifth session, 23 May 2008, A/HRC/8/7 at paras 9, 146 and 226. 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 what aspects of them are justiciable: see Second Session Report, supra n 117 at paras 37 and 42.
134 De Albuquerque, Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights, 30 November 2005, E/CN.4/2006/WG.23/2 at para 5(b).
135 Draft 1 of Article 8(4), Fourth Session Report, 23 April 2007, A/HRC/6/WG.4/2.

> concerning national policymaking and resource allocations. Other delegates argued that such standard was already implicit in the Covenant, and that there was no need to include such criteria in the optional protocol. Equally, the point was made that it would be difficult to define more specific criteria to assess the reasonableness of policies and resource allocations. Present article 8 at paragraph 4, includes a reference to a standard of "reasonableness" and, to underline its consistence with the nature of States parties' obligations, the provision closely reflects the wording of article 2 at paragraph 1, of the Covenant.[136]

The inclusion of assessment criteria in Article 8(4) thus reflected some States' ongoing discomfort with the adjudication of ESC rights—particularly with the prospect of their budgetary and policy measures coming under scrutiny in the context of alleged violations, an anxiety which arguably underlay all other proposals to restrict the scope of the Optional Protocol. Though other delegations protested that the 'reasonableness' test was unclear or overly broad, and would anyway have to be interpreted in a fashion consistent with Covenant obligations, the debate would continue throughout and after negotiations.

The criteria had not been included in the Elements Paper, which instead paralleled other existing complaints procedures by indicating only: 'The consideration of the merits of a communication takes place in the light of all the information made available by the State party and the complainant. Consideration of communications takes place in closed meetings.'[137] That original approach was consistent with the Committee's own draft from a decade earlier, which provided: 'The Committee may adopt such procedures as will enable it to ascertain the facts and to assess the extent to which the State party concerned has fulfilled its obligations under the Covenant.'[138] In its commentary on that draft provision, the Committee further noted:

> [T]he first Optional Protocol to the International Covenant on Civil and Political Rights does not specify the procedures to be used by the Committee in examining communications, other than to state that its consideration shall take place in closed meetings. *It is unnecessary for the draft protocol to be any more detailed* and it would seem to be sufficient to indicate that the Committee is *empowered to adopt its own procedures* for

136 Explanatory Memorandum, supra n 124 at para 29; see footnotes for parallel provisions in other complaint procedures.

137 De Albuquerque, supra n 134 at para 12(d).

138 See Report of the CESCR, supra n 112 at para 45. The Committee's proposed text on the examination of communications also provided for: consideration of information provided by 'other sources'; consensual fact-finding visits to States under review; closed-door meetings during examination; and publication of its views upon their adoption and transmission to the parties concerned.

> the consideration of communications and that such consideration should take place in *private session*.[139] (emphasis added)

The proposed Article 8(4) was in stark contrast to the Committee's initial draft, which sent a clear message: the Committee should determine its own standards of review, including through its rules of procedure. States should not intervene.

Nonetheless, a large part of States' subsequent negotiations centered on the inclusion (or exclusion) of some form of 'reasonableness' standard, and conjoined questions on the competence of the Committee to examine State policies. Answering those wary questions, later drafts of Article 8(4) added a 'margin of appreciation' or 'margin of discretion', implying a level of deference to the State in its policy decisions. That margin was meant to modify the assessment of 'reasonableness', but a fundamental question remained: what would be the *level* of that deference and, conversely, at what level of *detail* could the Committee consider the adequacy and appropriateness of State measures to fulfil their commitments?

The proposals were two dimensions of the same question and, just as they were coupled in Article 8(4), they were also debated loosely together. However, whereas 'reasonableness' survived negotiations and found its place in the Optional Protocol now being ratified, the proposed margins of 'appreciation' or 'discretion' were defeated. The following analysis looks separately at aspects of both intertwined initiatives—particularly failed arguments to expand them—before exploring the final compromise text of Article 8(4), and why the proposals had different fates.

While an examination of defeated alternatives in the drafting history could seem like the chronicle of a death foretold, the reasons that Article 8(4) ended up as it did offer an important window into the significance and appropriate application of the provision—and its differences from analogous standards of review in other systems.

A. The 'Reasonableness' Standard

The concept of 'reasonableness' arose early in the first session of the Working Group, in response to questions on the justiciability of ESC rights. During a dialogue with delegates, the Special Rapporteurs on the rights to health and housing pointed out that 'the Covenant does not impose an onerous burden on States parties: it requires them simply to show that they have taken some *reasonable* action towards the realization of the rights contained therein.'[140] Addressing the potential assessment of progressive realisation to the 'maximum available resources', the special rapporteurs suggested national

139 Ibid. at para 43.
140 First Session Report, supra n 123 at para 29 (emphasis added).

and regional jurisprudence could guide the application of Covenant obligations to individual complaints, alluding specifically to the 'reasonableness' standard applied to progressive realisation in the *Grootboom* case of South Africa's Constitutional Court.[141]

On the question of retrogressive measures, raised in dialogue with treaty body experts during the second session, a Committee member 'referred to the test of reasonableness found in common law systems', suggesting *prima facie* violations could be rebutted with 'reasonable justifications'.[142] In a situation involving discrepancies in the provision of public services to urban and rural areas, for instance, the Committee member asserted national policies 'would have to be justified according to reasonable and objective criteria directed to the fulfilment of State obligations'.[143]

Though 'reasonableness' had *not* been included in the communications procedure outlined in the Elements Paper,[144] the concept had gained traction by the third session. The United Kingdom, Canada and Norway suggested that both a 'reasonableness' test and a 'margin of appreciation' would be necessary to prevent undue interference with national policymaking.[145] Seemingly referring to the 'reasonableness' standard applied in its own common law system, the United Kingdom noted that national courts showed a high degree of deference to the State in ESC rights cases,[146] and suggested further limiting considerations of 'reasonableness' to 'issues concerning non-discrimination and core rights.'[147]

The Committee representative responded that States were implicitly afforded a 'wide margin of discretion' in reviews of their policies' compliance with Covenant obligations, and that failure to realise rights could always be defended through 'reasonable and objective criteria.' However, for those reasons, it was 'unnecessary in the light of the Committee's self-restraint, to expressly provide for a "standard of reasonableness" in an optional protocol.'[148]

As drafting began, that caution was cast aside, and 'reasonableness' became a mainstay of further negotiations. In the Chairperson's first Optional Protocol draft, Article 8(4) was anchored closely to the Covenant, largely reciting language from Article 2(1) of the ICESCR. Nevertheless, in the fourth session, some delegates quickly sought to pull the test far from the Covenant and standards implicit in it, attempting further to restrict the competence of the Committee to examine State policies. After abortive efforts to exclude from

141 Ibid. at paras 35–6; and *Grootboom*, supra n 20.
142 Second Session Report, supra n 117 at para 41.
143 Ibid. at para 65.
144 It was, however, mentioned in background regarding domestic decisions on resource allocation, specifically in the *Grootboom* case: see de Albuquerque, supra n 134 at para 41(a).
145 Third Session Report, supra n 127 at para 92.
146 Ibid.
147 Ibid. at para 93.
148 Ibid. at para 98.

consideration the duty to fulfil rights, and to evaluate the 'reasonableness' of measures only 'where and as required' or 'in this context',[149] a handful of mostly civil law States objected to the inclusion of a 'reasonableness' standard at all.[150]

Apparently pushing the common law concept of 'reasonableness', the United Kingdom suggested an explanatory annex to elaborate the term's meaning for States with other legal systems.[151] In short order, the United States, Poland and Denmark sequentially proposed amendments that would replace 'reasonableness' with the concept of 'unreasonableness' and add a reference to a 'broad margin of appreciation of the State party to determine the optimum use of its resources'.[152]

Numerous States and the NGO Coalition quickly rejected the proposed 'unreasonableness' standard, and voiced concerns that both the 'reasonableness' and 'unreasonableness' proposals amounted to reinterpretations of the Covenant.[153] One delegation added that such terms would unnecessarily micro-manage the work of the Committee.[154] Chile, Mexico and the NGO Coalition recommended the addition of 'effectiveness' after 'reasonableness', while Slovenia suggested adding 'adequacy'.[155] The African Group responded that 'effectiveness' was beyond the scope of the protocol.[156]

The fifth session was divided into two segments at the start of 2008, set seven weeks apart to allow for consultations and redrafting between negotiations, with a view to finalising a draft by the end of the session. Moreover, it was the last session in the Working Group's mandate, and its last chance to put forward an Optional Protocol text before the symbolic 60th anniversary of the UDHR.

During the first part of the fifth session, States reviewed a revised draft including all possible amendments put forward during the previous session.[157] As negotiations resumed, disputes continued over even the justiciability of ESC rights, as well as potential interference with State policymaking.[158] There was still strong support and vocal opposition for each of the proposed amendments to Article 8(4), particularly: 'reasonableness', 'unreasonableness' and a 'wide margin of appreciation'.[159] The United Kingdom proposed an annex

149 Fourth Session Report, supra n 132 at paras 92–3 (proposals by the African Group and the United Kingdom, respectively).
150 Ibid. at para 94.
151 Ibid.
152 Ibid. at paras 95, 97 and 153.
153 Ibid. at paras 95, 101, 103, 150 and 153.
154 Ibid. at para 103.
155 Ibid. at paras 104 and 153.
156 Ibid. at para 153.
157 Draft 2 of Article 8(4), in Revised Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 24 December 2007, A/HRC/8/WG.4/2, Annex II – Explanatory Memorandum at para 35.
158 Fifth Session Report, supra n 133 at para 10.
159 Ibid. at para 11.

defining criteria for an 'unreasonableness' test.[160] Chile and Slovenia supported the addition of 'effectiveness', while the African Group, Guatemala, Liechtenstein and Mexico supported amending the language to mirror Article 2(1) of the Covenant.[161] Numerous States called for a return to the original draft language, from before the deluge of conflicting proposals, highlighting 'the importance of closely reflecting the language of the Covenant.'[162] Other States petitioned to delete entirely the contentious terms 'reasonableness', 'unreasonableness', 'effectiveness' and 'adequacy'.[163] There was equal controversy over whether to retain, expand or delete the 'margin of appreciation' as well.[164]

At the end of the first half of its last session, the Working Group faced an apparent deadlock, with most parties unwilling to compromise on the standard of review.[165]

B. The Margin of 'Appreciation' or 'Discretion'

Support for an explicit 'margin of appreciation' in the Optional Protocol surfaced as early as the opening remarks of the Working Group's first session, in which some delegations noted it would be difficult for an adjudicatory body to determine violations of ESC rights due to the breadth of that margin.[166] Debates over the inclusion and scope of such a margin would preoccupy the Working Group until the end of negotiations, and were largely waged in tandem with those over the 'reasonableness' standard.

In dialogue with delegates during the first two sessions, special rapporteurs acknowledged the 'margin of appreciation' doctrine would be applied to individual communications.[167] So did a Committee member in attendance, who observed States have a 'broad' or 'wide' margin of discretion in choosing policies to progressively realise rights, and that the Committee considered 'the appropriateness of measures on a country-by-country basis.'[168] The Committee has likewise recognised in several General Comments over the last decade that States enjoy an inherent 'margin of appreciation'—that is, that they can adopt a range of measures consistent with their obligations to implement the Covenant.[169] One delegation quickly pointed out, however, that this inherent

160 Ibid. at para 88.
161 Ibid. at paras 88–9.
162 Ibid. at para 85.
163 Ibid. at para 88.
164 Ibid. at para 91.
165 Ibid. at para 88.
166 First Session Report, supra n 123 at para 19.
167 Ibid. at para 36; Second Session Report, supra n 117 at para 22.
168 Second Session Report, supra n 117 at paras 66, 79 and 83.
169 For specific CESCR General Comments asserting this, see supra n 107.

margin had not been questioned or spelled out for treaty-monitoring bodies in any of the other existing complaints procedures.[170]

States were in agreement that such a margin existed, but differed on its scope and on whether or not it was appropriate to expressly provide for it in an Optional Protocol. In the third session, when States began to push for the inclusion of both a 'reasonableness' test and a 'margin of appreciation' to limit the competence of the Committee,[171] other delegations and the NGO Coalition sought to decouple the two initiatives—proposing a 'reasonableness' test without an explicit margin, the latter of which would instead be handled on a case-by-case basis.[172] Before drafting had even begun, Switzerland responded that it would be 'essential' to provide a 'wide' margin in any Optional Protocol.

In the course of that debate, the Committee representative pointed to an important element missing from the discussion—that the Committee's decisions are non-binding views, and States have equal flexibility in how they choose measures to implement the Committee's recommendations.[173] In other words, the 'margin of appreciation' inherent to the Covenant is twofold—a recognition during review that a variety of measures could be consistent with Covenant obligations, and freedom for the State to choose from those options when bringing faulty policies into line with the Covenant. Yet neither reading of such a 'margin' precludes the Committee from assessing the compliance of State policies with their Covenant obligations.

At the opening of the fourth session, as the Working Group began to review the first draft Optional Protocol, the UN High Commissioner for Human Rights confirmed those twin elements:

> [T]he 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. . . . [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.[174]

Though no 'margin of appreciation' was included in the Working Group's first draft Optional Protocol, the Committee *did* include the concept in an

170 First Session Report, supra n 123 at para 66.
171 Third Session Report, supra n 127 at para 92.
172 Ibid. at paras 94–5.
173 Ibid. at para 122. See also Report of the United Nations High Commissioner for Human Rights on legal protection of ESCR, 21 June 2006, E/2006/86 at para 45.
174 Louise Arbour, United Nations High Commissioner for Human Rights, Opening statement, fourth session, 16 July 2007, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6155&LangID=E [last accessed 24 March 2011].

explanatory statement on assessing Covenant obligations pertaining to resource allocation, issued soon before the draft was to be considered.[175] The High Commissioner's remarks paraphrased the views expressed in the Committee's statement precisely, apparently in light of expected debates.

Indeed, early into the fourth session, the United States introduced a 'broad margin of appreciation', which numerous States supported—submitting successive proposals to expand the margin to be 'broad' or 'wide'.[176] Mexico and the NGO Coalition countered that, 'while a margin is implicit in the Covenant, it is not always broad, depending on the specific context and the right in question.'[177] Going into the fifth session with a 'margin of appreciation' included in the revised draft, delegations remained deeply divided—from opening statements, through the review of the draft—over whether to retain, modify or delete the provision entirely. After the first half of the session, the 'margin of appreciation' was replaced by a 'margin of discretion', but all of the substantive debates stayed the same.[178]

C. The Compromise Language of Article 8(4)

Between the two segments of the fifth session, the Chairperson circulated a second revised draft Optional Protocol, including points of general consensus from the last negotiations. She further held open-ended informal meetings with all delegations, which helped to communicate 'true bottom lines'.[179] Article 8(4) remained one of the most controversial provisions,[180] and did not change during those informal consultations. At the start of the latter half of its fifth session, the Working Group had before it a third, revised draft of the Optional Protocol—still including both 'reasonableness' and 'a margin of discretion', to be read 'in conformity' with Article 2(1) of the ICESCR.[181]

Along with the new draft, the Chairperson transmitted her own proposals, including that the sentence providing a margin be deleted, and that 'reasonableness' be followed by 'appropriateness' (the draft no longer proposed

175 CESCR statement, supra n 24 at paras 11–12.
176 Fourth Session Report, supra n 132 at paras 95–9 and 153.
177 Ibid. at para 100.
178 See Draft 3 of Article 8(4), fifth session, 19 February 2008, A/HRC/8/WG.4/2/Rev.1; Draft 4 of Article 8(4), fifth session, 25 March 2008, A/HRC/8/WG.4/3. Though 'discretion' was in the amended drafts, delegates argued primarily for a 'margin of appreciation', accentuating that the debate had not changed. The 'margin of appreciation' harkened to the European Court's doctrine, however, which is arguably more strict and more foreign to the Covenant, representing an explicit importing of the European concept: see infra n 342.
179 De Albuquerque, supra n 113 at 171.
180 Along with Articles 2 and 14 OP-ICESCR, on the rights protected, and international cooperation and assistance, respectively. Letter from the Chairperson-Rapporteur to the members of the Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 25 March 2008, A/HRC/8/WG.4/3.
181 Draft 4 of Article 8(4), fifth session, 25 March 2008, A/HRC/8/WG.4/3.

'effectiveness' or 'adequacy').[182] Several delegations opposed pairing 'reasonableness' and 'appropriateness', while others suggested deleting Article 8(4) altogether.[183] States previously supporting an 'unreasonableness' test joined those advocating 'reasonableness', countering a group seeking to exclude the term.[184] A fight was also pitched over the 'margin of appreciation', some concerned its removal would threaten State sovereignty, others that its mention would raise the burden of proof on alleged victims.[185] Regardless, delegates still sought greater clarification as to what either a 'reasonableness' test or a 'margin of appreciation' would entail, with one NGO calling for caution in grafting a European concept of a margin onto the Optional Protocol.[186]

The last proposed amendment to Article 8(4) recorded in the official report of the fifth session, put forward by Canada and supported by three other States, provided for the 'reasonableness' test to be applied 'in conformity with Part II of the Covenant', while acknowledging that 'appropriate policy measures' and 'the optimum use of its resources' would be governed by 'domestic priorities', as long as they were 'consistent' with Covenant obligations.[187] In other words, they proposed that 'reasonableness' and the margin of appreciation (by another name) would have to conform to States' obligations under all of Part II of the Covenant.

Consensus was not reached, and Article 8(4) was at the crux of disputes. During an informal lunch meeting, the Chairperson had relayed to 'skeptical' delegations that 'several states (namely European Union member states, African and Latin American states) had received clear instructions to reject any "compromise proposal" by the chair that would contain such concepts' as the 'margin of appreciation' or a test of 'unreasonableness'.[188] In the final days, the United States still insisted on a 'margin of appreciation' to guarantee governments could choose their own policies when more than one complied with the Covenant.[189]

With only two days remaining, 10 States drafted a compromise proposal on the most contentious aspects of the Optional Protocol—including its scope (Article 2), a provision prioritising certain communications (Article 4), criteria for assessment of alleged violations (Article 8(4)), and the handling of

182 Fifth Session Report, supra n 133 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.
183 Ibid. at para 169.
184 Ibid. at para 170.
185 Ibid. at para 171.
186 Ibid.
187 Ibid. 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 ibid. at paras 90 and 168.
188 De Albuquerque, supra n 113 at 175.
189 Porter, supra n 19 at 49.

reservations (Article 21).[190] In their proposed language, Article 8(4) would include a 'reasonableness' test 'where relevant,' to assess steps taken 'in accordance' with Article 2(1) ICESCR. Instead of a 'margin of appreciation', the Committee would 'respect the nature of the obligations undertaken by States parties under the Covenant.'[191]

On the second-to-last day of negotiations, the Chairperson met informally with delegations to resolve their differences and prepare a final draft, which she submitted at the end of the day for consideration at the last meeting.[192] As it now appears in the Optional Protocol, the ultimate compromise language of Article 8(4) excluded an explicit 'margin of appreciation', but recognised that States 'may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.' That choice of words was borrowed from similar language in the *Grootboom* case,[193] in which the Constitutional Court of South Africa articulated its own 'reasonableness' standard, including its level of deference to the State on policy decisions. The final text also provided a 'reasonableness' test to evaluate steps taken 'in accordance with Part II of the Covenant.'[194]

When the Working Group resumed negotiations on the last day, there were no objections to the transmission of the draft Optional Protocol, including the final compromise language, to the Human Rights Council for its consideration.[195] The Chairperson had noted that delegates' closing statements would be included in the final records.[196] None of the compromise negotiations following Canada's last proposed amendment on the day before were detailed in the fifth session report.

What followed instead was a series of formal closing remarks, either lauding the compromise or lamenting its shortcomings, depending on whose delegation spoke. States seemed to be issuing their first salvo of interpretive declarations, putting on record how they hoped Article 8(4) would be applied. A number of delegates criticised the removal of the 'margin of appreciation',[197] while Russia asserted the Committee would not be competent to assess the

190 Compromise Package Proposal on Articles 2, 4, 8 and 21, 2 April 2008 (on file with author). See also Vandenbogaerde and Vandenhole, supra n 16 at 216–7.

191 Ibid.

192 De Albuquerque, supra n 113 at 173; and de Albuquerque, '60 years after the adoption of the UDHR: Complaints before the UN for violations of Socio-Economic Rights', (Lisbon, May 2008) at 18, available at: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/droi_08091011_hesrca/DROI_08091011_HESRCAen.pdf [last accessed 24 March 2011].

193 De Albuquerque, supra n 113 at 175; and Porter, supra n 19 at 49. For the corresponding language from the *Grootboom* case, see text accompanying infra n 298.

194 The change from 'Article 2(1)' to 'Part II of the Covenant' seems to reflect support for Canada's earlier proposed amendments (listed at supra n 187).

195 De Albuquerque, Complaints before the UN, supra n 192.

196 Ibid.

197 Fifth Session Report, supra n 133 at paras 229 *et seq.*

compatibility of reservations lodged by States.[198] Others argued the language confirmed the Optional Protocol must be applied in keeping with the Covenant,[199] and did not 'diminish the scope of examination or protection of victims.'[200] In contrast, the United Kingdom asserted: 'the Covenant should be applied so as not to second-guess a State's reasonable policy choices, including by applying similar considerations as those in the Committee's statement of May 2007.'[201] Numerous States reserved their positions—overall or with reference to specific provisions such as Article 8(4)—but ultimately allowed the draft to be put forward to the Council.[202]

D. Matters of Interpretation

Though negotiations had ended in the Working Group, debates continued to simmer at the Human Rights Council[203] and in the Third Committee of the General Assembly. In the latter, the United Kingdom supported the draft as a compromise, but backpedaled to argue the Committee 'should concentrate on gross violations rather than on considering the reasonableness of the steps taken by a State party.'[204] Canada and New Zealand again stressed the importance of deference to States on matters of resource allocation and progressive realisation.[205] All three States were among a larger group still expressing doubts about even the justiciability of ESC rights, and put their discontent on

198 Ibid. at para 219
199 Ibid. at paras 236 and 241.
200 Ibid. at para 240.
201 Ibid. at para 246. See CESCR statement, supra n 24.
202 Fifth Session Report, supra n 133 at paras 214 (Algeria), 217 (US), 218 (India), 223 (Denmark), 224 (Netherlands), 226 (Canada), 228 (Poland), 230 (Norway), 235 (Sweden), 238 (New Zealand), 239 (Switzerland), 240 (Germany), 245 (Pakistan), 246 (UK), 248 (China), 250 (Indonesia) and 252 (Iran).
203 After the Working Group had closed negotiations, but before the text reached the Human Rights Council for consideration, a major dispute erupted around the alteration of the scope of the Optional Protocol (Article 2) by a limited number of States to include all Covenant rights, rather than just those in Parts II and III. The only additional right to be considered would be that to self-determination (including peoples' right 'to freely dispose of their natural wealth and resources'), provided by the sole Article of Part I. Some commentators have called the broadening of the scope a coup against political curtailment of human rights protections (see Mahon, 'Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights' (2008) 8 *Human Rights Law Review* 617 at 626 and 633), while others have predicted it will impede the legitimacy and effectiveness of the Optional Protocol (see Vandenbogaerde and Vandenhole, supra n 16 at 216–7). However, neither is likely the case since groups will not have standing to submit complaints through the Optional Protocol, and the representative member of the Committee indicated it might only consider issues of self-determination with respect to violations of other Covenant rights, such as in the context of indigenous land rights (see First Session Report, supra n 123 at paras 43 and 45; and Second Session Report, supra 117 at para 25). For video of statements by delegates, see Human Rights Council, eighth session Report, 2–18 June 2008, available at: http://www.un.org/webcast/unhrc/archive.asp?go=080618 [last accessed 24 March 2011].
204 GA Third Committee, supra n 18 at para 23.
205 Ibid. at paras 31 and 33.

record. Setting aside such differences, however, Denmark's delegation voiced plainly that it 'acknowledged that a significant number of States wished to see the Optional Protocol adopted by consensus and would not therefore insist on a vote.'[206] The Third Committee recommended the Optional Protocol to the General Assembly, which adopted it on 10 December 2008 by consensus.[207]

The compromise language of Article 8(4), as put forward by the Working Group, had survived without further amendments.

Now that States are signing and ratifying the Optional Protocol, the page turns to how the Committee will interpret and apply Article 8(4) to cases brought before it. Importantly, efforts to confine the Committee to assessment criteria that would limit its competence and undermine the right to a remedy—a broad 'margin of appreciation', the 'unreasonableness' standard, and the restriction of the Optional Protocol's scope to certain rights or aspects of them—were all soundly defeated. Though many would have preferred that it were not included at all, the standard of review came out relatively unscathed, and political compromise did not doom the Optional Protocol. Questions remain as to how the 'reasonableness' test will be applied, but the answer must be consistent with Covenant obligations and the object and purpose of the Optional Protocol.

4. Different Kinds of 'Reasonableness'

Disputes over the inclusion and significance of the 'reasonableness' test fundamentally reflect parallel debates regarding the nature of States' obligations under the Covenant—particularly what measures Sates must adopt and what level of resources they must dedicate to progressively realise Covenant rights. A 'reasonableness' standard of review imposes a limit on government discretion, and the breadth of that limit determines the extent to which a supervisory body can examine and prescribe the measures adopted by policymakers to implement their legal obligations.

Following repeated references during negotiations to 'reasonableness' standards in common law, in the South African constitution, and implicit in the Covenant itself, delegations ultimately still wanted more elaboration of the concept.[208] Committee members, States and advocates are likely to look to the jurisprudence of other judicial and treaty-monitoring bodies as they address, *inter alia*, remedial recommendations, burdens of proof, minimum core

206 Ibid. at para 24.
207 Final draft Optional Protocol to the ICESCR, fifth session, 23 May 2008, A/HRC/8/7 Annex 1.
208 Fifth Session Report, supra n 133 at para 171.

obligations, and the progressive realisation of rights.[209] The question remains to what extent 'reasonableness' standards of review from other legal systems are *relevant* to the application of the Optional Protocol to alleged violations of Covenant rights.

National and regional courts have provided important leadership in demonstrating the justiciability of ESC rights in diverse legal traditions, while facing many similar questions of competence.[210] However, the concept of 'reasonableness' is not a monolithic standard. In those jurisdictions applying 'reasonableness' tests, they have done so inconsistently—with radically different levels of deference to the State on policy and budgetary matters, resulting in equally varied outcomes. Any lessons to be taken from standards of review in other legal systems must be evaluated individually for their appropriateness in the context of the Covenant.

With a view to identifying elements that have been rejected or are applicable to the Optional Protocol, this section touches briefly on 'reasonableness' standards employed in the two legal systems most alluded to during negotiations: the English common law system, and the South African constitutional system.

A. The English Common Law System

The most widely known 'reasonableness' standard of review is that of the English common law tradition, referred to during negotiations by both a Committee member and the United Kingdom delegation.[211] Rather than a single standard, however, common law has produced separate strains of 'reasonableness' jurisprudence in tort and administrative law,[212] which is still causing confusion in UK courts today.[213] Both brands of 'reasonableness' are generally closer to the 'unreasonableness' standard rejected in the drafting of

209 Article 8(3) OP-ICESCR importantly provides for the Committee to consult documentation emanating from other UN bodies and international organisations, including regional human rights systems. While regional courts are not specified, they are certainly included, though the Committee would be at liberty to examine national and regional jurisprudence regardless, as a fundamental aspect of treaty interpretation (Article 38(1) Statute of the International Court of Justice) 1945, UNTS 993. Advocates have previously turned to successful national and regional economic, social and cultural rights cases for guidance on means by which economic, social and cultural rights can be rendered justiciable; the parameters of justiciability; the crafting of remedial requests; and strategies to ensure the implementation of court orders (see Langford et al., supra n 88 at 3–4).

210 For comprehensive, comparative surveys of national, regional and international economic, social and cultural rights jurisprudence, see Courtis, supra n 34; and Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008).

211 Second Session Report, supra n 117 at paras 41 and 65; Fourth Session Report, supra n 132 at paras 92–3.

212 Hickman, 'The Reasonableness Principle: Reassessing Its Place in the Public Sphere' (2004) 63 *Cambridge Law Journal* 166. See also Hickman, *Public Law After the Human Rights Act* (Oxford: Hart, 2010).

213 The Law Commission (UK), Administrative Redress: Public Bodies and the Citizen (2008) Law Commission Consultation Paper No 187. The Law Commission drew strong criticism for its

the Optional Protocol, which the European Court has also found to be in conflict with human rights law.[214]

(i) Tort law ('simple unreasonableness')

The concept of 'reasonableness' has been applied in tort law since at least the late eighteenth century, requiring public authorities to act with reasonable care when exercising their discretion under statutory powers.[215] In one of the earliest such cases, *Leader v Moxon*,[216] the court held that public authorities' 'discretion is not arbitrary, but must be limited by reason and law.'[217] Subsequent decisions found in favour of plaintiffs not only when public authorities overtly exceeded the letter of the law, but also when they acted without reasonable care to avoid unnecessary harm to others.[218] In at least two cases, public authorities were found to be negligent for acting unreasonably even when the court determined they had acted both in good faith and within the scope of their statutory powers.[219] The definitive application of 'reasonableness' in tort law was the decision in *Geddis v Proprietors of the Bann Reservoir*,[220] which upheld that discretion must be exercised reasonably under statutory powers, and that considerations of reasonableness may determine legal liability.[221] Courts confirmed in later cases that they considered unreasonable actions not to be justified by statutory powers, unless specifically provided for by law.[222]

That broad application of the 'reasonableness' principle continued in tort claims against public authorities until the 1970 decision of *Dorset Yacht Club*

suggestion in a recent consultation paper that UK legal standards applied to negligence claims against public authorities have been 'piecemeal and unprincipled'. The paper called for different approaches to be used in tort suits brought against private individuals and public bodies, which are currently examined under the same 'reasonableness' test, as established in *Caparo Industries plc v Dickman* [1990] 2 AC 605. The Law Commission's final report, *Administrative Remedies: Public Bodies and the Citizen* (London: The Stationery Office, (2010) ('The Law Commission Paper')), includes the Law Commission's unyielding response to criticisms over its viewpoint. Both the consultation paper and final report are available at: http://www.lawcom.gov.uk/remedies.htm [last accessed 24 March 2011].

214 See *Smith and Grady* 1999–VI; 29 EHRR 493; *Hatton and Others v United Kingdom* 2003–VIII; 37 EHRR 28; *H.L. v United Kingdom* 2004-IX; 40 EHRR 761 at para and 142; and *Osman v United Kingdom* 1998–VIII; 29 EHRR 245.

215 This was without prejudice to Crown Immunity, which remained in effect until 1947. Individuals were nonetheless able to bring suits against individual agents of public authorities for tortuous injury: see *Halsbury's Laws of England, Vol 1*, 4th edn (London: Butterworths, 1973) at para 189; and McLean, 'The Crown in Contract and Administrative Law' (2004) 24 *Oxford Journal of Legal Studies* 129 *at* 145.

216 *Leader v Moxon* [1773] 3 Wils. K.B. 461.

217 Ibid.; and Bourne, 'Discretionary Powers of Public Authorities: Their Control by the Courts' (1948) 7 *University of Toronto Law Journal* 395 at 395.

218 Bourne, ibid. at 396–405; and Hickman, supra n 212 at 168.

219 Bourne, ibid. at 409.

220 *Geddis v Bann Reservoir (Proprietors)* [1878] 3 App Cas 430 at 445–56.

221 Hickman, supra n 212 at 167.

222 Bourne, supra n 217 at 404.

Co Ltd v Home Office.[223] In *Dorset Yacht*, the House of Lords ruled against the Home Office for damage caused by youths who had escaped from a reform programme due to lack of oversight by correctional officers. Finding the State had a 'duty of care' to prevent the youths' actions, the decision was considered a 'sea change' in public liability,[224] but simultaneously established that authorities could only be held accountable in tort for negligence 'so unreasonable that it could not be regarded as a real exercise of discretion', thus exceeding the scope of their statutory authority (*ultra vires*).[225] While affirming *Geddis* in principle, the requirement that negligent actions be *ultra vires* rendered non-justiciable any tort damage claims brought against public authorities acting within their mandates.[226] *Dorset Yacht* raised the bar in such suits closer to that of '*Wednesbury* unreasonableness',[227] the stricter administrative standard now typically conjured by common law.

The House of Lords later distanced itself from the *ultra vires* requirement introduced by *Dorset Yacht*, but explicitly retained the '*Wednesbury* unreasonableness' threshold it comprises.[228] In subsequent tort cases,[229] the 'reasonableness' requirement has left courts reluctant to find public authorities liable for failing to confer a benefit, even when positive obligations are mandated—preferring not to encroach on discretionary power in matters of policymaking or resource allocation.[230]

(ii) Administrative law ('*Wednesbury* unreasonableness')

In *Associated Provincial Picture Houses v Wednesbury Corporation*,[231] the Court of Appeal held that the discretion of public authorities was unimpeachable by courts, provided they were acting within the power conferred upon them by the law. Lord Greene famously asserted, 'the task of the court is not to decide what it thinks is reasonable', but whether the measures taken by public authorities within the 'four corners' of their discretion are 'so unreasonable that no reasonable authority could ever have come to it.'[232] Actions within the scope of that discretion, he said, 'cannot be questioned in any court of law.'[233]

223 *Dorset Yacht Club Co Ltd v Home Office* [1970] 2 All ER 294.
224 The Law Commission Paper, supra n 213 at paras 4.36–4.37.
225 *Dorset Yacht Club*, supra n 223, per Lord Reid and Lord Diplock. Hickman, supra n 212 at 170–3; and The Law Commission Paper, supra n 213 at para 3.123.
226 The Law Commission Paper, supra n 213 at paras 3.123–3.124.
227 See below at (ii). Hickman, 'The Reasonableness Principle', supra n 212 at 170–1, and, generally, Hickman, *Public Law*, supra n 212.
228 Hickman, 'The Reasonableness Principle', supra n 212 at 184, citing *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 and 736–7. See also *Barrett v Ministry of Defence* [1995] 3 All ER 87 (CA).
229 Subsequent tort cases have used the 'reasonableness' test established in *Caparo Industries plc v Dickman* [1990] 2 AC 605. The Law Commission Paper, supra n 213 at paras 3.124 and 3.129.
230 The Law Commission Paper, supra n 213 at paras 3.130, 3.136, 3.163, 3.186 and 4.39.
231 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA).
232 Ibid.
233 Ibid.

Whereas in earlier tort claims, a *prima facie* violation put the burden on defendants to prove they had acted reasonably, '*Wednesbury* unreasonableness' demanded that *no reasonable authority* could possibly have considered the action or omission in question for the case to even be justiciable, connoting an almost absolute deference to public authorities.[234]

In two decisive cases submitted to Strasbourg, the European Court of Human Rights found the *Wednesbury* standard to have set the threshold of unreasonableness 'so high that it effectively excluded any consideration by the domestic courts'[235] of whether restrictions of Convention rights were justifiable or proportionate,[236] thereby denying the claimants' right to a remedy under Article 13 of the European Convention.[237] Both those cases dealt with violations prior to the entry into force of the Human Rights Act, which has since required UK courts to interpret and develop domestic laws in keeping with Convention rights.[238]

Following the Human Rights Act's entry into force, the House of Lords consistently held that courts must apply a proportionality test to Convention rights cases, instead of '*Wednesbury* unreasonableness'.[239] Nonetheless, lower courts narrowly applied Convention rights and the corresponding proportionality review, producing inconsistent rulings and more frequent appeals to the House of Lords.[240] For its part, the House of Lords complicated matters by at times upholding lower courts' recalcitrant use of '*Wednesbury* unreasonableness' in such cases.[241] Yet that trend seems to have abated with a November 2010 decision by the new Supreme Court, which confirmed lower courts should generally apply the proportionality test in keeping with the jurisprudence of the European Court of Human Rights.[242]

(iii) Conclusion

For clear reasons, it was the right choice for States to reject 'unreasonableness' as a standard of review under the Optional Protocol. Despite comparisons

234 Ibid.; and Hickman, 'The Reasonableness Principle', supra n 212 at 179.
235 *Smith and Grady v United Kingdom*, supra n 214 at para 138. The Court noted (at para 131) that, while 'the precise scope of the obligations under Article 13 would depend on the nature of the individual's complaint' and of the rights abridged Article 8 of the European Convention on Human Rights imposes positive obligations on authorities to balance protection of rights with, *inter alia*, interests 'necessary in a democratic society.'
236 Ibid.; and *Hatton and Others v United Kingdom*, supra n 214 at para 141.
237 *Smith and Grady v United Kingdom*, supra n 214 at paras 138–9; and *Hatton and Others v United Kingdom*, supra n 214 at paras 141–2.
238 Section 3 Human Rights Act 1998, entered into force on 2 October 2000.
239 *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 at paras 26–9 and 32.
240 The Law Commission paper, supra n 213 at paras 3.186, 4.39, 4.40 and 4.55.
241 See *Kay and others v Lambeth London Borough Council* [2006] UKHL 10.
242 *Manchester City Council v Pinnock* [2010] UKSC 45. The Supreme Court was established in October 2009, replacing the Appellate Committee of the House of Lords as the highest court in the United Kingdom.

made during negotiations, even common law standards of 'reasonableness' have typically equated to 'unreasonableness' when applied by courts reluctant to enforce the State's positive obligations, and do not provide a consistent or appropriate model for the application of Article 8(4). To borrow imagery from *Wednesbury*, the obligation to fulfil human rights requires assessment within the 'four corners' of discretion, whereas 'unreasonableness' only looks at a State's actions outside the boundaries of its discretionary power. However, not all policy options available to a State are 'reasonable'.

B. The South African Constitutional System

During negotiations of the Optional Protocol, delegates and human rights experts addressing the Working Group made recurring references to the limited but influential case law of the Constitutional Court of South Africa[243]—particularly its prominent rulings on ESC rights provided by South Africa's Constitution.[244] Significantly, the Constitution makes ESC rights directly justiciable in domestic courts,[245] and requires the 'reasonable' provision of numerous rights, including those to a healthy environment;[246] land and natural resources;[247] housing;[248] health care, food, water and social security;[249] education;[250] access to information;[251] just administrative action;[252] and judicial guarantees.[253] For example, Section 26 provides:

> (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

As Justice Yacoob observed: 'Socio-economic rights are expressly included in the Bill of Rights . . . . The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.'[254]

243 For example, see above supra nn 141 and 144.
244 Constitution of the Republic of South Africa 1996 ('Constitution'), available at: http://www.info.gov.za/documents/constitution/1996/index.htm [last accessed 24 March 2011].
245 Section 38 Constitution.
246 Section 24(b) Constitution.
247 Section 25(5) Constitution.
248 Section 26(2) Constitution.
249 Section 27(2) Constitution.
250 Sections 29(1)(b) and 29(2) Constitution.
251 Section 32(2) Constitution.
252 Section 33(1) Constitution.
253 Section 35 Constitution.
254 *Grootboom*, infra n 20 at para 20.

Exactly that question has preoccupied much of the Court's jurisprudence on ESC rights, frequently dwelling both on the significance of 'reasonableness' being included directly in the text providing rights, and on the appropriate role of the Court in enforcing them. The Court has demonstrated the viable application of a 'reasonableness' standard to claims involving fundamental ESC rights—and in some cases their violation—yet its approach continues to draw considerable criticism, deserved or not, and presents marked contrasts with the approach of the Committee.

(i) 'Reasonableness' versus 'rationality'

The Court has developed its 'reasonableness' standard on a case-by-case basis, and in a largely consistent fashion, but has been accused of adopting an overly administrative approach to the Constitution.[255] Indeed, '*Wednesbury* unreasonableness' is alive and well in South African administrative law, and the Constitutional Court has struggled when reviewing administrative cases to move away from the legacy of common law. In reviewing lower court cases involving constitutional provisions of 'reasonableness', the Court has decidedly required a 'simple test' of unreasonableness instead of the insurmountable *Wednesbury* standard codified in the Promotion of Administrative Justice Act.[256]

In its first ESC rights case, *Soobramoney*[257]—brought by a terminally ill individual who was refused necessary dialysis treatment reserved for curable patients—the Court similarly had to address the high level of discretion

255 Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007) at 142; Liebenberg, 'Socio-Economic Rights: Revisiting the Reasonableness Review/Minimum Core Debate', in Woolman and Bishop (eds), *Constitutional Conversations* (Cape Town: Pretoria University Law Press, 2008) at 322–3; and Coomans, 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness" Test as Developed by the South African Constitutional Court' (2005) 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 167 at 195. Liebenberg (ibid.), who has been credited with introducing 'reasonableness' to the Constitution during negotiations as a higher standard than the existing rationality review (see Coomans, ibid. at 181), has more recently expressed her disappointment with the concept's application:

> [T]he evaluative and remedial paradigms presented by the reasonableness approach for the adjudication of positive socio-economic rights claims do not suggest any meaningful departure from conceptions of the judicial role under pre-constitutional administrative law. The unfortunate result is that the judicial contribution to the debate over transformation is no different than it would have been in a constitutional setting where socio-economic rights had either not been entrenched at all or had functioned only as directive principles of state policy.

256 Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (Pretoria: Pretoria University Law Press, 2009) at 82–4, citing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 7 BCLR 687 (CC).

257 *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT 32/97) [1997] ZACC 17.

typically afforded the State, noting that the lower court judgment 'refers to decisions of the English courts in which it has been held to be undesirable for a court to make an order as to how scarce medical resources should be applied'.[258] As government resources were demonstrably inadequate,[259] the Constitutional Court upheld the lower court's unwillingness to interfere with the government's decision on how to spend its limited resources,[260] observing: 'A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.'[261]

While largely maintaining that high level of deference, the Court has importantly since distanced itself from common law rationality tests, noting in a more recent case: 'The test for rationality is a relatively low one. . . . But that is not the test for determining constitutionality under our Constitution. Section 27(2) of the Constitution sets the standard of reasonableness which is a higher standard than rationality.'[262]

(ii) Developing the 'reasonableness' standard

Four ESC rights cases since *Soobramoney* have elaborated upon the constitutional requirements of 'reasonable' measures: *Grootboom*;[263] *Treatment Action Campaign*;[264] *Khosa*;[265] and *Mazibuko*.[266] The Court first defined its approach to 'reasonableness' in *Grootboom*, its most prominent ESC rights case, brought by a homeless community forcibly evicted from their informal settlements. The Court found the government had not adopted reasonable measures to provide temporary shelter for South Africa's large and vulnerable population without adequate housing, including the evictees in question. Its decision identified three interlocking elements of State obligations:

(a) the obligation to 'take reasonable legislative and other measures';
(b) 'to achieve the progressive realisation' of the right; and
(c) 'within available resources.'[267]

258 Ibid. at para 30.
259 Ibid. at para 23.
260 Ibid. at para 59.
261 Ibid. at para 29.
262 *Khosa and Others v Minister of Social Development & Ors (2004) 6 BCLR 569 (CC)* at para 67.
263 *Grootboom*, supra n 20.
264 *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC).
265 *Khosa*, supra n 262.
266 *Lindiwe Mazibuko and Others v City of Johannesburg and Others* (2009) ZACC 28.
267 *Grootboom*, supra n 20 at para 38. While *Grootboom* specifically addressed housing rights (s26(2) Constitution), the State has the same obligations to implement the rights to property (25(5) Constitution), health care, food, water and social security (s27(2) Constitution. See Section B above.

The 'reasonableness' of measures is therefore dependent on available resources, which define what measures are open to authorities and the pace at which rights can be progressively realised. Reaffirming its decision in *Soobramoney* on that point, the Court echoed in *Grootboom* that 'the obligation does not require the state to do more than its available resources permit'.[268]

Significantly, however, the decision also specified that 'reasonable' measures must satisfy a number of process requirements even within those limits, including the crafting of a comprehensive, coherent and coordinated national plan,[269] which targets short-, medium- and long-term needs.[270] Moreover, that strategy must be implemented[271] and accompanied by ongoing monitoring of rights conditions,[272] prioritising measures to assist vulnerable populations.[273] The Court has more recently added that the design and implementation of those measures must be transparent[274] and involve 'meaningful engagement' with those affected, especially if they are marginalised or vulnerable.[275]

Although the State was obligated only to take reasonable measures *within* available resources, as the Constitution provides,[276] the Court asserted it was 'essential that a reasonable part of the national housing budget be devoted' to 'provide relief for those in desperate need', though 'the precise allocation is for national government to decide in the first instance.'[277] Despite its outspoken deference to the State on budgetary decisions, the Court's interpretation of 'reasonable' measures demanded the prioritisation of the vulnerable and needy when allocating resources. This is vitally important to understand: the measures adopted by authorities *within* the 'four corners' of their discretion are subject to scrutiny by the Court, which retains ultimate authority over what the range of 'reasonable' measures comprises.[278] This is a much higher standard of review than 'unreasonableness'.

In the *Grootboom* case, the backlog in housing construction—and thus the slow pace of progressive realisation—was so severe[279] that the Court found it unreasonable to leave those without housing in limbo indefinitely. However, the Court prefaced that conclusion by observing that a national programme

268 *Grootboom*, supra n 20 at para 46.
269 Ibid. at paras 39–40.
270 Ibid. at para 43.
271 Ibid. at para 42
272 Ibid. at para 43.
273 Ibid. at para 44.
274 *Treatment Action Campaign*, supra n 264 at para 123; and *Mazibuko*, supra n 266 at para 71.
275 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (2008) ZACC 1 at para 15.
276 See text accompanying supra n 267. The rights, *inter alia*, to a healthy environment and education are silent on available resources, potentially imposing a greater obligation on the State.
277 *Grootboom*, supra n 20 at para 66.
278 For similar observations, see Liebenberg, supra 255 at 306.
279 *Grootboom*, supra n 20 at para 58.

without a focus on short-term needs, which 'leaves out of account the immediate amelioration of the circumstances of those in crisis', could hypothetically still be reasonable if it provided 'affordable houses for most people within a reasonably short time.'[280]

It is somewhat tautological to suggest that the relative importance of prioritising vulnerable groups depends on the severity of their vulnerability, but the point to take away is that the Court's 'reasonableness' standard demands that measures earnestly target the fulfilment of rights, even if not stipulating minimum required levels of provision—and thus not requiring States to provide immediate relief based on poor living standards alone. Reasonable programmes 'must provide for relief for those in desperate need',[281] but poor conditions persisting despite the government's best efforts are not a sufficient basis for the Court's intervention.

Nonetheless, critics argue the 'reasonableness' standard applied by the Court is still characterised by excessive deference to the State, and does not adequately define the scope or content of individual rights.[282] In response to similar claims by plaintiffs seeking relief from poor conditions, the Court has unrelentingly held that any ESC rights provided by the Constitution with inbuilt 'reasonableness' limitations are not 'self-standing' positive entitlements,[283] and that their content 'can therefore not be determined without reference to the reasonableness of the measures adopted to fulfil the obligation.'[284]

In the recent case of *Mazibuko*, the claimant argued that Johannesburg's free basic monthly supply of water did not satisfy minimum essential levels of human dignity.[285] Enigmatically, though human dignity is a non-derogable,[286] self-standing right[287] and core value[288] in South Africa's Constitution, which courts must promote in the interpretation of all other constitutional rights[289] and their limitations,[290] the Court found:

280 Ibid. at paras 64 and 65.
281 Ibid. at para 66. Note that the Court decidedly observes the State must provide *for* relief, rather than provide relief itself in all cases of poor conditions.
282 Bilchitz, supra 255 at 141.
283 *Grootboom*, supra n 20 at paras 38 and 74; *Treatment Action Campaign*, supra n 264 at paras 23, 34 and 39; *Khosa*, supra n 262 at para 22; and *Mazibuko*, supra n 266 at para 56.
284 *Khosa*, supra n 262 at para 43. The Court (at paras 105–6) has notably avoided addressing whether or not the Constitution's general limitation of 'reasonableness' (s 36(1)) imposes the same obligation on other rights not providing an internal 'reasonableness' limitation. See also Bilchitz, supra n 255 at 175.
285 *Mazibuko*, supra n 266 at paras 6 and 55. See also in this issue of the *Human Rights Law Review* Wesson, Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg*.
286 Section 37 Constitution.
287 Section 10 Constitution.
288 Section 7 Constitution.
289 Section 39 Constitution.
290 Section 36 Constitution.

> The argument must fail for the same reasons that the minimum core argument failed in *Grootboom* and *Treatment Action Campaign*. Those reasons are essentially twofold. The first reason arises from the text of the Constitution and the second from an understanding of the proper role of courts in our constitutional democracy.[291]

While potentially considering the existence of inadequate levels of rights when assessing the 'reasonableness' of measures,[292] the Court argued that the 'reasonableness' standard and the role of the Court itself preclude any claim for immediate relief based solely on poor levels of rights, even those necessary for human dignity or survival. That is the basis for both the Court's reluctance to define minimum standards of ESC rights, and its high degree of deference to the State on budgetary and policy decisions.

Even if poor conditions may be considered in assessing the reasonableness of State policies and programmes,[293] the Court likewise underscored in *Grootboom* that States' constitutional obligations under the 'reasonableness' standard are primarily process requirements, which vary with each right and do not entail minimum levels of provision. As a point of comparison, the Court differentiated the content of housing rights in the Constitution from those in the Covenant:

> The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of Section 26. These differences, in so far as they relate to housing, are:
>
> (a) The Covenant provides for a *right to adequate* housing while section 26 provides for the *right of access* to adequate housing.
> (b) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.[294]

The distinction holds true for most of the ESC rights provided by the Constitution,[295] and cannot be overstated: the rights are defined by *access* rather than *adequacy*, and *reasonableness* rather than *appropriateness*. The Court applies the 'reasonableness' standard as the *legal standard* of ESC rights provided by the Constitution—and not just a standard of review.[296] This

291 *Mazibuko*, supra n 266 at paras 55–6.
292 Ibid. at para 75. See also *Grootboom*, supra n 20.
293 Ibid.
294 *Grootboom*, supra n 20 at para 28. The Covenant does not necessarily require legislative measures (see Section 2 above), but the rest of the distinction is still valid.
295 For applicable sections of the Constitution, see supra nn 247–51.
296 The Court's standard of review is provided by s 39 of the Constitution, which *requires* the Court to consider human dignity, equality, freedom and international law, but not 'reasonableness'. The legal standard of 'reasonableness' is located only within the text of specific

points to the crucial differences in how a 'reasonableness' test would be applied to assess the 'appropriateness' of measures under the Optional Protocol.[297]

(iii) Levels of deference in the Court's 'reasonableness' review

The Optional Protocol notably borrowed language directly from the *Grootboom* decision to resolve arguments over what level of deference should be afforded States when assessing potential violations. In applying the 'reasonableness' test, Article 8(4) provides: '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.'

Though there are clear and deliberate similarities, the language omitted from the parallel passage in *Grootboom* highlights the definitive differences between the two standards of review:

> 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. Many of these would meet the *requirement of reasonableness*. Once it is shown that the measures do so, this requirement is met.[298] (emphasis added)

The Covenant's legal standard of 'appropriateness' opens more doors to what the Committee can assess when determining the 'range of possible policy measures' available to States, and whether the measures adopted by States are located within that range, and are therefore 'reasonable'. When reviewing the 'reasonableness' of measures 'in accordance' with the general obligations of Covenant rights, the Committee has made clear that its scrutiny extends to optimisation in spending and policy choices, stemming from States' obligation to take steps to the *maximum* of available resources, rather than only *within* them.[299]

rights and the general limitations clause (s 36). It is significant in this regard that the Optional Protocol borrows language from the standard of review described in *Grootboom*, rather than from the legal standard requiring 'reasonableness'.

297 Discussing *Grootboom* in a submission to the Working Group, Special Rapporteur on the right to food, Jean Ziegler, likewise noted that the Committee would need to examine the 'appropriateness' of measures and not just their 'reasonableness', due to the different obligations imposed by the Covenant and South Africa's Constitution: see Information provided by the Special Rapporteur on the Right to Food, 5 February 2004, E/CN.4/2004/WG.23/CRP.7 at para 45. Ziegler raised analogous points in dialogue with the Working Group: see Second Session Report, supra n 117 at para 21.

298 *Grootboom*, supra n 20 at para 41.

299 See Section 2 above; and CESCR Statement, supra n 24.

This is not to write off, but rather to qualify what lessons can be taken from the South African model. The Constitutional Court has maintained that the content of rights is limited to procedural requirements, but in developing its jurisprudence has opened a range of factors to potential consideration when assessing the 'reasonableness' of measures adopted by States, including the levels of rights provision,[300] speed of progressive realisation[301] and budget appropriations.[302] Moreover, the importance it puts on planning, monitoring, impact assessment, 'meaningful engagement' and prioritisation of the vulnerable are similar to the Committee's observations on the requirements of Covenant obligations.

(iv) 'Reasonable' remedies

While the Court refrains from engaging in the fine-point budget and optimisation analyses valued by the Committee, its binding decisions carry a weight that the Committee's views and recommendations lack. Both bodies wield an interpretive authority demanding the State's attention as it adopts new measures to comply with its rights obligations. However, the Court's legal standard of 'reasonable measures' is a lower bar than 'all appropriate means' to the 'maximum of available resources', as stipulated by the Covenant.

This is evident in the Court's exceedingly deferential remedial orders. In *Grootboom*, for example, the Court ordered the design and implementation of a reasonable programme, including measures 'such as' relief, but did *not* order immediate relief for the vulnerable, or even that the programme necessarily provide it.[303] In *Treatment Action Campaign*, often lauded for

300 See analysis of *Grootboom* above at supra nn 279–81 and 292. The Court suggested in *Mazibuko* that unreasonable policies are often characterised by inadequate provision of services, but that the latter is only emblematic and not determining of unreasonableness. The unfortunate converse of this viewpoint is that it would be hard to demonstrate measures are unreasonable in the Court's eyes if conditions are not grossly inadequate.

301 Particularly with respect to vulnerable populations: see *Grootboom*, supra n 20 at paras 58 and 64–5.

302 Particularly if grossly inadequate in distribution: see *Grootboom*, supra n 20 at para 66. The Court indicated in *Grootboom* (at para 45) that optimisation was a component of 'reasonable' measures: 'accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.' However, in its more recent cases, the Court has been more conservative, deferring to the State without examining budgetary efficiency or comparing allocations: see Nolan and Dutschke, supra n 41 at 284–5.

303 *Grootboom*, supra n 20 at paras 96 and 99(2). Pillay commented that there were actually *two* orders issued in the *Grootboom* case—the 'interlocutory order' giving effect to a private settlement between the State and complainant community before the ruling was issued, and the declaratory 'general order' setting out State obligations with respect to 'reasonable measures' required by the Constitution. Though the latter order was binding, Pillay rightly observes, the reasons elaborated in the opinion preceding it 'develop law and jurisprudence, [but] do not create specific obligations which are immediately enforceable.' See Pillay, 'Implementation of *Grootboom*: Implications for the Enforcement of Socio-Economic Rights' (2002) 6 *Law, Democracy and Development* 255 at 262–5.

having enforced positive entitlements, the Court actually only ordered the State to 'remove anomalous restrictions'[304] on affordable drugs and to 'permit and facilitate' their use, including through HIV testing and counseling, 'if necessary'.[305] In *Khosa*, the Court struck down a provision found to be discriminatory in excluding a certain segment of non-citizens from social security benefits, and ordered the offending laws to be read in keeping with the Constitution.[306] In none of those cases, however, did the Court prescribe any budgetary allocations or specify 'reasonable' measures the State was *required* to adopt. Instead, it loosely delineated the boundaries of 'reasonable' measures, and allowed the State to adopt its preferred path within that range.

While the Court is arguably hitting well below its weight, this is a useful parallel to the non-binding views the Committee will adopt in response to individual complaints, showing one way to guide the State in fulfilling its Covenant obligations. For instance, the Court affords the same level of discretion to the State in adopting measures to fulfil its constitutional obligations as it does in the implementation of measures to remedy situations where it has demonstrably fallen short. In each case, there are twin aspects of 'reasonableness' being assessed—the 'reasonableness' of restrictions placed on rights (*de facto* or imposed), and that of the pace of progressive realisation. The South African model illustrates that 'reasonableness' is an agile standard that can encapsulate obligations to respect, protect and fulfil ESC rights. The Court's focus on the State's good-faith implementation of legal commitments, and long-term remedial solutions when it fails to do so, is a reminder that the nature of Covenant obligations as interpreted by the Committee must define its 'reasonableness' review of individual complaints brought under the Optional Protocol. Covenant obligations should inform both the level of scrutiny exacted by the Committee, and the precision of its remedial recommendations when violations are found.

5. Applying the 'Reasonableness' Test of Article 8(4)

The preceding sections have outlined crucial elements of the project awaiting the Committee when it applies the Optional Protocol to individual communications—the definition of normative obligations imposed by the Covenant; the contours of the treaty-based complaint procedure aligned with those obligations, which will structure the Committee's review of complaints; and distinct judicial dynamics relevant to assessing a State's fulfilment of its legal commitments.

304 The Court described its remedial order in *Treatment Action Campaign* thus in *Mazibuko*, supra n 266 at para 65.
305 *Treatment Action Campaign*, supra n 264 at operative para 3(a) and (b).
306 *Khosa*, supra n 262 at para 98.

Early on in negotiations, delegates and specialist guests repeatedly stressed that the Committee is a body of experts providing States with guidance in implementing their Covenant obligations—not a judicial mechanism—and that the Optional Protocol would be a procedural tool allowing individual complaints with respect to existing obligations, without generating new substantive obligations for States or changing the nature of existing obligations.[307] Indeed, the only new obligations imposed by the Optional Protocol are procedural requirements regarding communications between the Committee and the State.[308] As Scheinin has described the function of treaty-based complaints mechanisms: 'Both the body before which justiciability is argued and the applicable procedure are clear as fixed parameters for the operation of substantive interpretation.'[309]

The Optional Protocol defines its own scope as follows: 'Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.'[310] Complaints can thus be submitted with regard to *any* Covenant rights violations, and the Committee will assess State responsibility for alleged violations based on the 'reasonableness' of its measures in accordance with Covenant obligations.[311]

The challenge, then, is to square 'reasonableness' with 'appropriateness' in a fashion true to the Covenant. To do so, this Section examines: legal standards underlying the examination of communications; the Committee's stated approach to assessing compliance (or lack thereof) with Covenant obligations through a 'reasonableness' review; what level of deference the Committee should afford States, in keeping with those obligations; and the legal consequences of violations.

A. Legal Standards

The concept of judicial review is premised on the application of legal standards to evaluate whether the measures adopted by States are excessively restrictive to achieve their stated goal, and whether alternative measures were adequately

307 First Session Report, supra n 123 at paras 38 (special rapporteurs), 40 (Committee member), 55 (delegates); and Third Session Report, supra n 127 at para 122 (Committee member).

308 Articles 5 and 13 create new obligations on States indirectly related to their communications with the Committee, allowing the Committee to issue interim measures and requiring the State to protect victims from ill-treatment and intimidation, but both reflect States' already-existing customary legal obligations essential to judicial guarantees.

309 Scheinin, 'Justiciability and the Indivisibility of Human Rights', in Langford et al., supra n 88 at 20.

310 Article 2 OP-ICESCR.

311 Article 8(4) OP-ICESCR.

considered.[312] In the context of human rights, monitoring bodies assess the compatibility of State policies with the given legal standard applied to the rights in question. As a legal standard, 'appropriateness' sets a higher bar than 'reasonableness'.[313] Compliance with the standard of 'all appropriate means' set forth in Article 2(1) of the Covenant may require budgetary prioritization and optimization,[314] expanding considerably the potential scope of the Committee's review.

Without supplanting States' authority to adopt the measures they prefer, such legal scrutiny is nonetheless contentious when it challenges the legitimacy of measures inconsistent with States' legal obligations. When declaring an action or omission of the State to be illegitimate, a quasi-judicial body may or may not articulate specific remedial orders or recommendations, but the determination of appropriate remedies is likely to be a controversial aspect of the process, insomuch as it may appear to infringe on authorities' policy-making prerogative.

Judicial review is a process common to domestic and international systems, for which reason the leadership of national and regional judiciaries has been vital to definitively demonstrate the justiciability of ESC rights. The admissibility criterion requiring exhaustion of domestic remedies—a general rule of international law included in the Optional Protocol—acknowledges that domestic remedies must be made available to remedy violations, and are preferable to adjudication on the international level.[315] As the Committee has noted, however, effective remedies do not need to be judicial; administrative remedies are also 'appropriate', provided they are accessible, affordable, timely, effective and—'based on the principle of good faith . . . take account of the requirements of the Covenant in their decision making.'[316]

While States are accorded primary responsibility for implementing their treaty obligations, the Covenant also provides for an international supervisory body to assess their performance through an appropriate review system.[317] As States are required to implement their treaty commitments in good faith,[318] the reporting obligations included in the Covenant are an important

312 Courtis, supra n 34 at 33–4.

313 Abramovich, 'Fostering Dialogue: The Role of the Judiciary and Litigation', in Langford et al., supra n 88 at 170–1.

314 See analysis accompanying supra nn 39–42.

315 Abramovich, supra n 313 at 173. The Committee notes the requirement that domestic remedies be exhausted is predicated by their being effective, such that effective remedies are required to enforce all Covenant rights (citing Article 27 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 (VCLT); and Article 8 UDHR, and 'international procedures. . . are ultimately only supplementary to effective national remedies.' See also General Comment No 9, supra n 48 at paras 3–4; and analysis at text accompanying supra n 58.

316 General Comment No 9, supra n 48 at para 9.

317 Part IV ICESCR. See Alston and Quinn, supra n 27 at 162–3.

318 Articles 26–7 and 31–2 VCLT. See also 'Draft Articles on the Law of Treaties with Commentary' (1966) 2 *Yearbook of the International Law Commission* (especially Articles 23, 25 and 27–8 at 211 and 217–8.

basis for the Committee's authority when assessing the 'appropriateness' of measures adopted. However, even once a claimant resorts to international complaint mechanisms, any remedial orders or recommendations must be implemented by State authorities and enforced through domestic judicial guarantees. For that reason, Abramovich elucidates:

> [L]egal intervention in the enforcement stage does not consist of the compulsory imposition of a sanction, understood as a detailed and self-sufficient order, but of the follow up of a fixed instruction in general terms, in which concrete content is built throughout the "dialogue" between the court and the public authority. Therefore, the decision, far from constituting the end of the process, is an inflexion point that modifies the sense of the jurisdictional intervention. After the court's pronouncement, the State is tasked to design the means by which the judicial decision will be complied with, and the court simply ensures that this charge is carried out in compliance with its order.[319]

This is also true, *mutatis mutandis*, in the context of individual communications under the Optional Protocol. The Optional Protocol reasonableness *is* a procedural tool in a 'dialogue' with States—from the potential issuing of interim measures, to pursuit of a friendly settlement, to examination of communications, to the formulation of views and remedial recommendations, to follow-up with the State party, to the facilitation of international cooperation and assistance, if necessary. In order to implement their Covenant obligations effectively, States must take seriously the communications procedure and the Committee's views, including its remedial recommendations.

B. The Committee's Approach to 'Reasonableness'

As was evident in the tone, content and course of negotiations over the Optional Protocol, States were wary of obligations imposing policy constraints, especially any involving resource allocations.[320] Concerns about the assessment criteria the Committee would use when reviewing States' policy measures and use of resources arose almost immediately, as part of broader questions and exchanges about the justiciability of Covenant obligations. The presence during negotiations of treaty body experts, special rapporteurs, as well as guests from other human rights systems already adjudicating ESC rights, seemed to allay some of the anxieties over how a complaints procedure would function. During the third session, when support was growing for the inclusion of a 'standard of

319 Abramovich, supra n 313 at 170–1.
320 See analysis of negotiations at text accompanying supra nn 123–28, 136 and 145.

reasonableness', the Committee member in attendance responded it would be 'legitimate, albeit unnecessary' to expressly provide for one.[321]

More illuminating, however, was an unusual statement issued by the Committee in the weeks following the Chairperson's first draft of an Optional Protocol text before the next session.[322] Elaborating upon how the Committee might assess alleged violations of Covenant obligations in the context of a complaints procedure—specifically with reference to the 'maximum of available resources' and progressive realisation—the Committee included both a 'reasonableness' standard and a 'margin of appreciation' in its statement, which influenced as much as prophesised the subsequent direction of negotiations.[323] While not a binding document, the statement provides some insights and some confusion that are important to consider.

Opening its statement, the Committee noted that the Optional Protocol would complement—and involve the same standard of review as—the periodic reporting process, on which the methodology presented in the statement was based.[324] Reiterating its past observations on the nature of obligations under the Covenant, the Committee emphasised that even severe resource constraints do not excuse States from their responsibilities, and that they must adopt targeted, low-cost measures to optimise resources and protect the most disadvantaged and marginalised individuals or groups.[325] It also confirmed States' immediate obligations to 'take steps . . . to the maximum of available resources', guarantee non-discrimination (whether direct or indirect), and ensure the minimum core content of Covenant rights.[326]

When assessing communications under the Optional Protocol, specifically whether measures adopted were 'adequate' or 'reasonable', the Committee said it would consider, *inter alia*:

(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;

321 Third Session Report, supra n 148. Some delegations agreed it was sufficiently implicit. See also Explanatory Memorandum, supra n 124.
322 CESCR Statement, supra n 24.
323 Ibid. at paras 8, 11 and 12. A 'margin of appreciation' had not yet been included in the draft Optional Protocol.
324 Ibid. at paras 1–2.
325 Ibid. at paras 3–4.
326 Ibid. at paras 5–7.

(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.[327]

All of the above points—addressing the nature of 'steps taken', the 'maximum available resources', the need to expeditiously pursue progressive realisation, the prioritisation of vulnerable populations—reaffirm the Committee's past interpretations of States' obligations, and are consistent with Part II of the Covenant.[328] The most novel additions are in clauses (b) and (d), at once recognising and restricting States' discretion in their selection of 'appropriate' measures. Stressing the importance of a principled and 'non-arbitrary' policymaking process, there is a presumption that States will adopt the *least* restrictive measures available, which fully realise Covenant rights the *most* quickly. The Committee is clearly indicating here that it will not be bashful in examining States' discretionary choices determining resource allocation, the speed of realisation, or the levels of rights provided to those most vulnerable.

As evident in the substantive dimensions of 'reasonableness' outlined in its statement, the Committee has been guided largely by its past expoundings upon State obligations in its numerous general comments. As much as those comments offer guidance to States reporting on their realization of Covenant rights, they also offer a map to examine States' compliance with their obligations with respect to the facts of alleged violations. While the inclusion of a 'reasonableness' standard of review has provided an opportunity to elucidate the breadth of States' discretion in their implementation of Covenant rights (and, conversely, the appropriate precision of the Committee's recommendations), it has not changed the obligations imposed by the Covenant.

In the fourth session of negotiations, when the first draft Optional Protocol was reviewed in light of the Committee's statement, there were still disputes between delegations insisting the 'reasonableness' standard be expressly provided for, and those maintaining that it was sufficiently implicit.[329] In the context of that debate, prior to the last session, the OHCHR drafted a conference paper for delegates clarifying the principle of 'reasonableness' as it appeared in the nine core international human rights treaties.[330] The paper

327 Ibid. at para 8.
328 See Section 2.
329 Fourth Session Report, supra n 132 at para 100.
330 See Note prepared by the Secretariat, 'The Use of the "Reasonableness" Test in Assessing Compliance with International Human Rights Obligations', 1 February 2008, A/HRC/8/WG.4/CRP.1.

identified two common threads of 'reasonableness' in all treaties[331] enlisting the principle: its use as a criterion 'relating to the time frame for carrying out an action' and 'for legitimate restrictions on rights'.[332] Both aspects of 'reasonableness' easily house progressive realisation, minimum core content and the principled policymaking required by the Covenant.

Relevant to those obligations, the paper concluded: 'While the concept defies easy definition, one common feature among the different usages is the importance of assessing any policy measure in its context.'[333] For each Covenant right providing a 'reasonableness' limitation, the speed of realisation and minimum necessary levels of rights similarly depend on local realities, in keeping with obligations imposed by Article 2(1) as a whole.[334]

C. *Levels of Deference in the Committee's 'Reasonableness' Review*

The Committee has clearly and consistently held that the scope of discretion afforded States encompasses only those policy measures fulfilling Covenant obligations, and does not excuse failures to take all necessary steps.[335] As is clear from the Committee's approach to 'reasonableness', the State is moreover obligated to engage in a principled policymaking process—based on transparency and inclusion—which the Committee may review to confirm States have adopted the least-restrictive available measures.[336]

Specifically, the Committee stated that the adoption of retrogressive or no steps to realise Covenant rights puts the burden on the State to show its actions took 'the most careful consideration' of the 'totality' of Covenant rights, and made use of all available resources.[337] When a State refutes its failure to meet its obligations, based on resource constraints, the Committee noted it would evaluate the justification on a range of factors, including: the severity of the breach; whether it compromised minimum core content of rights; the State's economic and development situations, including exceptional circumstances draining resources; the State's resource optimisation efforts; and whether the State sought to augment its available resources through international cooperation and assistance.[338]

331 The Convention on the Rights of the Child was the only treaty not providing some form of 'reasonableness'.
332 Note prepared by the Secretariat, supra n 330 at para 32.
333 Ibid. at para 31.
334 For a list of Covenant Articles including 'reasonableness' criteria, see the text accompanying supra n 78.
335 For specific CESCR General Comments asserting this, see supra n 107.
336 See analysis at text accompanying supra nn 38 and 96. See also CESCR statement, supra n 175 at paras 8 and 11.
337 General Comment No 3, supra n 35; and CESCR Statement, supra n 24 at para 9.
338 CESCR Statement, supra n 24 at para 10.

It is in the context of those obligations incumbent upon States—to adopt appropriate policies and fulfil the Covenant in good faith—that the Committee couched its recognition of States' implicit 'margin of appreciation' in determining what measures are most appropriate in their given situations, to implement both the Covenant and the Committee's remedial recommendations.[339]

The Committee member participating in Working Group discussions confirmed this framing of States' discretionary authority.[340] Furthermore, in response to a query by delegates as to how the Committee would handle complaints against the illegalisation of same-sex unions (if brought with regard to Covenant family rights), the Committee member notably did not suggest such an exclusion would be within the State's discretion.[341] This is in stark contrast to the European Court's vision of the 'margin of appreciation', which has deferred to States on the matter of same-sex marriage, due to lack of consensus amongst European States.[342] On the contrary, the Committee has recognised that the immediate obligation of non-discrimination includes protection from ill-treatment based on sexual orientation and *de facto* or legally unrecognised family relationships.[343] The Human Rights Committee likewise found an analogous distinction based on sexual orientation to constitute a discriminatory and arbitrary interference with the right to privacy, and not to meet its 'reasonableness' test.[344]

These divergences in jurisprudence and the rejection of an explicit 'margin' in the Optional Protocol accentuate that any deference paid to States in the context of assessing the 'reasonableness' of policy measures is constrained by Covenant obligations, distinguishing the Committee's standard from those of the common law, South African and European systems.

D. Violations and Remedies

The Optional Protocol plainly establishes that the Committee can identify breaches of any dimension of Covenant rights—including States' duties to respect, protect or fulfil them. Two different matters, however, are the identification of a violation and determination of appropriate remedies within a

339 Ibid. at para 11.
340 First Session Report, supra n 123 at para 46; and Second Session Report, supra n 117 at paras 37, 60 and 65–6.
341 Second Session Report, supra n 117 at para 62.
342 *Schalk and Kopf v Austria* Application No 30141/04, 24 June 2010. The European Court is particularly deferential to States on matters of social policy, see Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the European Convention on Human Rights* (Oxford: Intersentia, 2002) at 167–9 and 218.
343 General Comment No 20, supra n 62 at paras 31–2.
344 Article 17 read in conjunction with Article 2(1) ICCPR. See *Toonen v Australia* CCPR/C/50/D/488/1992; 1 IHRR 97 (1994) at paras 8.3, 8.6 and 9.

State's available resources, the latter of which is less developed with respect to ESC rights.[345] While that burden will fall largely upon the State, the Committee will inevitably offer guidance on what forms of redress would satisfy Covenant obligations.

In its 2007 statement, the Committee identified lines of remedial recommendations it anticipated making in response to violations, specifically: remedial actions (such as compensation to the victim) based on the case at hand; and general recommendations that the State remedy root causes of violations.[346] With respect to the latter, the Committee indicated it would recommend 'goals and parameters to assist the State party in identifying appropriate measures', such as non-discrimination, provision for the disadvantaged, protection from grave threats, and optimisation measures or priorities to ensure resource allocation conforms with Covenant obligations.[347] The Committee also reaffirmed that States must choose and adopt the most appropriate measures within those boundaries, and that it may recommend 'a follow-up mechanism to ensure ongoing accountability'.[348]

That dialogue between the Committee and States over what measures are appropriate to address generally substandard conditions will ultimately determine the effectiveness of the Optional Protocol in providing recourse for victims of violations related to the fulfilment of ESC rights. Individual communications under the Optional Protocol are likely to allege factual violations, due to both acts and omissions by States. The causes of those breaches may vary, though, particularly amongst omissions. For instance, 'normative' violations ('legal gaps') may leave entitlements beyond reach or difficult to enforce domestically, while 'factual' omissions (i.e. failure to provide enough medicine or seats in the classroom) may be a consequence of justifiable resource constraints in exceptional situations.[349] The latter type of violations could be much more costly to repair, involving development of a State's capacity or institutional restructuring to maximise its use of available resources.

The Committee has observed a range of *prima facie* violations, including retrogressive (or failure to adopt appropriate) policy measures, discrimination, failure to ensure minimum core content, and refusal of necessary international assistance.[350] Once a *prima facie* violation is established in a given case, the State must demonstrate that its policies and decision-making process are reasonable and satisfy its Covenant obligations. As noted, however, those presumptions of impermissibility can be rebutted on the basis of demonstrable resource constraints[351]—raising an important question as to the legal

345 Courtis, supra n 34 at 84–5.
346 CESCR Statement, supra n 24 at para 13.
347 Ibid.
348 Ibid.
349 Report of the High Commissioner for Human Rights, supra n 34 at paras 55–69.
350 See analysis at text accompanying supra nn 35, 45, 66 and 84.
351 See analysis at supra n 337.

consequences of failures to take adequate measures or achieve minimum levels of rights, if those lapses are excused in such circumstances.

It is here the Committee's review must serve as a point of inflexion in its dialogue with States *regardless* of whether or not it finds them technically in breach. If scarcity of resources beyond a government's control has led to regressive measures, the State is nonetheless under the same obligations to move as expeditiously as possible towards the full realisation of rights[352]—including their minimum core content, if compromised. Breaches of Covenant rights are not prerequisites for the Committee to refer under-funded States to other UN agencies, or to otherwise facilitate international cooperation and assistance under the auspices of Article 14 of the Optional Protocol or Part IV of the Covenant.

In all of this process, the Committee and States should share the goal of effectively remedying the inadequate rights situations giving rise to a complaint in the first place.

6. Conclusion

To echo the words of Justice Yacoob, the question is 'not whether socio-economic rights are justiciable . . . but how to enforce them in a given case.'[353] The shadow of arguments over their suitability for adjudication will be sure to stretch out a little longer, including in efforts to influence the interpretation of the Optional Protocol, and particularly the level of deference to State policymakers in the consideration of communications.

Though the Optional Protocol provides an unprecedented specification of the standard of review to be adopted by the Committee, it also sounds out clearly that the 'reasonableness' of States' policies must be assessed 'in accordance with Part II of the Covenant.' Efforts to subvert the effectiveness of the Optional Protocol—through the insertion of an explicit 'margin of appreciation' or an 'unreasonableness' test—were rejected in favor of a strong individual complaints procedure that will reinforce the monitoring and implementation of Covenant obligations.

The inclusion of a 'reasonableness' test has provided an opportunity to consider the tenor of the dialogue between the Committee and States, but seems most likely to transpose previous interpretations of Covenant obligations into the consideration of individual complaints brought under the Optional Protocol. At the heart of those obligations is the adoption by States of 'all appropriate means' to realize Covenant rights.[354] The 'appropriateness' of

352 General Comment No 3, supra n 28 at para 9.
353 *Grootboom*, supra n 20 at para 20.
354 Article 2(1) ICESCR.

measures States adopt is demonstrated by their effectiveness, and the Committee reserves for itself the role of judging States' fulfilment of their obligations.[355]

While the Optional Protocol must be applied in conformity with the Covenant, it is inextricably tied to the need for domestic enforcement of ESC rights through effective remedies. The most important lessons to take from domestic cases are thus: how decisions have facilitated dialogue with (and within) states; how remedial orders have been implemented; and how adjudication has helped to promote and facilitate the realisation of ESC rights—the fundamental objective of having an Optional Protocol to the Covenant.

The ultimate effectiveness of the Optional Protocol relies on a meaningful dialogue between the Committee and States, including through follow-up procedures to monitor the implementation of recommendations. States must refrain from lodging reservations in conflict with the object and purpose of either the Optional Protocol or the Covenant, which would likely subvert discussions even if the obligations upon States remain the same. The Committee also has opportunities to strengthen its relationship with States through the adoption of complementary rules of procedure related to the assessment of communications—whether those include elaboration of follow-up procedures, the possibility of State visits, hearings or other fact-finding procedures, or rules that enhance the effectiveness of interim measures. However those possibilities play out, the Optional Protocol will draw needed attention to the dire situations facing millions of people every day, and will hopefully help States to implement their ESC rights obligations more effectively.

355 See analysis at text accompanying supra nn 54–6.