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Dissertation title:

The potential impact of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on the realisation of socio-economic rights in the international arena: what can be learnt from the justiciability of socio-economic rights in South Africa?

Supervised by Professor Pierre de Vos

Student name: **Doris Galliker**

Student number: GLLDOR001

Registered for an LLM in Human Rights Law

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I hereby declare that I have read and understood the regulations governing the submission of LLM in Human Rights Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and the this dissertation conforms to those regulations.

Doris Galliker

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1) Introduction

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (the 'Optional Protocol' or the 'OP-ICESCR') has recently been adopted by the General Assembly of the United Nations.¹ This document establishes a new complaints procedure for economic, social and cultural rights ('ESCR') within the United Nations human rights system. Hence, those rights – as it is already the case for civil and political rights (CPR) – will become quasi-justiciable at international level. Once the Optional Protocol will enter into force, individuals and groups victims of violations of any right contained in the International Covenant on Economic, Social and Cultural Rights (the 'Covenant' or the 'ICESCR') will have the possibility to submit communications to the United Nations Committee on Economic, Social and Cultural Rights (the 'Committee' or the 'CESCR'), as long as the state concerned is party to the OP-ICESCR.²

This represents an historic change in the international human rights mechanisms landscape as well as an important development in the debate concerning the justiciability of economic and social rights (ESR). However, questions remain concerning the real impact of such a procedure. Can this new complaint mechanism be an efficient way of enforcing ESR throughout the world?

In an attempt to answer those questions, it may be useful to look at the experience of national jurisdictions having recognised ESR as justiciable. So far, only a small minority of countries are in this situation. Among them, South Africa is often taken as an example, since it adopted one of the most progressive constitutions in the world. The South African Bill of Rights integrates civil and political as well as economic, social and cultural rights. Consequently, for thirteen years now, cases on ESR have been brought to the South African Constitutional Court (the 'Court') – the highest judicial body on constitutional matters. Those judgments form a unique jurisprudence that can be useful for any entity working in the field of ESR, both at national and at international levels.

¹ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, United Nations General Assembly Resolution A/RES/63/117 (2008).

² OP-ICESCR op cit (n1) art 2.

In this work, I will show that the CESCR's interpretation of states' obligations regarding ESR developed so far in its general comments fails to take account of some important justiciability concerns. Therefore, if the purpose of the OP-ICESCR has to succeed, it should adopt a more cautious approach in reviewing individual communications. I suggest that the South African jurisprudence on ESR – and particularly the reasonableness standard used by the Court – would be a useful model for the Committee because it showed the necessary flexibility needed to take account of human rights interests and states' realistic interests.

In order to clarify the subject, I start the discussion by outlining the main concerns raised in the justiciability of ESR debate. Then I put the question in its historical context by recounting the 18 years process that lead to the adoption of the Optional Protocol. This will allow a better comprehension of the challenges to the new mechanism. I then look at the main provisions of the OP-ICESCR so as to understand the framework they create for the complainants and for the states. In the following part, I focus on the Committee's approach towards states obligations under the Covenant and evaluate whether it can be realistically applied in the context of the Optional Protocol. Finally, I attempt to show that the South African Constitutional Court's jurisprudence in the landmark ESR cases provides for an appropriate model of review that could be taken up by the CESCR when confronted to the new task of assessing individual complaints.

2) The debate on the justiciability of economic and social rights

a. Introduction

The debate on the justiciability of ESR is central to the subject of the present work. It is therefore necessary to start by explaining what it is about. Although – on the paper – it has been universally accepted that everyone is entitled to ESR,³ no clear common understanding has been found on the nature of those rights and, in turn, on what they imply and how they can be best implemented. Langford has synthesised the questions at the heart of the debate as follows: the issue is ‘whether [ESCR] are *legal* rights and whether courts have the *legitimacy and capacity* to adjudicate them’.⁴

There is one major reason why it is important to understand this debate for the subject I am dealing with here. If it has to be successful, the adjudication of ESR has to take into account the justiciability concerns. As I will show in this work, this is what the South African Constitutional Court has done,⁵ and this is why it might serve as an example for the Committee.

In this chapter, I will first give a definition of the concept of justiciability. Then, I will outline the main arguments shaping the debate.

b. The definition of the concept of justiciability

In broad terms, the concept of justiciability of ESR can be defined as ‘the extent to which an alleged violation of an economic or social subjective right invoked in a particular case is suitable for judicial or quasi-judicial review’.⁶ Consequently, if the judicial or quasi-judicial body ‘finds a violation, it must be able to provide a remedy or redress’.⁷

³ Universal Declaration of Human Rights, United Nations General Assembly Resolution A/RES/3/217 (1948) art 22-25-26.

⁴ M Langford ‘The justiciability of social rights: from practice to theory’ in M Langford (ed) *Social rights jurisprudence: emerging trends in international and comparative law* (2008) 29.

⁵ E C Christiansen ‘Adjudicating non-justiciable rights: socio-economic rights and the South African Constitutional Court’ (2007) 38 (2) *Columbia Human Rights Law Review* at 321-344.

⁶ F Coomans ‘Some introductory remarks on the justiciability of economic and social rights in a comparative constitutional context’ in F Coomans (ed) *Justiciability of economic and social rights: experiences from domestic systems* (2006) 4.

⁷ *Ibid.*

In order to have a better understanding of the concept, it is useful to make the distinction between justiciability, enforceability and judicialism.⁸ Enforceability has to do with ‘the identification of the entitlements and duties created by the legal regime’, whereas justiciability focuses on the mechanisms that are put in place to deal with the non-compliance with the norms established by the legal regime.⁹ The two concepts are closely related to each other as the latter ‘is a direct follow-up to the’ former.¹⁰

The difference between justiciability and judicialism is also quite subtle. Judicialism implies a process involving a court. This is not a necessary condition for justiciability, as the review can be judicial or quasi-judicial.¹¹

It should also be noted that there are some disagreements on the meaning of the concept itself. Dennis and Stewart have attempted to show that, in the debate, all sides use the notion ‘in ambiguous ways’.¹² They explained that usually, governments tend to understand justiciability as to what can be done in their own jurisdiction.¹³ Similarly, the Committee has argued that all the rights in the Covenant must be considered as having some justiciable features, and for that reason, ‘states parties should provide for judicial enforcement ... in their domestic law’.¹⁴ On the other hand, they noted that scholars and nongovernmental organisations (‘NGOs’) consider rights as being justiciable as soon as there is a mechanism or a procedure for their adjudication.¹⁵ Craven expressed this view when he stated that ‘justiciability ... depends, not on the quality of the decision, but rather on the authority of the body to make the decision’.¹⁶

I agree with Dennis and Stewart when they say that Craven’s view is limited and that a more substantive approach to justiciability should pay attention to the obligations of the states, and whether complaints are susceptible to be rationally and

⁸ J K Mapulanga-Hulston ‘Examining the justiciability of economic, social and cultural rights’ (2002) 6 (4) *International Journal of Human Rights* 36.

⁹ Mapulanga-Hulston op cit (n8) 37.

¹⁰ Ibid.

¹¹ Ibid.

¹² Dennis and Stewart ‘justiciability of economic, social and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?’ (2004) 98 (3) *American Journal of International Law* 473.

¹³ Ibid.

¹⁴ Dennis and Stewart op cit (n12) 473-474.

¹⁵ Dennis and Stewart op cit (n12) 474.

¹⁶ M Craven cited in Dennis and Stewart op cit (n12) 474.

meaningfully resolved.¹⁷ Therefore, they suggested that '[t]he issue of justiciability must turn on an assessment about the overall impact of the adjudicator's decision: will adjudication contribute to a practical, useful resolution of the issue at hand, which the relevant parties will, in turn, respect and implement?'.¹⁸

Those are complex questions. The impact of the adjudicator's decision will depend on several factors. In this work, I will focus on the standards of review chosen in adjudicating ESR cases. Keeping in mind the subtleties of the definition of justiciability, I will use the term in its broad sense, as introduced at the beginning of this part.

c. The arguments against the justiciability of economic and social rights

The main challenges to the justiciability of ESR are based on two types of arguments: concerns about the nature of the rights per se and concerns about judicial review.¹⁹ Critics based on judicial review focus on two aspects related to the courts, namely their political legitimacy and their institutional competence. They contend that courts should not adjudicate on socio-economic issues because '[p]olicies on ESCR involve taking from one group to give to another and are therefore infinitely more contentious than [CPR] policies; the political process is better at coping with this than the judicial one'.²⁰

i. The nature of economic and social rights

The distinction between CPR and ESR finds its origins in the process of adopting the two separate Covenants that occurred in the 1950s and 1960s. Leaving aside the historical arguments according to which the separation is due to the political and ideological tensions of the Cold War, the discussions on the differences between the two sets of rights has focused on their legal nature.²¹ Although the international community has recognised the universality, indivisibility, interdependence and

¹⁷ Dennis and Stewart op cit (n12) 474.

¹⁸ Dennis and Stewart op cit (n12) 475.

¹⁹ Christiansen op cit (n5) 347.

²⁰ J Cottrell and Y Ghai 'The role of the courts in the protection of economic, social & cultural rights' in Y Ghai and J Cottrell (ed) *Economic, social & cultural rights in practice: the role of judges in implementing economic, social & cultural rights* (2004) 85.

²¹ Christiansen op cit (n5) 345.

interrelatedness of all human rights, as well as the fact that they had to be treated equally,²² a gap still exists in the perception of their nature.

One distinction commonly used by opponents of the justiciability of ESR is the dichotomy between negative and positive rights. This terminology follows from the type of obligation governments have to take in order to respect, protect and fulfil human rights. According to this classification, CPR are negative rights because they entail negative state obligations. In the traditional view, those rights – like for example freedom of expression or due process – are perceived as ‘negative rights because they only require that the state refrain from interfering in the individual’s exercise of the right’.²³ Consequently, their implementation would not have important budgetary implications and would not be related to political choices about resources allocation.

On the other hand, ESR are seen as positive rights because the state has a positive obligation to fulfil what they imply.²⁴ The actions the government has to take to provide social welfare would have important financial costs, which in turn have an incidence on the allocation of resources. Moreover, ESR would be vague, imprecise, realisable only progressively and aspirational. On the contrary, CPR would be better defined, realisable immediately and justiciable.²⁵

Proponents of the justiciability of ESR have rejected the distinction on several grounds. They have argued that both sets of rights give rise to negative and positive obligations.²⁶ Scholars have long recognised that ESR entail governments’ actions, but also restrain.²⁷ The right not to be subjected to arbitrary evictions illustrates this aspect. Similarly, CPR also imply important public expenditure. Examples are the right to a fair trial or the right to vote. The South African Constitutional Court followed the same reasoning when it recognised that both types of rights would give rise to budgetary implications and did not agree with the fact that, because ESR

²² Status of the International Covenants on Human Rights: draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Commission on Human Rights Resolution E/CN.4/1997/105 (1996) annex para 1; Vienna Declaration and Programme of Action, World Conference on Human Rights, (1993) para 5.

²³ Christiansen op cit (n5) 345.

²⁴ Ibid.

²⁵ A Neier ‘Social and economic rights: a critique’ (2006) 13 (2) *Human Rights Brief* 1.

²⁶ Langford op cit (n4) at 30-31; Mapulanga-Hulston op cit (n8) at 39-41.

²⁷ Langford op cit (n4) 30.

would almost inevitably entail state expenditures, they should not become justiciable.²⁸ The CESCR shared this opinion in its ninth general comment where it stated:

While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of [ESCR] which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.²⁹

Today, a consensus seems to prevail on the fact that both sets of rights imply expenditures. The argument that ESR are of a different nature because their costs are higher than CPR is not convincing anymore. As Langford has rightly put, if '[ESCR] require greater public investment than [CPR] ... it is a matter of degree rather than substance'.³⁰

Another concern raised by the supporters of the non-justiciability of ESR is that they cannot be precisely defined. 'This line of argument maintains that the content of [ESCR] is inherently vague and indeterminate and as such these rights do not lend themselves to judicial enforcement.'³¹ Dennis and Stewart – two of the stronger opponents to the adoption of an optional protocol to the ICESCR – suggested that the first step before talking about justiciability should be clarifying the rights and obligations set forth in the Covenant.³² Justice Langa expressed another point of view in stating that 'the content of these rights is less clearly defined more because of their exclusion from the realm of adjudication, than due to an inherent vagueness'.³³ This implies that making ESR justiciable would permit to clarify their content – and more importantly – the content of the respective state duties. Here, I agree with Justice Langa that adjudicating ESR cases will help defining them. The

²⁸ *Certification of the Constitution of the Republic of South Africa* 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 78.

²⁹ The domestic application of the Covenant, CESCR General Comment 9, E/C.12/1998/24, (1998) para 10.

³⁰ Langford op cit (n4) 31.

³¹ Mapulanga-Hulston op cit (n8) at 41-42.

³² Dennis and Stewart op cit (n12) at 465-466.

³³ P Langa 'Taking dignity seriously. judicial reflections on the Optional Protocol to the ICESCR' (2009) 29 (1) *Nordic Journal of Human Rights (Nordisk Tidsskrift for Menneskerettigheter)* at 33-34.

advantage is that it allows taking the specific context into account, something that is crucial when one talks about state obligations towards socio-economic entitlements.

This brief overview shows that the claim that ESR cannot be made justiciable because of their nature has increasingly lost its significance.³⁴ In the justiciability perspective, the major difference between ESR and CPR might not be their nature but rather their implementation. ESR necessitate the development of an appropriate plan ‘rather than the creation of fully individual protection’.³⁵ Therefore, today’s debate is rather focused on the role of the courts – or the Committee – and whether they have the competence and the legitimacy to adjudicate ESR cases.³⁶ I will now expose those concerns, which can be seen, in some cases, as well founded.

ii. Legitimacy

Judicial review of ESR is situated at the boundary between law and politics.

Therefore, there are concerns that it might undermine the principle of separation of powers, which sees social and economic issues as the preserve of the legislative and the executive arenas. According to the critics, ‘there is always a risk that the courts may cross the line between indicating failures of policy and priorities and indicating so clearly what the priorities ought to be that they are actually making policy’.³⁷

In a democratic system, in order to preserve its independence, the judiciary is not elected by the citizens. Therefore, it does not enjoy a political legitimacy and is not accountable to the public in the same way as the two other powers.³⁸ In addition, social matters are traditionally dealt through the political process because they involve decisions about resources allocation; usually courts are not given the legitimacy to adjudicate on them. Therefore, according to arguments concerned about legitimacy, ‘[t]o view [ESR] as justiciable would necessarily and impermissibly intrude on the province of the legislative branch—most glaringly

³⁴ Langford op cit (n4) 30; M Pieterse ‘Coming to terms with judicial enforcement of socio-economic rights’ (2004) 20 (3) *South African Journal on Human Rights* 390.

³⁵ Cottrell and Ghai op cit (n20) 87.

³⁶ Christiansen op cit (n5) 347.

³⁷ Cottrell and Ghai op cit (n20) 86.

³⁸ Pieterse op cit (n34) 390.

when a court overrides a legislative act regarding social welfare and asserts a different course of action for the state.’³⁹

This opinion is expressed by Aryeh Neier – former director of Human Rights Watch and strong CPR advocate – who maintained that ESR necessitate a broader redistribution of states resources due to their ‘substantial costs’, contrary to CPR which protection only has ‘incidental costs’.⁴⁰ Therefore, he argued, with its consequences on the allocation of resources, the implementation of ESR should stay in the realm of politics. Neier claimed that ESR could not be made justiciable because courts are not the place for negotiation and compromise and that ‘only the political process can handle those questions’.⁴¹

However, those who – like Neier – state that the judiciary has not the legitimacy to adjudicate on ESR cases because they involve decision on resources allocation maybe miss the fact that those concerns could also apply to CPR if it is taken into account, as explained earlier, that the latter also necessitate financial resources.⁴²

Judicial review also raises questions concerning the kind of democracy that can ideally serve the purpose of human rights in general. Pieterse has correctly pointed out that it is ‘naive and contrary to the purpose of human rights protection to assume that abuses of democratic power may adequately be corrected only by a future election, or that the citizenry may not participate in governance in ways other than voting in elections’.⁴³ Indeed, majoritarian democratic systems do not always ensure that human rights are protected. For example, minority groups might be excluded.⁴⁴

These defects of elective democracy are fairly patent. Complementary accountability mechanisms are needed to ensure that the effective exclusion from elective processes does not result in a denial of human rights. Adjudication provides an alternative and important forum in which such individuals and groups can have their voice heard.⁴⁵

Another reason that can be mentioned for encouraging judicial review of ESR is the fact that it could create a constructive dialogue about effective policy-making

³⁹ Christiansen op cit (n5) 348.

⁴⁰ Neier op cit (n25) 1.

⁴¹ Ibid.

⁴² Pieterse op cit (n34) 390.

⁴³ Pieterse op cit (n34) 391.

⁴⁴ Langford op cit (n4) 33.

⁴⁵ Ibid.

between the judiciary, the legislative and the executive.⁴⁶ In this regards, Justice Langa argued that ‘[t]he South African jurisprudence ... showcases a constitutional dialogue between the different branches of government, which furthers the democratic values of openness, responsiveness and accountability, and moves towards a re-conceptualisation of the doctrine of separation of powers’.⁴⁷

Finally, judicial review of ESR does not imply courts making law or policy – as some fear – but rather reviewing state’s actions using specific criteria. The question as to whether judges might interfere with the tasks of other branches of government would only be marginal but this is the issue on which the debate should concentrate.⁴⁸ In countries where ESR are justiciable, courts developed tools to deal with the risk of judicial interference. This is the case of South Africa and this is precisely the focus of this work.

The debate on legitimacy has mostly centred on national adjudication. With regards to international adjudication – and especially in the context of the OP-ICESCR – the main objection is related to the principle of state sovereignty.⁴⁹ Governments do not appreciate interference in their domestic affairs. Furthermore, the fact that countries find themselves in very different circumstances – politically and economically – is considered as being an obstacle to any effort to develop a coherent approach in adjudicating ESR at international level. Therefore, domestic political processes would be better suited to improve socio-economic situations.⁵⁰

Langford attempted to answer to those concerns. First, he noted that states have agreed to give up some degree of sovereignty in committing to international human rights obligations and in accepting the supervision of treaty bodies.⁵¹ Second, he explained that ‘some international human [rights] treaties have given States a wide degree of latitude’ and mentioned – as it will be shown later – that the CESCR spoke ‘of a “margin of discretion” when it comes to policy choices’.⁵² Third, he observed that ‘international supervisory bodies place strong emphasis on their role in

⁴⁶ Ibid.

⁴⁷ Langa op cit (n33) 32.

⁴⁸ Langford op cit (n4) 34.

⁴⁹ Ibid.

⁵⁰ Dennis and Stewart op cit (n12) 467.

⁵¹ Langford op cit (n4) 34.

⁵² Ibid.

examining the justification for a particular act or omission as opposed to a general deliberation on the ideal measure for such a situation'.⁵³ As it will be explained below, this is where the reasonableness standard – developed by the South African Constitutional Court and integrated in the OP-ICESCR – comes into play in the assessment of an alleged violation of human rights.

iii. Competence

The third concern raised by the opponents to the justiciability of ESR is that the judiciary does not have the competence – or the capacity – to deal with socio-economic issues. Christiansen has summarised the problem of institutional competence of the courts as follows:

[T]he concerns are whether a court or judge has the institutional capability to appropriately adjudicate social rights when confronted with a single complainant or group (the “plaintiff problem”); to access and review all necessary specialized information (the “information problem”); and to adequately remedy any violation of the right in view of the limited scope of the problem before the court—especially when contrasted with the required universality of the solution (the “remedy problem”).⁵⁴

He went on by explaining that the critics presumably fear that ‘either a court will provide a narrow, individualized remedy for the present party only, ignoring the host of absent but similarly situated persons, or it will evaluate all claims based on the limited (and possibly idiosyncratic) information from a single plaintiff’.⁵⁵

Concerning the plaintiff problem, there are legitimate worries that a single complaint might inadequately frame a larger socio-economic issue.⁵⁶ This was already described by Lon Fuller in the late 1970s as the ‘polycentricity’ phenomenon.⁵⁷ This term describes ‘decisions that affect an unknown but potentially vast number of interested parties and that have many complex and unpredictable social and economic repercussions, which inevitable vary for every subtle difference in the decision’.⁵⁸ Because of the characteristics of the litigation process, courts are seen as

⁵³ Ibid.

⁵⁴ Christiansen op cit (n5) 349.

⁵⁵ Christiansen op cit (n5) 350.

⁵⁶ Christiansen op cit (n5) 351; Langford op cit (n4) 37.

⁵⁷ Pieterse op cit (n34) 392; Langford op cit (n4) 36.

⁵⁸ Pieterse op cit (n34) 392-393.

lacking the appropriate skills to deal with polycentric matters.⁵⁹ The polycentric issue ‘is the most difficult and the one of the most enduring arguments in the capacity debate’.⁶⁰ However, ‘[w]hile the polycentricity of a dispute certainly mandates judicial caution and awareness of social consequences of judgements, it cannot preclude judicial involvement in social rights matters altogether’.⁶¹ Moreover, arguments based on the polycentricity tend to oversimplify the problem, caricaturing ESR claims in comparison to other legal questions.⁶² In addition, when adjudicating on ESR cases, judges usually take polycentric concerns seriously. This is evidenced by the development of legal tests,⁶³ as for example the reasonableness standard.

Information is an important concern for judges, especially when dealing with social matters implying a high level of governmental action.⁶⁴ Contrary to the legislature, which has the capacity to gather all the data needed to implement a policy, the courts usually only use the information they receive from the parties.⁶⁵ It is therefore important to ensure that the evidence provided is relevant and unbiased.⁶⁶ This raises the question of the quality of the information given to the courts.⁶⁷ Moreover, critics contend that judges lack the expertise needed to deal with economic or technical subjects. This has to be taken seriously given the potential impact courts orders can have on the budget of the state.⁶⁸

Nevertheless, one can argue that the degree of expertise needed depends on what one expects from courts’ adjudication.

If their role is not to decide policy and resource allocation but rather to assess whether the State (or other actors) have adequately [complied] with their legal obligations, then they need not to be “policy wonks”. What is required is essentially the exercise of “traditional” judicial competences: “hearing from the rights claimants, and other witnesses about the particular situation at issue, considering evidence from expert witnesses about the broader policy issues, hearing arguments from the parties and, finally, applying the law to the facts in a fair and impartial manner.”⁶⁹

⁵⁹ Pieterse op cit (n34) 393.

⁶⁰ Langford op cit (n4) 36.

⁶¹ Pieterse op cit (n34) 394.

⁶² Langford op cit (n4) 36.

⁶³ Ibid.

⁶⁴ Langford op cit (n4) 35.

⁶⁵ Christiansen op cit (n5) 351.

⁶⁶ Langford op cit (n4) 35.

⁶⁷ Christiansen op cit (n5) 351.

⁶⁸ Pieterse op cit (n34) 394.

⁶⁹ Langford op cit (n4) 35-36.

Furthermore, one can recognise that courts have an advantage on the other branches of the government. The information they receive illustrates real and concrete situations.⁷⁰ They ‘can test more effectively the particular implications of abstract principles and discover problems the legislature could not forecast’.⁷¹

The remedy problem is certainly one of the greatest concerns regarding ESR adjudication. The ‘incapacity of courts to formulate just and appropriate remedies without usurping legislative authority over budgeting is a fundamental argument of justiciability opponents’⁷² and it might be well-founded. How can it be ensured that the decisions of the courts in ESR cases will not negatively impact on governmental resources? The ICESCR and the South African Constitutional Court give some guidance in this regards. The state must realise the rights progressively using available resources. However, both texts stay silent on how this should be evaluated.⁷³ Here again, the reasonableness standard might be a useful tool to assess the actions of the government, and subsequently, to opt for an appropriate remedy.

To come back to the polycentricity issue, it should be added that judges can integrate polycentric concerns in crafting a remedy. The judiciary can order that the government addresses rapidly the emergency needs of the plaintiffs as well as design a plan to solve the general problem.⁷⁴

Finally, I should point out a fundamental difference between national and international adjudications with regards to remedies. Whereas, for example, the South African Constitution gives a wide authority to the courts in making ‘any order that is just and equitable’ when a state conduct has been found unconstitutional,⁷⁵ the CESCR, in the framework of the OP-ICESCR, does not have the power to order remedies. Article 9 only allows the Committee to give its views and recommendations to the state concerned.⁷⁶ However, there might not be an important substantial difference if one thinks that ‘[i]n the context of [ESCR] adjudication, the

⁷⁰ Langford op cit (n4) 35.

⁷¹ Pieterse op cit (n34) 395.

⁷² Christiansen op cit (n5) 352.

⁷³ Ibid.

⁷⁴ Langford op cit (n4) 37.

⁷⁵ Constitution of the Republic of South Africa, 1996, section 172(1).

⁷⁶ OP-ICESCR op cit (n1) art 9.

remedial effect does not always create a tangible and immediate benefit, but often does create guidelines to assist governments in realizing their mandate'.⁷⁷

To conclude, it is important to stress that most of the arguments against the justiciability of ESR raise some valid concerns that have to be taken seriously. This is what the South African Constitutional Court has done so far in cases related to ESR. On the other hand, the CDESCR has – to a certain extent – failed to give enough credit to those critics. Now that it will be soon confronted to the quasi-judicial task of reviewing complaints of alleged human rights violations, it might find helpful to get some inspiration from the South African jurisprudence on ESR.

University of Cape Town

⁷⁷ Langa op cit (n33) 32.

3) From the proposal to the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: an 18 years process

a. Two mechanisms for one system: the establishment of the distinction between the two sets of rights

During the negotiations leading to the adoption of the two United Nations covenants on human rights,⁷⁸ the question of a mechanism that would allow individuals to lodge complaints about alleged breach of provisions of each document by the ratifying states was already debated. Objections to create such a procedure for the ICESCR were mostly based on arguments against the justiciability of ESR.⁷⁹ Therefore, disagreement about the desirability of including a complaints mechanism in a human rights treaty was also one of the reasons for the adoption of two separate human rights covenants – one containing CPR and another containing ESCR.

The classic view that holds the Cold War ideologies responsible for the fact that the UN member states adopted two texts, with two different supervision mechanisms, is certainly correct but does not explain everything. It is true that many Western countries were the defendants of civil and political liberties, while the Eastern bloc was an advocate of socio-economic entitlements. However, as Dennis and Stewart attempted to show in their controversial article, there might as well have been other reasons for the disagreements.⁸⁰ For example, it is interesting to note that Socialist states firmly set against the idea of having expert committees supervising both treaties, whereas the United States and other Western countries were in favour of such a solution.⁸¹ As Langford pointed out, states responses to the idea of an international complaint mechanism for ESCR raised three different types of concerns, namely, ‘sovereignty, substantive and procedural concerns’⁸² – with the two latter being expressed in the general debate on justiciability as shown in the previous chapter.

⁷⁸ International Covenant on Economic Social and Cultural Rights, United Nations General Assembly Resolution A/RES/21/2200 (1966); International Covenant on Civil and Political Rights, United Nations General Assembly Resolution A/RES/21/2200 (1966).

⁷⁹ M Langford ‘Closing the gap? An introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2009) 29 (1) *Nordic Journal of Human Rights* (*Nordisk Tidsskrift for Menneskerettigheter*) 9.

⁸⁰ Dennis and Stewart op cit (n12) 462-515.

⁸¹ Langford op cit (n79) 4.

⁸² Langford op cit (n79) 5.

Some States are sceptical towards any form of international supervision For other States, substance appears to play a larger role Other countries ... claim they are procedurally constrained by their constitution in which types of international supervision they can accept.⁸³

Taking those factors into account, Dennis and Stewart suggested that there were actually good reasons explaining why the two sets of rights could not be integrated in a single document. They stated that:

From the outset, and for good reason, [ESCR], unlike [CPR]rights, have been defined primarily as aspirational goals to be achieved progressively. The drafters of the UDHR and the two Covenants well understood the difficulties and obstacles relating to justiciability. The decision to put the two sets of rights in different treaties with different supervisory mechanisms was well considered, and the underlying reasons for those distinctions and decisions appear to remain valid today It did reflect an assessment of the practical difficulties that states would face in implementing generalized norms requiring substantial time and resources.⁸⁴

The discussions occurring in 1954, during the tenth session of the Commission on Human Rights ('the Commission'), show that no state really envisioned the establishment of an individual complaints procedure for ESCR.⁸⁵ The only initiative that came close to it was a French proposal for an optional mechanism that would have allowed inter-state complaints on selected ESR.⁸⁶ But most of the countries expressed their strong reluctance for such an option and eventually, France withdrew it before it could be voted on.⁸⁷

Hence, in adopting two distinct human rights treaties, the UN member states established a distinction between the two sets of rights. A discrepancy of treatment between the 'two generations' of rights also materialised in the fact that, contrary to the International Covenant on Civil and Political Rights ('the ICCPR'), the ICESCR was not adopted together with an optional protocol allowing its supervisory body to consider complaints of individuals claiming to be victims of human rights violations.⁸⁸ Consequently, at international level, CPR were made quasi-justiciable,

⁸³ Ibid.

⁸⁴ Dennis and Stewart op cit (n12) 465.

⁸⁵ Dennis and Stewart op cit (n12) at 485-487.

⁸⁶ Dennis and Stewart op cit (n12) 485.

⁸⁷ Dennis and Stewart op cit (n12) 486

⁸⁸ ICESCR op cit (n78).

whereas adjudication of ESCR was not possible. States compliance with the ICESCR was only supervised through the system of state periodic reporting.⁸⁹

Another distinction between the two sets of rights had been made concerning the bodies that would oversee the treaties. Whereas part IV of the ICCPR establishes the creation of the Human Rights Committee as the supervisor of the treaty, part IV of the ICESCR gives this task to the Economic and Social Council ('ECOSOC').⁹⁰ The major difference was that the members of the Human Rights Committee are independent experts serving in their personal capacity, while ECOSOC is composed of states representatives.⁹¹ The implications of this disparity are important. Contrary to independent experts, states representatives operate on a mandate from their governments and therefore cannot hold independent opinions.

It should also be noted that under article 40(4) of the ICCPR, the Committee has the clear obligation to study the reports submitted by the states and then to transmit to them its own reports and general comments.⁹² The ICESCR is vaguer on the implementation of its reporting system. It merely requires that ECOSOC has to consider states 'reports on the measures ... adopted and the progress made in achieving the observance of the rights recognized' in it.⁹³ The reading of part IV hinders the clear identification of which body was given the main responsibility for supervision (the ECOSOC or the Commission), and of what would be 'the nature of the scrutiny to be undertaken by the UN bodies'.⁹⁴

Moreover, contrary to the ICCPR, the ICESCR stays silent concerning any direct feedback from ECOSOC to the states.⁹⁵ This flaw gives the impression that the reporting system is only one-dimensional and misses one of its important aspects, which is its capacity to create a dialogue between the state concerned and the United Nations supervisory bodies. Thus, the drafters rather chose to put the emphasis on the role of the United Nations specialised agencies in giving recommendations and

⁸⁹ M Craven 'The International Covenant on Economic, Social and Cultural Rights' in Raija Hanski and Markus Suksi (ed) *An introduction to the international protection of human rights* (1999) at 102-112.

⁹⁰ ICCPR op cit (n78) part IV; ICESCR op cit (n78) part IV.

⁹¹ ICCPR op cit (n78) art 28; Langford op cit (n79) 4.

⁹² ICCPR op cit (n78) art 40(4).

⁹³ ICESCR op cit (n78) part IV art 16(1).

⁹⁴ Craven op cit (n89) 112.

⁹⁵ ICESCR op cit (n78) part IV; ICCPR op cit (n78) art 40(4).

technical assistance for the implementation of the ICESCR.⁹⁶ Hence, as Matthew Craven argued, neither ECOSOC nor the Commission were actually expected to examine states compliance with the Covenant. He explained the problems with this supervision system as follows:

What is clear is that no body has the ability to interpret the Covenant in a manner that binds States Parties, and that States are merely under an obligation to submit reports at periodic intervals—any further participation in the supervisory process is entirely voluntary. Reading between the lines, it would appear that what was envisaged was a system in which ECOSOC would act as a conduit for the transmission of requests for international assistance, both economic and technical. It was not expected that ECOSOC would ‘assess’ the State reports, or evaluate State performance with respect to the implementation of their obligations under the Covenant.⁹⁷

This led to the conclusion that the reporting system as provided under the ICESCR first lacked clarity on how it was supposed to be conducted and secondly, lacked the implementation that would have allowed it to serve its purpose.

Soon after the ICESCR was entered into force, this lack of clarity proved to be an obstacle to the implementation of its reporting system.⁹⁸ For that reason, ECOSOC created a new body – the Committee on Economic, Social and Cultural Rights – responsible for the consideration of the reports submitted by the states.⁹⁹ The Committee has been able to develop its own working methods and turned out to become one of the most effective human rights reporting procedures in the United Nations system.¹⁰⁰ Moreover, the experience gained in considering the reports of the states parties allowed it to produce a number of general comments on various topics related to the interpretation of the Covenant.

b. A plea for a complaints procedure at the 1993 World Conference on Human Rights

Despite the gains made by the CESCR, human rights advocates still expressed the need for a complaints mechanism for the ICESCR. Some of the stronger supporters

⁹⁶ ICESCR op cit (n78) part IV.

⁹⁷ Craven op cit (n89) 112.

⁹⁸ Craven op cit (n89) 113.

⁹⁹ Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, ECOSOC Resolution 1985/17 (1985).

¹⁰⁰ Craven op cit (n89) 113.

of the idea – like Philip Alston – were to be found in the Committee itself, whose approach was based on the following motivations. First, the Committee argued that ‘such a procedure was needed to place [ESCR] on an equal footing with [CPR]’.¹⁰¹ Secondly, the consideration of complaints would enhance the Committee’s ability to deal with concrete human rights violations, as it would receive concrete information.¹⁰² As it has been the case for the Human Rights Committee regarding CPR, examining complaints would enable the Committee to develop a body of jurisprudence that would in turn permit a better interpretation of the provisions of the Covenant.¹⁰³ Thirdly, governments and domestic courts might take ESCR more seriously if they could be adjudicated at international level.¹⁰⁴ On the other hand, the main arguments against the introduction of an individual complaints mechanism for ESCR were still based on the idea that ESCR were not justiciable.¹⁰⁵

The CESCR began to take some concrete steps, no later than its first meetings. In 1990, Philip Alston – then Rapporteur of the Committee – suggested that the feasibility of a mechanism that would give the CESCR the ability to receive and consider individual or collective complaints should be studied.¹⁰⁶ The Committee approved and asked him to report on the subject, what he did four times between 1991 and 1996, as he was then the Chairperson of the Committee.¹⁰⁷ In addition, in 1992, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the Realization of Economic, Social and Cultural Rights also recommended the adoption of such a mechanism.¹⁰⁸ The following year, at the World Conference on Human Rights in Vienna, the Committee made the following statement, calling for the adoption of an optional protocol:

The Committee believes that there are strong reasons for adopting a complaints procedure (in the form of an optional protocol to the Covenant) in respect of the [ESCR] recognized in the Covenant. Such a procedure would be entirely non-compulsory and would permit communications to be

¹⁰¹ E De Wet ‘Recent developments concerning the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights’ (1997) 13 *South African Journal on Human Rights* 516.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ De Wet op cit (n101) 517.

¹⁰⁶ P Alston ‘Foreword’ xii, in M Langford (ed) *Social rights jurisprudence: emerging trends in international and comparative law* (2008).

¹⁰⁷ Craven op cit (n89) 102.

¹⁰⁸ E/CN.4/1997/105 op cit (n22) annex para 2.

submitted by individuals or groups alleging violations of the rights recognized in the Covenant Various procedural safeguards designed to guard against abuse of the procedure would be adopted. They would be similar in nature to those applying under the first Optional Protocol to the [ICCPR].¹⁰⁹

At the same time, some leading non-governmental organisations ('NGOs') active in the field of ESR started a campaign in the mid 1980s and presented a draft optional protocol at the Conference.¹¹⁰

In the same vein, the Vienna Declaration and Programme of Action – the text adopted at the Conference – as well as to affirm that '[a]ll human rights are universal, indivisible and interdependent and interrelated',¹¹¹ declared that '[t]he community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis'.¹¹² It thus 'encourage[d] the Commission on Human Rights, in cooperation with the [CESCR], to continue the examination of optional protocols to the [ICESCR]'.¹¹³

c. The Committee's Proposal

In 1996, the CESCR requested Philip Alston to draft an optional protocol.¹¹⁴ A text was adopted and submitted to the Commission the same year.¹¹⁵ In its preliminary considerations introducing the proposal, the Committee stated:

That if the principle of the indivisibility, interdependence and interrelatedness of the two sets of rights is to be upheld in the work of the United Nations, it is essential that a complaints procedure be established under the [ICESCR], thereby redressing the imbalance that presently exists.¹¹⁶

Concerning the locus standi, the Committee's Proposal proposed that communications could be received from individuals and groups claiming to be victims of a violation or acting on behalf of alleged victims.¹¹⁷ This suggestion is broader than what was provided under the first Optional Protocol to the ICCPR

¹⁰⁹ Cited in E/CN.4/1997/105 op cit (n22) annex para 11.

¹¹⁰ Langford op cot (n79) 6.

¹¹¹ E/CN.4/1997/105 op cit (n22) annex para 1; Vienna Declaration op cit (n22) para 5.

¹¹² E/CN.4/1997/105 op cit (n22) annex para 1; Vienna Declaration op cit (n22) para 5.

¹¹³ E/CN.4/1997/105 op cit (n22) annex para 1; Vienna Declaration op cit (n22) para 75.

¹¹⁴ Craven op cit (n89).

¹¹⁵ E/CN.4/1997/105 op cit (n22).

¹¹⁶ E/CN.4/1997/105 op cit (n22) para 11(e).

¹¹⁷ E/CN.4/1997/105 op cit (n22) para 19-23; Dennis and Stewart op cit (n12) 468.

(‘OP-ICCPR’), which states that only communications from individuals can be considered. However, the CESCR’s ‘expansive approach’¹¹⁸ has been justified by the evolving practice of the Human Rights Committee.¹¹⁹ In addition, it proposed a provision protecting individuals and groups who would submit a communication under the protocol.¹²⁰

Regarding the scope of the optional protocol – meaning which rights should be subjected to the complaints mechanism – the Committee debated the possibility of an à la carte approach.¹²¹ Such an option would allow states to ‘exclude some rights or levels of obligations through either opting in or out’.¹²² Although divided on the matter, a majority of the Committee members preferred a comprehensive approach, implying that the states party would have to accept the procedure for all the rights set forth in articles 1 to 15 of the Covenant.¹²³ Here again, the Committee opted for ‘an inclusive rather than a restrictive approach’.¹²⁴ According to its analysis, there was no good reason to exclude one or more of the rights enshrined in the ICESCR.¹²⁵ Nevertheless, it is interesting to note its remark concerning article 1, dealing with the right to self-determination:

The Committee noted, however, that the right to self-determination should be dealt with under this procedure only in so far as [ESCR] dimensions of that right are involved. It considered that the [CPR] dimensions of the right should remain the preserve of the Human Rights Committee in connection with article 1 of the [ICCPR].¹²⁶

As it will be discussed below, the question of the inclusion of the right to self-determination into the range of the rights subjected to the procedure was a cause of disagreement until the very end of the negotiations in April 2008.

On the outcome of the examination of the communications, the proposal stated that ‘[w]here the Committee is of the view that a State Party has violated its obligations

¹¹⁸ Dennis and Stewart *op cit* (n12) 468.

¹¹⁹ E/CN.4/1997/105 *op cit* (n22) para 20-22.

¹²⁰ E/CN.4/1997/105 *op cit* (n22) para 29-31.

¹²¹ E/CN.4/1997/105 *op cit* (n22) para 24-28.

¹²² C Mahon ‘Progress at the front: the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights’ (2008) *Human Rights Law Review* 631.

¹²³ E/CN.4/1997/105 *op cit* (n22) para 24-28.

¹²⁴ E/CN.4/1997/105 *op cit* (n22) para 24.

¹²⁵ E/CN.4/1997/105 *op cit* (n22) para 24-25.

¹²⁶ E/CN.4/1997/105 *op cit* (n22) para 25.

under the Covenant, the Committee may recommend that the State Party take specific measures to remedy the violation and to prevent its recurrence'.¹²⁷ It has to be noted that the use of the term 'specific measures' is quite bold when one knows how eager states are to prevent 'interference' in their domestic affairs, and even more when it is about socio-economic issues that are closely linked to governmental policies. It is not surprising that this wording did not survive the debates of the following years.

Additionally, the Committee's proposal included articles dealing with the receivability and the admissibility of the communications,¹²⁸ the substantiation of the complaints,¹²⁹ interim measures,¹³⁰ reference to state party and friendly settlement,¹³¹ the examination of the communications,¹³² the follow-up procedures¹³³ and the rules of procedure.¹³⁴ However, after deliberation, the Committee did not include a provision for inter-state complaint.¹³⁵

In drafting its proposal, the CESCR drew its inspiration from the first OP-ICCPR as well as the Human Rights Committee's experience and practice.¹³⁶ Therefore, apart from the possibility of considering oral information during hearings and the possibility of meetings with states to talk about the evolution of a specific situation, the text did not include new procedures unfamiliar to the first OP-ICCPR.¹³⁷

d. A workshop and an independent expert to further the discussion

In February 2001, the Office of the High Commissioner for Human Rights ('OHCHR') and the International Commission of Jurists ('ICJ') organised an informal workshop where governments and NGOs were invited to participate in a review 'on the justiciability of economic, social and cultural rights, with particular

¹²⁷ E/CN.4/1997/105 op cit (n22) para 49(1).

¹²⁸ E/CN.4/1997/105 op cit (n22) para 32-33.

¹²⁹ E/CN.4/1997/105 op cit (n22) para 34-35.

¹³⁰ E/CN.4/1997/105 op cit (n22) para 36-37.

¹³¹ E/CN.4/1997/105 op cit (n22) para 38-41.

¹³² E/CN.4/1997/105 op cit (n22) para 42-45.

¹³³ E/CN.4/1997/105 op cit (n22) para 50-51.

¹³⁴ E/CN.4/1997/105 op cit (n22) para 52-54.

¹³⁵ E/CN.4/1997/105 op cit (n22) para 13-14.

¹³⁶ De Wet op cit (n101) 543.

¹³⁷ De Wet op cit (n101) 543-544.

reference to the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights'.¹³⁸

The same year, the Commission and ECOSOC appointed Professor Hatem Kotrane as independent expert whose mandate was the examination of the question of a draft optional protocol.¹³⁹ After having studied the Committee's proposal as well as the conclusions of the OHCHR-ICJ workshop and consulted several governments, the expert submitted his first report to the Commission.¹⁴⁰ As Dennis and Stewart explained, the independent expert's initial report contained some doubts concerning the readiness of the member states to adopt an optional protocol given the degree of opposition that the issue still encountered.¹⁴¹ When he expressed his position on the justiciability of ESCR, he referred to the two different types of obligations for the states, namely an obligation of result for CPR and an obligation of means (ie, conduct) for ESCR, and asked how the latter could be measured.¹⁴² However, it must be noted that the expert's analysis is inconsistent with the Committee's view according to which ESCR imply both obligations of conduct and result.¹⁴³ Mr Kotrane also made a recommendation 'that the complaints mechanism be limited to "situation revealing a species of gross, unmistakable violations of or failures to uphold any of the rights set forth in the Covenant"'.¹⁴⁴ Despite the fact that his first report concluded that a working group should not be created immediately, the Commission chose that option.¹⁴⁵

¹³⁸ Report on the workshop on the justiciability of economic, social and cultural rights, with particular reference to the draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Commission on Human Rights Resolution E/CN.4/2001/62/Add.2 1; Dennis and Stewart op cit (n12) 469.

¹³⁹ Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights, Commission on Human Rights Resolution E/CN.4/RES/2001/30 (2001) para 8(c); Dennis and Stewart op cit (n12) 469; Mahon op cit (n122) 623.

¹⁴⁰ Dennis and Stewart op cit (n12) 469.

¹⁴¹ Report of the independent expert on the question of a draft optional protocol to the International Covenant on Economic, Social and Cultural Rights, Commission on Human Rights Resolution E/CN.4/2002/57 (2002) para 55; Dennis and Stewart op cit (n12) at 469-470.

¹⁴² E/CN.4/2002/57 op cit (n141) para 20; Dennis and Stewart op cit (n12) 470; M Langford and J A King 'Committee on Economic, Social and Cultural Rights' in M Langford (ed) social rights jurisprudence: emerging trends in international and comparative law (2008) 483.

¹⁴³ Langford and King op cit (n142) 483.

¹⁴⁴ E/CN.4/2002/57 op cit (n141) para 34; Dennis and Stewart op cit (n12) 470.

¹⁴⁵ E/CN.4/2002/57 op cit (n141) para 55; Dennis and Stewart op cit (n12) at 469-470.

e. The Open-Ended Working Group to consider options regarding the elaboration of an optional protocol to the ICESCR

In April 2002, the Commission decided to create ‘an open-ended working group of the Commission with a view to considering options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights’.¹⁴⁶ Although it was initially supposed to meet only once, its mandate was extended twice, allowing it to meet five times between February 2004 and April 2008, under the chairmanship of the Portuguese Catarina de Albuquerque.¹⁴⁷ During the first session of the working group in 2004, the debates concentrated mostly on the justiciability of ESCR.¹⁴⁸ The question was ‘whether and to what extent [ESCR] are able to be adjudicated under a complaints procedure to ICESCR, and whether the proposed optional protocol would enhance the protection of [ESCR]’.¹⁴⁹ It was reported that:

A number of delegations made reference to case law from national and regional courts and argued that the fact that [ESCR] were already adjudicated upon by some courts demonstrated that these rights could in principle also be subject to a complaints procedure under ICESCR. Conversely, other delegations argued that a complaints procedure would be inappropriate because of the particular character of [ESCR].¹⁵⁰

On the nature of the rights set forth in the Covenant:

A number of delegations argued that the provisions of ICESCR were imprecise and consequently did not lend themselves to adjudication under a complaints procedure. Other delegations maintained that the provisions were sufficiently precise to allow for a complaints procedure, arguing that the provisions of ICESCR cannot be spelled out in more detail as they are context-dependent and subject to interpretation in the light of particular situations.¹⁵¹

The report of the working group’s first session shows that the discussions could not focus on the elaboration of a protocol while there were still strong opposing views on the general question of ESCR justiciability. Unsurprisingly, not having managed to

¹⁴⁶ Question of the realization in all countries of the economic, social and cultural rights contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and study of special problems which the developing countries face in their efforts to achieve these human rights, Commission on Human Rights Resolution E/CN.4/RES/2002/24 (2002) at para. 9(f).

¹⁴⁷ Mahon op cit (n122) at 623-626.

¹⁴⁸ Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session, Commission on Human Rights Resolution E/CN.4/2004/44 (2004); Mahon op cit (n122) 623.

¹⁴⁹ E/CN.4/2004/44 op cit (n148) para 58.

¹⁵⁰ Ibid.

¹⁵¹ E/CN.4/2004/44 op cit (n148) para 59.

find a consensus on whether to start the process of drafting, the working group asked for an extension of its mandate.¹⁵²

At its second meeting, in an attempt to be more effective and to direct the discussion on the content of an optional protocol, the working group gave its chairperson the responsibility to submit a document containing the elements that would shape the procedure.¹⁵³ Ms de Albuquerque presented the requested document entitled 'Elements for an optional protocol to the [ICESCR]' at the third session of the working group in February 2006.¹⁵⁴

The Elements Paper – as it has been called – analysed the features of a communications procedure, taking into account issues like the scope of rights that should be subjected to the mechanism, the admissibility criteria and the standing – namely who may submit a communication – the proceedings on the merits, the question of friendly settlement of disputes and interim measures.¹⁵⁵ It also looked into the questions of the inquiry procedure and the inter-state procedure.¹⁵⁶ In addition, it studied several points that required particular attention like the consequences of an optional protocol on the domestic decisions on resource allocation, the relationship of an optional protocol with existing procedures on the international level and the question of duplication of mechanisms, the issue of international cooperation and assistance, the question of the costs of an optional protocol, what it would mean not to adopt an optional protocol and the question of the impact of an optional protocol on improving implementation of ESCR at the national level.¹⁵⁷

¹⁵² E/CN.4/2004/44 op cit (n148) para 76.

¹⁵³ Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session Commission on Human Rights Resolution E/CN.4/2005/52 (2005) para 102; Mahon op cit (n122) at 623-624.

¹⁵⁴ Elements for an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Commission on Human Rights Resolution E/CN.4/2006/WG.23/2 (2006).

¹⁵⁵ Mahon op cit (n122) 624; E/CN.4/2006/WG.23/2 op cit (n154) para 3-11.

¹⁵⁶ E/CN.4/2006/WG.23/2 op cit (n154) para 11-13.

¹⁵⁷ E/CN.4/2006/WG.23/2 op cit (n154) para 13-23.

In its third session, the working group used the Element Paper as a basis for the discussion.¹⁵⁸ This allowed it to address concretely the very issues that had to be taken into account. Concerning the scope of the optional protocol, a majority of delegations expressed themselves in favour of a comprehensive approach.¹⁵⁹ The proposal for allowing the supervisory body ‘to request interim measures of protection from the State to prevent irreparable harm to the alleged victim’ in some exceptional cases also found important support.¹⁶⁰ The question of an inquiry procedure still raised a lot of doubts as a significant number of delegations stated that they had not taken a final position on the matter.¹⁶¹ Regarding the consequences of an optional protocol on the domestic decisions on resource allocation, ‘the issue of the standards and criteria the Committee would use in determining whether resource allocations complied with the Covenant’¹⁶² raised concerns among the delegations. One of the suggestions that had been made was the application of a ‘standard of reasonableness’ in considering states actions.¹⁶³

The result of the third session was that many delegations started to consider the drafting of the protocol as the next step.¹⁶⁴ As the report reads:

A clear majority of delegations noted that considerable progress had been made in clarifying various questions relating to an optional protocol. In their view, the Working Group had fulfilled the mandate assigned to it by the [Commission] and could no longer make significant progress without engaging in a drafting exercise.¹⁶⁵

In June 2006, the newly created Human Rights Council (the ‘Council’ or the ‘HRC’) expressed the same view and gave the green light to start the drafting process.

Resolution 1/3 stated that:

The Human Rights Council, ... [d]ecides to extend the mandate of the Working Group for a period of two years in order to elaborate an optional protocol to the [ICESCR] and, in this regard, requests the Chairperson of the Working Group to prepare, taking into account all views expressed during the sessions of the Working Group on, inter alia, the scope and application of an optional protocol, a first draft optional protocol, which includes draft

¹⁵⁸ Report of the Open-ended Working Group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session, Commission on Human Rights Resolution E/CN.4/2006/47 (2006).

¹⁵⁹ E/CN.4/2006/47 op cit (n158) para 26-33.

¹⁶⁰ E/CN.4/2006/47 op cit (n158) para 65-67.

¹⁶¹ E/CN.4/2006/47 op cit (n158) para 69-75.

¹⁶² E/CN.4/2006/47 op cit (n158) para 93.

¹⁶³ E/CN.4/2006/47 op cit (n158) para 95.

¹⁶⁴ Mahon op cit (n122) 624.

¹⁶⁵ E/CN.4/2006/47 op cit (n158) para 125.

provisions corresponding to the various main approaches outlined in her analytical paper, to be used as a basis for the forthcoming negotiations.¹⁶⁶

The draft prepared by the chairperson and its explanatory memorandum were presented to the working group at its fourth meeting in July 2007.¹⁶⁷ The debates were conducted following the structure of the text, article by article.¹⁶⁸ This enabled the working group to deepen the discussion concerning the following subjects: the criteria to be used by the Committee in examining the communications; the scope of the protocol; the question of international assistance and cooperation and the establishment of a fund; the admissibility criteria; the issue of interim measures; and the possibility of friendly settlement.¹⁶⁹

Taking into account what had been said in the course of the fourth session, Ms de Albuquerque prepared a revised draft optional protocol that she submitted to the working group during the first part of its fifth session, held in February 2008.¹⁷⁰ Although the text was thoroughly reviewed, the participants could not find a compromise on the fundamental issues of the standing, the scope, the review criteria, the reservations and the question of international cooperation and assistance.¹⁷¹

A second revised draft was submitted in the second part of the fifth session of the working group, held from 31 March to 4 April 2008.¹⁷² The text attempted to reproduce the proposals that obtained the broader support from the members of the working group.¹⁷³ In her letter introducing the revised draft, Ms de Albuquerque expressed her hope that this last version would allow the finalisation of the

¹⁶⁶ Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Human Rights Council Resolution A/HRC/RES/1/3 (2006) para 2.

¹⁶⁷ Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights - Prepared by the Chairperson-Rapporteur Catarina de Albuquerque, Human Rights Council Resolution A/HRC/6/WG.4/2 (2007).

¹⁶⁸ A/HRC/6/WG.4/2 op cit (n167); Mahon op cit (n122) 625.

¹⁶⁹ Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fourth session, Human Rights Council Resolution A/HRC/6/8 (2007) para 148-186.

¹⁷⁰ Revised Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights – Letter from the Chairperson-Rapporteur, Catarina de Albuquerque, to the members of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Human Rights Council Resolution A/HRC/8/WG.4/3 (2008).

¹⁷¹ Mahon op cit (n122) 625.

¹⁷² Revised Draft Optional Protocol To The International Covenant On Economic, Social And Cultural Rights – Prepared by the Chairperson-Rapporteur after the first part of the fifth session of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights, Human Rights Council Resolution A/HRC/8/WG.4/3 annex (2008).

¹⁷³ A/HRC/8/WG.4/3 op cit (n170).

negotiations.¹⁷⁴ But, as she pointed out, agreement still had to be found regarding the question of the rights that should be subjected to the complaints procedure, the question of the examination of the steps taken by the state party through a reasonableness test, and the question of a trust fund to assist submission of communications and to provide expert and technical support to governments and NGOs for the implementation of ESCR.¹⁷⁵ Informal consultations and negotiations between the regional groups finally led to a consensus, although there were still opposing views, notably on the fact that the right to self-determination figuring in part I of the Covenant was excluded from the rights subjected to the procedure.¹⁷⁶ A majority of delegations recognised the text as the best compromise and on the 4th of April 2008 – the last day of its fifth session – the working group took the decision to submit the text for approval to the HRC.¹⁷⁷

f. The adoption of the Optional Protocol to the ICESCR

The Council examined the draft optional protocol during its eighth session, in June 2008.¹⁷⁸ Unsurprisingly, the exclusion of the right to self-determination contained in part I of the ICESCR still raised concerns for some delegations and consequently, the debate on the scope of the optional protocol went on until a compromise was found.¹⁷⁹ The last version of the draft did not discriminate any rights enshrined in the Covenant.¹⁸⁰

The revised text did not explicitly include Part I within the scope of the OP-ICESCR, but reference to Parts I, II and III were replaced by more generic (and arguably very vague) wording, specifying that complaints could be brought before the Committee in relation to ‘any of the [ESCR] set forth in the Covenant’.¹⁸¹

The HRC finally agreed on the revised text, which was adopted without a vote on the

¹⁷⁴ Ibid.

¹⁷⁵ Ibid; A/HRC/8/WG.4/3 op cit (n172) annex art 2-8(4)-14.

¹⁷⁶ Report of the Open-ended Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session, Human Rights Council Resolution A/HRC/8/7 (2008) para 214-245; Mahon op cit (n122) 625.

¹⁷⁷ A/HRC/8/7 op cit (n176) para 211-255.

¹⁷⁸ International Service for Human Rights ‘Human Rights Council, 8th Session, Session Overview, 2-18 June 2008’ (2008) *Human Rights Monitor Series*; Mahon op cit (n122) 626.

¹⁷⁹ International Service for Human Rights op cit (n178) 19-21.

¹⁸⁰ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Human Rights Council Resolution A/HRC/RES/8/2 (2008) art 2.

¹⁸¹ Mahon op cit (n122) 626.

18th of June 2008.¹⁸² Recommendation was made to the General Assembly so that the optional protocol could be adopted.¹⁸³

It was on the significant day of the 10th of December 2008 – which marked the 60th anniversary of the Universal Declaration of Human Rights – that the General Assembly unanimously adopted the Optional Protocol to the ICESCR.¹⁸⁴ The will to adopt the text on the day of this historic commemoration ‘partly explains the late surge in efforts to complete the drafting of the protocol’.¹⁸⁵ According to what had been recommended, the text had been opened for signature at the United Nations Treaty Event in September 2009.¹⁸⁶ Twenty-nine countries – principally from Africa, Europe and Latin America – signed the text during the ceremony.¹⁸⁷ By this act, the signatory countries expressed their interest in becoming party to the OP-ICESCR. For those countries, the next step should be the ratification of the text. The Optional Protocol will enter into force once ten states party to the ICESCR will have ratified or acceded to it.¹⁸⁸

The length and the content of the discussions that led to the adoption of the Optional Protocol are certainly good indicators to the challenges that will still have to be overcome, now that the text has been accepted by the General Assembly. Before focusing on some of those issues and in order to have a better understanding of the subject, I am now outlining the provisions of the OP-ICESCR.

¹⁸² A/HRC/RES/8/2 op cit (n180).

¹⁸³ A/HRC/RES/8/2 op cit (n180) para 2.

¹⁸⁴ Langford op cit (n79) 1; OP-ICESCR op cit (n1).

¹⁸⁵ Langford op cit (n79) 2.

¹⁸⁶ OP-ICESCR op cit (n1) para 2.

¹⁸⁷ United Nations Press Release ‘New Optional Protocol on Economic, Social and Cultural Rights and “Rotterdam Rules” signed by nearly 50 states during 2009 Treaty Event’ 30 September 2009 L/T/4418.

¹⁸⁸ OP-ICESCR op cit (n1) art 18.

4) The provisions of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

a. Introduction

The OP-ICESCR represents an important step forward in terms of ESCR protection as it creates a new complaints procedure allowing ESCR to become quasi-justiciable at international level. It gives to the CESCR ‘the competence ... to receive and consider communications’.¹⁸⁹ This has to be seen as a very positive development. Undeniably, more than merely acknowledging that ESCR are equal to CPR, it provides a concrete tool for victims of ESCR violations. However, as the previous chapter explained, the adopted text is the result of a compromise between two kinds of interests: human rights protection interests and states realist interests. This is obvious when one looks at the limitations to the procedure included in numerous final provisions. Moreover, although other existing instruments have inspired the content of the Optional Protocol,¹⁹⁰ it also includes some novelties.

In this chapter, I outline the main articles of the Optional Protocol in order to have a better comprehension of the framework they create for individual and groups complaints. I will sometimes go back to the discussions that occurred during the drafting process as they give some insight to understand the purpose of the provisions. After looking briefly at the preamble, I will discuss the standing and the scope of the procedure, the admissibility criteria for the communications, the question of interim measures, the examination of the communications by the Committee, the follow-up to the views of the Committee, the inter-state procedure, the inquiry procedure and the question of international assistance and cooperation.

b. The preamble

Although the preamble could be seen as a mere declaration without effect, it is necessary to look at it because it expresses the reasons for the adoption of the Optional Protocol.

¹⁸⁹ OP-ICESCR preamble-art 1.

¹⁹⁰ Inspiration as been taken from instruments such as the First Optional Protocol to the ICCPR (‘OP-ICCPR’) and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (‘OP-CEDAW’); Langford op cit (n79) 18.

First of all, it must be noted that the preamble of the OP-ICESCR is much more developed than the one of the OP-ICCPR. It starts by making reference to the United Nations Charter as well as to the Universal Declaration of Human Rights, recalling the fundamental values of dignity, equality, freedom – including freedom from fear and want – justice, peace and non-discrimination.¹⁹¹

It also reaffirms ‘the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms’,¹⁹² as expressed in the 1993 Vienna Declaration and Programme of Action.

Finally, it takes up Article 2(1) of the ICESCR, which sets out governments obligations towards ESCR. It states:

[T]hat each State Party to the [ICESCR] undertakes to take steps, individually and through international assistance and cooperation, 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 Covenant by all appropriate means, including particularly the adoption of legislative measures.¹⁹³

Through the diction of the preamble, the Optional Protocol is reaffirming the United Nations commitment regarding ESCR. But it also recognises that, in order to ‘achieve the purposes of the Covenant and the implementation of its provisions’,¹⁹⁴ a mechanism of individual complaints would be necessary.

c. Article 2: Communications – the standing and the scope of the procedure

Article 2 deals with the standing – meaning who is entitled to submit a complaint – and the scope – meaning which rights are subject to the communications procedure.

It reads:

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 [ESCR] set forth in the Covenant by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent.¹⁹⁵

¹⁹¹ OP-ICESCR preamble.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

¹⁹⁵ OP-ICESCR art 2.

This means that one single person can send a communication to the Committee about her or his own situation. The same applies to groups of individuals. One additional important feature is that not only direct victims – be they individuals or groups – can bring a complaint, but also people acting on their behalf. This is a broader approach than the one adopted in the first OP-ICCPR.¹⁹⁶ But even for this procedure, it is not new in practice as the Human Rights Committee's rules of procedures already enabled it.¹⁹⁷

The possibility to lodge a complaint on behalf of the victims is an important tool for national and international NGOs. Moreover, victims of socio-economic violations are usually marginalised and, for reasons related to costs and access to information, would not be able to contact the CESCR without the help of an intermediary. However, 'the final text does not grant standing to NGOs to file communications in their own right: they may do so only on behalf of individuals or groups of individuals claiming to be victims'.¹⁹⁸ This implies that organisations must base their submissions on concrete cases. They cannot, in their own names, take up a situation of ESCR violations and denounce it via a communication to the Committee using the mechanism put in place by the Optional Protocol. But this does not prevent them from encouraging victims to use the procedure and, in the case the latter are willing to, to submit a complaint on their behalf and based on their stories.

Concerning the standing, it should also be pointed out that the adopted text does not allow for collective complaints, as it is for example provided in the European Social Charter.¹⁹⁹ Such an option had been envisaged in the first versions of the text, but the working group decided to exclude it.²⁰⁰ This would have enabled certain organisations to submit communications directly.²⁰¹ As collective actions are not mentioned, the Committee might have to clarify the conditions for the submission of complaints sent by groups or on their behalf. Questions like what constitutes a group

¹⁹⁶ Optional Protocol to the International Covenant on Civil and Political Rights, United Nations General Assembly Resolution A/RES/21/2200 (1966) art 2.

¹⁹⁷ Mahon op cit (n122) 633-634.

¹⁹⁸ Mahon op cit (n122) 634.

¹⁹⁹ Ibid.

²⁰⁰ Ibid; Langford op cit (n79) 19.

²⁰¹ Ibid.

– for example, does a trade union constitute a group²⁰² – or how an organisation can represent a group will have to be addressed.

In relation to the scope of the new procedure, Article 2 states that communications can be submitted concerning ‘a violation of any of the [ESCR] set forth in the Covenant’.²⁰³ The consequence of this comprehensive approach might mean that fewer states would ratify the text. However, during the drafting process:

This approach was partly ‘evidence-based’ given the many presentations that demonstrated that a wider range of the Covenant obligations and rights had been adjudicated in various national and regional jurisdictions. There was also a concern that an ‘a la carte’ approach could lead to a hierarchy of rights and obligations.²⁰⁴

As mentioned earlier, the most contentious point regarding the scope was possibly the inclusion of the right to self-determination in the set of rights subjected to the OP-ICESCR. The compromise that had been reached in the final wording implies that civil and political dimensions of the right to self-determination are excluded from the rights covered by the protocol.²⁰⁵ Therefore, when addressing complaints involving violations of that right, the Committee will have to limit itself to its economic, social and cultural aspects.

d. Article 3 and 4: Admissibility

The admissibility criteria under the OP-ICESCR clearly express the wish to limit the number of complaints. Whereas some limitations are justified, other might turn out to be too restrictive and even counterproductive in terms of human rights protection. This is why the admissibility conditions under the Optional Protocol have been qualified as a ‘watershed in terms of stringency’.²⁰⁶ While classic criteria of admissibility have been taken up from other mechanisms, others have been added. According to the conditions already used under other instruments, a communication should be considered inadmissible when:

²⁰² Mahon op cit (n122) 634.

²⁰³ OP-ICESCR art 2.

²⁰⁴ Langford op cit (n79) 20.

²⁰⁵ Ibid.

²⁰⁶ Langford op cit (n79) 21.

- All available domestic remedies have not been exhausted, unless those are unreasonably prolonged;²⁰⁷
- The alleged violation occurred before the entry into force of the Optional Protocol for the state concerned unless it continued after that date;²⁰⁸
- It has already been or is being examined by the Committee or ‘another procedure of international investigation or settlement’;²⁰⁹
- ‘It is incompatible with the provisions of the Covenant’;²¹⁰
- ‘It is manifestly ill-founded [or] not sufficiently substantiated’;²¹¹
- ‘It is an abuse of the right to submit a communication’;²¹²
- ‘It is anonymous or not in writing’.²¹³

Besides those conditions, Article 3 sets out new criteria for admissibility that might well prevent a certain number of cases to be eligible for consideration. They state that a communication should be considered inadmissible by the Committee when:

- ‘It is not submitted within one year after the exhaustion of the domestic remedies’ unless it is demonstrated that it was not possible to do so;²¹⁴
- ‘It is exclusively based on reports disseminated by the mass media’.²¹⁵

The one-year time limit criteria clearly shows a new restrictive approach in terms of admissibility. ‘This temporal requirement is likely to have a choking effect on claims in countries where the new Optional Protocol is not well known or promoted’.²¹⁶ Indeed, if victims are not aware of their possibilities under the OP-ICESCR early enough, they might not be able to lodge a complaint in time. Gathering all the necessary elements in order to send a communication to the Committee might well take few months. Moreover, the exact moment when the domestic remedies have been exhausted might also be difficult to identify. Therefore, this criterion might

²⁰⁷ OP-ICESCR art 3(1).

²⁰⁸ OP-ICESCR art 3(2(b)).

²⁰⁹ OP-ICESCR art 3(2(c)).

²¹⁰ OP-ICESCR art 3(2(d)).

²¹¹ OP-ICESCR art 3(2(e)).

²¹² OP-ICESCR art 3(2(f)).

²¹³ OP-ICESCR art 3(2(g)).

²¹⁴ OP-ICESCR art 3(2(a)).

²¹⁵ OP-ICESCR art 3(2(e)).

²¹⁶ M Scheinin and M Langford ‘Evolution or revolution? – Extrapolating from the experience of the Human Rights Committee’ (2009) 29 (1) *Nordic Journal of Human Rights* (*Nordisk Tidsskrift for Menneskerettigheter*) 110.

have undesirable repercussions on victims of ESCR violations. I would suggest that the Committee does not take it in a too rigid manner so as to allow some flexibility depending on the cases.

Another limitation is to be found in Article 4, which introduces the new condition of 'clear disadvantage' in the evaluation of the admissibility of a complaint. It states that '[t]he Committee may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance'.²¹⁷ It means that the CESCR will have to consider, long before the reviewing stage, whether or not the situations presented to it show that the complainants have clearly and significantly suffered a disadvantage. If the Committee finds that this factor is not present, the concerned case may be declared inadmissible.

The condition of 'clear disadvantage' raises several problems. First, it is pretty vague wording and the absence of criteria to decide which situation should or should not be considered as revealing a clear disadvantage might prevent the Committee to adopt a uniform approach when deciding on the admissibility of the complaints.²¹⁸ In certainty, the terms 'clear disadvantage' and 'serious issue of general importance' lack clarity. The Committee will have to define them and resolve questions such as how to differentiate a 'clear disadvantage' from an 'unclear disadvantage' and how a 'serious issue of general importance' can be appreciated.

Secondly, Article 4 raises some concerns that might well short circuit the examination of the complaints, as it requires the Committee to evaluate the merits of the cases before deciding on their admissibility.²¹⁹

Thirdly, this condition seems 'to imply that some violations could be considered insignificant', which is unacceptable.²²⁰ One might have the impression that the Committee will have to assess situations presented to it according a threshold of suffering. The danger is that it can lead to rank ESCR violations according to a degree of suffering, forgetting that any violation is illegal and should never occur.

²¹⁷ OP-ICESCR art 4.

²¹⁸ A/HRC/8/7 op cit (n176) para 157.

²¹⁹ A/HRC/8/7 op cit (n176) para 59.

²²⁰ Ibid.

Therefore, because Article 4 ‘could lead to the dismissal of worthy complaints’, it would ‘be advantageous to let cases move automatically to the merits stage where the actual impact could be properly interrogated’.²²¹

The reason why Article 4 has been integrated has been explained by ‘(an unfounded or at least unproven) correlation being made between the fact that there are many millions of people living in poverty and deprivation, and the possibility or likelihood that such circumstances would give rise to the lodging of an individual complaint’.²²²

This provision was therefore seen ‘as a valve for the Committee to control what some feared could be a flood of frivolous or undeserving cases’.²²³ It is actually a shame that this view has prevailed as nothing supports such speculations about the number of communications that will be sent to the CESCR. On the contrary, an overview of the caseload under other human rights instruments showed that other treaty bodies actually did not receive a large amount of communications.²²⁴

e. Article 5: Interim measures

Article 5(1) reads:

At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations.²²⁵

The inclusion of a provision allowing for interim measures follows the development that has been witnessed in recent complaints mechanisms such as the OP-CEDAW.²²⁶ This is also in line with the Human Rights Committee’s practice and the rules of procedures of the Committee against Torture and the Committee on the Elimination of Racial Discrimination.²²⁷ In the case of the OP-ICESCR, the importance that such measures might play in cases of violations of ESCR might have convinced that they should be dealt with directly in the protocol. Several states and

²²¹ Scheinin and Langford op cit (n216) 110.

²²² Mahon op cit (n122) at 635-636.

²²³ Scheinin and Langford op cit (n216) 110.

²²⁴ Dennis and Stewart op cit (n12) 508.

²²⁵ OP-ICESCR art 5(1).

²²⁶ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, United Nations General Assembly Resolution A/RES/54/4 (1999) art 5.

²²⁷ Mahon op cit (n122) 640; Langford op cit (n79) 24.

NGOs argued that '[t]he function of interim measures to prevent irreparable harm was of such importance that the matter should not be deferred to the Committee's rules of procedure'.²²⁸

However, one point that remains unclear concerning interim measures is whether they are legally binding or not. While some states consider them authoritative, others argue that given the quasi-judicial nature of the complaints procedure, decisions taken by the Committee could not be legally binding.²²⁹ Here it is useful to note that the Human Rights Committee – having already discussed this issue – stated that its non-judicial nature did not impair the fact that its views carried 'some important characteristics of a judicial decision'.²³⁰ A kind of consensus was found in the OP-ICESCR where it is stated that interim measures could only be requested in exceptional circumstances.²³¹

f. Article 8: Examination of communications

According to article 8, the CESCR 'shall examine communications received ... in the light of all documentation submitted to it'²³² and this has to be conducted in closed meetings.²³³ Moreover

[w]hen examining a communication ... , the Committee may consult, as appropriate, relevant documentation emanating from other United Nations bodies, specialized agencies, funds, programmes and mechanisms, and other international organizations, including from regional human rights systems, and any observations or comments by the State Party concerned.²³⁴

Besides those procedural aspects, article 8 sets out how the Committee should evaluate the complaints. 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.²³⁵

²²⁸ A/HRC/6/8 op cit (n169) para 67.

²²⁹ Langford op cit (n79) 24.

²³⁰ Ibid.

²³¹ OP-CEDAW op cit (n226) art 5(1).

²³² OP-ICESCR op cit (n1) art 8(1).

²³³ OP-ICESCR op cit (n1) art 8(2).

²³⁴ OP-ICESCR op cit (n1) art 8(3).

²³⁵ OP-ICESCR op cit (n1) art 8(4).

This provision has to be read together with article 2(1) of the Covenant, which establishes the obligations of governments regarding ESCR. Its first part introduces the reasonableness approach, as developed by the South African Constitutional Court. According to this standard of review, when considering a complaint, the CESCR will have to assess whether states actions had been reasonable. The second part of the provision implicitly recognises that states enjoy a margin of discretion – or appreciation – in the adoption of policies affecting ESCR.²³⁶

The practical implications of article 8(4) will be dealt with in chapter V where I will speak about the Committee's interpretation of states obligations, and in chapter VII when analysing South African jurisprudence on the subject. Here, I will only give some elements that will help clarifying the reasons for the inclusion of this provision in the Optional Protocol.

Article 8(4) results from a discussion that touched the core of the justiciability debate. It is an attempt to give guidance as to how the CESCR will have to assess whether states have violated their obligations. As Mahon explained:

Concerns about the Committee's potential over-involvement in policy setting prompted a desire to curtail this through the inclusion of criteria in the text of the OP-ICESCR, which would guide the Committee as to the standard it was to apply when undertaking its consideration of the merits of the claim.²³⁷

During the drafting process, other standards have also been discussed. For example, the doctrine of a 'broad margin of appreciation' has also been proposed as a criterion of review, as well as a standard of 'unreasonableness' instead of a standard of reasonableness.²³⁸ But the favoured option had been a combination between the reasonableness standard of review and the principle of margin of discretion. States who are still sceptical to the idea of the Optional Protocol see it 'as a way of preventing inappropriate or unnecessary incursions into policy choices or resource allocation decisions'.²³⁹ On the other hand, those who militated for a comprehensive and effective instrument consider it as 'a standard of review that had been proven effective at the domestic level', like in South Africa.²⁴⁰ As a matter of fact, it is

²³⁶ Mahon op cit (n122) 638.

²³⁷ Mahon op cit (n122) 636-637.

²³⁸ B Porter 'The reasonableness of article 8(4) – Adjudicating claims from the margins (2009) 29 (1) *Nordic Journal of Human Rights (Nordisk Tidsskrift for Menneskerettigheter)* 45.

²³⁹ Porter op cit (n238) 47.

²⁴⁰ Ibid.

significant to note that the South African Constitutional Court's decision in *Government of the Republic of South Africa and Others v Grootboom and Others (Grootboom)*²⁴¹ has inspired the actual wording of article 8(4). It is in this landmark case that the Court used the reasonableness test for the first time and stressed the necessity 'to recognise that a wide range of possible measures could be adopted by the state to meet its obligations'.²⁴²

g. Article 9: Follow-up to the views of the Committee

Article 9 provides direction as to what happens once the CESCR has examined a communication. A comprehensive written dialogue between the Committee and the state concerned is envisaged. First, the Committee must transmit its views and recommendations to the parties concerned.²⁴³ Then, the state has six-months to send its written answer to the Committee.²⁴⁴ Finally, the CESCR may request that the state submit further information in its subsequent reports.²⁴⁵ It must be stressed that being a quasi-judicial body, it does not have the capacity to deliver legally binding decisions, but only views and recommendations. The impact of the decisions taken in the framework of the Optional Protocol will depend on the good will of the states concerned, as it is the case with other complaints procedures at the United Nations level. However, the development of a new and rich jurisprudence should not be underestimated. This will hopefully have a positive impact on the progressive realisation of ESCR.

h. Article 10: Inter-State communications

It is worth noting that the Optional Protocol includes a provision for a voluntary inter-state communications, whereas this option, figuring in other complaints mechanisms, has remained unused so far.²⁴⁶ However, the fact that this traditional provision is part of the new instrument can be seen as a positive aspect when one thinks about the possible development of the international human rights complaints procedures. As Mahon explained:

²⁴¹ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

²⁴² *Grootboom* supra (n241) para 41; Porter op cit (n238) at 49-50.

²⁴³ OP-ICESCR op cit (n1) art 9(1).

²⁴⁴ OP-ICESCR op cit (n1) art 9(2).

²⁴⁵ OP-ICESCR op cit (n1) art 9(3).

²⁴⁶ Mahon op cit (n122) 629.

The inclusion of this provision is indeed a positive retention, as not only does it ensure that for the sake of any potential future unification of the treaty body communications procedures there is no significant gap when it comes to inter-State justiciability of human rights, but also it leaves open the door for possible developments in international jurisprudence in this regard.²⁴⁷

Thus, thanks to article 10 of the Optional Protocol, ESCR will not be left apart if the inter-state communications procedure has to develop in the future.

i. Article 11: Inquiry procedure

According to the inquiry procedure, a state who declares that it recognises the competence of the CESCR provided for under article 11 will have to cooperate in the examination of any reliable information alleging that it has gravely or systematically violated any ESCR set forth in the Covenant.²⁴⁸ In that context, the Committee can decide to conduct an inquiry, which may include a visit to the territory of the state concerned. However, such a visit is subjected to the consent of the state.²⁴⁹ The findings, comments and recommendations of the Committee shall be transmitted to the state concerned, who, in turns, has six months to submit its observation to the CESCR.²⁵⁰ The results of the proceedings and the measures taken by the state in response to an inquiry can be included in the Committee's annual report and the state's report respectively.²⁵¹

The possibility of an inquiry procedure is not new as it was already included in other mechanisms such as the OP-CEDAW.²⁵² Like the inter-state communication procedure, the inquiry procedure under the OP-ICESCR is an opt-in procedure, meaning that the state has to express its consent for it to be applicable.

If it is used in an appropriate manner, such a procedure has the potential to play a positive role in the international protection of human rights. It could allow 'a response to be made to serious violations in a timely manner'²⁵³ and 'could be used by individuals and groups facing difficulties in accessing the communication

²⁴⁷ Mahon op cit (n122) 642.

²⁴⁸ OP-ICESCR op cit (n1) art 11(2).

²⁴⁹ OP-ICESCR op cit (n1) art 11(3).

²⁵⁰ OP-ICESCR op cit (n1) art 11(5)-(6).

²⁵¹ OP-ICESCR op cit (n1) art 11(7)-12(1).

²⁵² OP-CEDAW op cit (n226) art 8.

²⁵³ A/HRC/6/8 op cit (n169) para 111.

procedure or in danger of reprisal'.²⁵⁴ Moreover, it could be a useful tool for NGOs who cannot submit communications in their own names. Under article 11, they could transmit information regarding any ESCR violation occurring in a country, which would have consented to the inquiry procedure. This information could then be used by the Committee to conduct an inquiry.

j. Article 14: International assistance and cooperation

Article 2(1) of the Covenant provides that states parties have the obligation 'to take steps, individually and through international assistance and co-operation, especially economic and technical ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant'.²⁵⁵ It is on this basis that a number of states – most of all from Africa, Latin America and the Caribbean – have stressed the need to include a provision that would express a corollary duty in the OP-ICESCR.²⁵⁶ Thus, article 14 states that the Committee can transmit 'to United Nations specialized agencies, funds and programmes and other competent bodies, its views or recommendations concerning communications and inquiries that indicate a need for technical advice or assistance'.²⁵⁷

Moreover, article 14 provides for the establishment of a trust fund 'with a view to providing expert and technical assistance to States Parties ... for the enhanced implementation of the rights contained in the Covenant'.²⁵⁸ During the drafting process, several Western states were opposed to this provision on the basis 'that such a fund would duplicate existing funds and that it would send a wrong signal that non-compliance with the Covenant rights could be justified by a lack of international assistance'.²⁵⁹ Those arguments were rejected as the fund was seen as giving effect to the legal obligation contained in article 2(1) of the ICESCR.²⁶⁰ Moreover, it was argued that 'developing countries did not seek to detract from their obligations, and that shared efforts were required, as developing countries could not fully realize Covenant rights without international assistance, which was mandated by the

²⁵⁴ Ibid.

²⁵⁵ OP-ICESCR op cit (n1) art 2(1).

²⁵⁶ Mahon op cit (n122) 641.

²⁵⁷ OP-ICESCR op cit (n1) art 14(1).

²⁵⁸ OP-ICESCR op cit (n1) art 14(3).

²⁵⁹ A/HRC/6/8 op cit (n169) para 129.

²⁶⁰ A/HRC/6/8 op cit (n169) para 130.

Covenant and the Charter of the United Nations'.²⁶¹ One question that remains is whether the purpose of the trust fund will actually be achievable in practice.

University of Cape Town

²⁶¹ Ibid.

5) The Committee's interpretation of states obligations under article 2(1) of the ICESCR

a. Introduction

The impact of the Optional Protocol will depend on a number of aspects, from technical and practical to conceptual matters. But what will be definitely critical is how the Committee will assess states' compliance with ESCR. Under the ICESCR, the obligations of the states for the implementation of the rights appear in article 2(1).²⁶² The present chapter will look at the Committee's understanding of states obligations towards ESR. For the purpose, I will use the Committee's general comments that have been drafted thanks to years of experience in reviewing countries reports. This analysis will show that the CESCR's interpretation of the obligations established by article 2(1) is not sensitive enough to the justiciability debate and therefore, might not be the most suitable for the adjudication of cases under the OP-ICESCR.

b. Article 2(1) of the ICESCR: need of clarification

Under the Covenant, the obligations of states towards the substantive rights enshrined in articles 6 to 15 are stated in part II. Article 2(1) states how governments must implement those rights. It 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.²⁶³

Much has been said about the 'elusive and intricate' meaning of this provision.²⁶⁴ It is true that the vagueness of the terms used and the way they are put in relation to each other does not allow for a straightforward and clear understanding of states obligations. Consequently, since the adoption of the Covenant, the floor has been open to different interpretations of the provision, with one main concern: the justiciability of ESR. The debate on the justiciability of ESR is about to move

²⁶² ICESCR op cit (n78) art 2(1).

²⁶³ Ibid.

²⁶⁴ M Sepúlveda The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights (2003) 377.

forward as the CESCR will have to review individuals and groups complaints as provided by the OP-ICESCR. In this context, the question that must be asked is: how the CESCR is going to interpret states obligations under the Covenant? A logical scenario would be for the Committee to base its judgements on the principles that it has developed so far. But is it feasible? Can and should the Committee use those standards in the context of an individual complaints mechanism?

In attempting to answer this question, I shall now proceed to the examination of the Committee's understanding of the wordings used in article 2(1). For this purpose, I will look at the Committee's general comments. The Committee first expressed its views on the nature of states' obligations in general comment 3 issued in 1990.²⁶⁵ The document examined the meaning of article 2(1). In order to develop a comprehensible analysis, I will look separately at the different obligations contained in the provision. However, it must be bore in mind that they can only be understood in relation to each other.

i. 'to take steps ... with a view to achieving progressively the full realization of the rights'

According to article 2(1), states have the obligation to take steps to achieve progressively the full realisation of the rights enshrined in the Covenant.²⁶⁶ In its third general comment, the Committee interpreted the obligation to take steps as having an immediate effect and thus distinguished it from the obligation to fully realise ESCR, which can only be achieved progressively.²⁶⁷ The Committee explained that:

[T]he undertaking ... "to take steps" ... is not qualified or limited by other considerations Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned.²⁶⁸

In other words, it means that states must take some immediate actions designed to realise the rights progressively. Therefore, states can be in breach of their obligation

²⁶⁵ Committee on Economic, Social and Cultural Rights *The nature of States parties obligations* (Art. 2, par.1) (1990) E/1991/23 CESCR General Comment 3.

²⁶⁶ ICESCR op cit (n78) art 2(1).

²⁶⁷ CESCR General Comment 3 op cit (n265) para 1-2.

²⁶⁸ CESCR General Comment 3 op cit (n265) para 2.

under article 2(1) if they do not take such steps immediately. This will not be the case if they cannot fully realise the rights as this can only be achieved progressively.²⁶⁹

The Committee has explained the notion of progressive realisation in the following terms:

The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of [ESCR]. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.²⁷⁰

Therefore, it can be argued that the notion of progressive realisation implies several obligations. First, the states must take steps without delay in order to be in compliance with the 'obligation to move as expeditiously and effectively as possible towards'²⁷¹ the realisation of the rights. Secondly, the notion of progressive realisation also means that states are obliged to improve socio-economic conditions continuously.²⁷² Finally, as the progression has to be continuous, it would be very difficult for a government to justify any deliberately retrogressive measures.²⁷³ Therefore, a deliberately retrogressive measure that cannot be justified would be seen as a violation of the Covenant. On this subject, the Committee has stated:

[A] general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.²⁷⁴

²⁶⁹ CESCR General Comment 3 op cit (n265) para 9.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Sepúlveda op cot 8n264) 319.

²⁷³ CESCR General Comment 3 op cit (n265) para 9.

²⁷⁴ Committee on Economic, Social and Cultural Rights *The right to adequate housing (Art. 11 (1) of the Covenant)* (1992) E/1992/23 CESCR General Comment 4 para 11.

Langford and King found some inconvenient with the Committee's interpretation of the obligation to take steps for the progressive realisation of social rights. They argued that the idea that certain obligations are of immediate effect created 'a dichotomy between so-called progressive and immediate obligations, which may have the unintended effect of watering down the strength of the Covenant obligations'.²⁷⁵ Indeed, classifying obligations in such a way might lead to a misconception of states' responsibilities. States might understand that they do not need to take any immediate action for the realisation of an obligation that would have been categorised as progressive.²⁷⁶

To resolve the risk of an interpretative misunderstanding, one can argue that each right entails both immediate and progressive obligation – this becomes maybe clearer when one think about the typology of the obligations to respect, protect and fulfil human rights. The immediate obligation is to act now in order to achieve a full realisation of the rights in a certain period of time. This is valid for all the rights enshrined in the Covenant. Therefore, states cannot justify a total inaction on the pretext that ESR are subjected to their progressive realisation. According to the Committee's views, states have to adopt legislations as well as plans of action and policies for the implementation of the rights, and this must be done as soon as possible.²⁷⁷

Another conceptual difficulty of the notion of progressive realisation is stressed by Chapman, who explained that, because the Committee has not been able to define what the 'obligation to move as expeditiously and effectively as possible towards'²⁷⁸ the full realisation of the rights really means, 'it lacks concrete standards for evaluating the performance of governments and their compliance with the Covenant'.²⁷⁹ She concluded that it is therefore not surprising that the CESCR 'does not use progressive realization as the standard by which it reviews the performance of states parties'.²⁸⁰

²⁷⁵ Langford and King op cit (n142) 487.

²⁷⁶ Ibid.

²⁷⁷ Langford and King op cit (n142) at 487-489.

²⁷⁸ CESCR General Comment 3 op cit (n265) para 9.

²⁷⁹ A R Chapman 'A "violations approach" for monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) 18 *Human Rights Quarterly* 32.

²⁸⁰ Ibid.

ii. ‘by all appropriate means, including particularly the adoption of legislative measures’

Article 2(1) says that the progressive realisation of the rights can be achieved by ‘all appropriate means, including particularly the adoption of legislative measures’.²⁸¹ In other words, states enjoy a margin of discretion in deciding which steps they are taking, as long as those steps are appropriate.

The Committee recognised that usually legislative measures would be ‘highly desirable’ and in some cases, even indispensable.²⁸² It suggested that:

Such legislation might include: (a) targets or goals to be attained and the time frame for their achievement; (b) the means by which the purpose could be achieved; (c) the intended collaboration with civil society, the private sector and international organizations; (d) institutional responsibility for the process; (e) national mechanisms for its monitoring; and (f) remedies and recourse procedures.²⁸³

However, the CESCR also stressed that the adoption of legislations was ‘by no means exhaustive of the obligations of States parties’.²⁸⁴ Depending on the case, ‘judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable’,²⁸⁵ as well as ‘administrative, financial, educational and social measures’,²⁸⁶ would also be considered appropriate measures. Furthermore, the Committee has stressed many times the importance to develop concrete national strategies and policies for the implementation of the rights protected by the Covenant.

Although states have a margin of appreciation in choosing appropriate measures, the Committee has stressed that it can make ‘the ultimate determination as to whether all appropriate measures have been taken’.²⁸⁷ The question is therefore: how the CESCR will assess the appropriateness of the means taken by states? In its third general comment, it only gave some broad guidelines concerning that issue. It said that the ‘steps should be deliberate, concrete and targeted as clearly as possible towards

²⁸¹ ICESCR op cit (n78) art 2 (1).

²⁸² CESCR General Comment 3 op cit (n265) para 3.

²⁸³ Committee on Economic, Social and Cultural Rights The Right to Social Security (Art. 9) (2008) E/C.12/GC/19 CESCR General Comment 19 para 72.

²⁸⁴ CESCR General Comment 3 op cit (n265) para 4.

²⁸⁵ CESCR General Comment 3 op cit (n265) para 5.

²⁸⁶ CESCR General Comment 3 op cit (n265) para 7.

²⁸⁷ CESCR General Comment 3 op cit (n265) para 4.

meeting the obligations recognized in the Covenant'.²⁸⁸ It further developed a list of criteria for coherent policies in its subsequent general comments, putting the emphasis on the 'obligation to adopt a national strategy or plan of action to realize' ESR.²⁸⁹ It started in its first general comment on a specific right that was dedicated to the right to adequate housing where it attempted to give guidelines for a coherent national housing strategy.²⁹⁰ However, it did not provide clear criteria for the assessment of such a plan of action.

After few years of experience gained through the review of states reports, the Committee has been able to elaborate a clearer list of standards for the evaluation of national strategies. It appears in its subsequent general comments on substantive rights such as, for example, the right to food and the right to health.²⁹¹ It has found its latest expression in its last general comment on a specific right, namely general comment 19 on the right to social security issued in 2008. While recognising that states enjoy a margin of discretion in choosing their own approach for the implementation of ESR,²⁹² the Committee established a number of criteria that have to be fulfilled in the development of any national legislation, strategies and policies. The Committee stated that:

The strategy and action plan should be reasonably conceived in the circumstances; take into account the equal rights of men and women and the rights of the most disadvantaged and marginalized groups; be based upon human rights law and principles; cover all aspects of the right ... ; set targets or goals to be achieved and the time-frame for their achievement, together with corresponding benchmarks and indicators, against which they should be continuously monitored; and contain mechanisms for obtaining financial and human resources.²⁹³

Moreover, the Committee added that 'the principles of non-discrimination, gender equality and people's participation'²⁹⁴ as well as 'accountability', 'transparency', the 'independence of the judiciary and good governance'²⁹⁵ have to be respected in the

²⁸⁸ CESCR General Comment 3 op cit (n265) para 2.

²⁸⁹ CESCR General Comment 19 op cit (n283) para 68.

²⁹⁰ CESCR General Comment 4 op cit (274) para 12.

²⁹¹ Committee on Economic, Social and Cultural Rights *The Right to Adequate Food (Art. 11)* (1999) E/C.12/1999/5 CESCR General Comment 12 para 21-28; Committee on Economic, Social and Cultural Rights *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2000) E/C.12/2000/4 CESCR General Comment 14 para 53-56.

²⁹² CESCR General Comment 19 op cit (n283) para 66.

²⁹³ CESCR General Comment 19 op cit (n283) para 68.

²⁹⁴ CESCR General Comment 19 op cit (n283) para 69.

²⁹⁵ CESCR General Comment 19 op cit (283) para 70.

implementation of a national strategy.

This approach is very similar to the one presented by the Committee in a statement issued during the drafting process of the Optional Protocol. The purpose of the statement – which is not legally binding – is ‘to clarify how [the CESCR] might consider States parties obligations under article 2, paragraph 1, in the context of an individual communications procedure’.²⁹⁶ In this document, the Committee explained that in considering complaints brought before it, it would assess whether the measures taken by the state are ‘adequate’ or ‘reasonable’.²⁹⁷ It stated that in doing so, it would consider the following elements:

- (a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of [ESCR];
- (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 was in accordance with international human rights standards;
- (d) Where several policy options are available, whether the State party adopted 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.²⁹⁸

In addition, the statement stressed that:

At all times the Committee bears in mind its own role as an international treaty body and the role of the State in formulating or adopting, funding and implementing laws and policies concerning [ESCR]. To this end, and in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances.²⁹⁹

Hence, through its various general comments and its 2007 statement, the Committee declared that it would use a reasonableness standard in the review of the communications sent under the OP-ICESCR procedure. In addition, it committed itself to respect states margin of appreciation in policy decisions. This is also the

²⁹⁶ Committee on Economic, Social and Cultural Rights An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant – Statement (2007) E/C.12/2007/1 para 2.

²⁹⁷ CESCR Statement E/C.12/2007/1 op cit (n296) para 8.

²⁹⁸ Ibid.

²⁹⁹ CESCR Statement E/C.12/2007/1 op cit (n296) para 11.

approach that has been established in the Optional Protocol. Article 8(4) states that '[w]hen examining communications ... , the Committee shall consider the reasonableness of the steps taken by the State' and '[i]n 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'.³⁰⁰ The Committee's interpretation of article 8(4) will play a role of major importance for the whole mechanism set out by the Protocol. As Porter pointed out, '[w]hether 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'.³⁰¹

Although the CESCR attempted to give some criteria for the assessment of the reasonableness of the steps taken, its understanding of the concept still needs to be clarified. The real question is how the Committee will use this standard of review in practice. It will have to develop its own approach and this will certainly be done in the first cases presented before it. The CESCR will most probably use the principles enunciated in its general comments as well as in its 2007 statement. It might also find it useful to look at the South African Constitutional Court's model of reasonableness review. Langford and King suggested that the obligation to take steps as interpreted by the Committee could be compared to the reasonableness standard developed by the South African Constitutional Court in socio-economic cases.³⁰² However, in the two authors' view, the Committee's approach still lacked coherency in comparison with the one developed by the Court.³⁰³ Similarly, Sepúlveda showed that the CESCR assessed the reasonableness of the measures taken by governments in its evaluation of states reports. She argued that the Committee needed to clarify this standard of review and suggested that, in doing so, it could look at some relevant domestic jurisprudence, like for example the South African one.³⁰⁴

³⁰⁰ OP-ICESCR op cit (n1) art 8 (4).

³⁰¹ Porter op cit (n238) 40.

³⁰² Langford and King op cit (142) 487.

³⁰³ Langford and King op cit (142) 500.

³⁰⁴ Sepúlveda op cit (n264) 337.

iii. ‘to the maximum of its available resources’³⁰⁵

The wording ‘to the maximum of its available resources’ must be understood both as an obligation and as a limitation. The obligation lies in the fact that the government is obliged to use the maximum of its available resources for the progressive realisation of the rights enshrined in the Covenant. The limitation is implied by the fact that, in order to achieve this obligation, states cannot go beyond the resources at their disposal. However, this does not mean that insufficient or limited resources would justify non-action by the states.³⁰⁶ As shown earlier, some steps have to be taken immediately, regardless of states’ economic situation.³⁰⁷ Therefore, the Committee has emphasised:

[T]hat even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.³⁰⁸

The CESCR went further by stating that at any time, no matter the economic circumstances, ‘the vulnerable members of society ... must be protected by the adoption of relatively low-cost targeted programmes.’³⁰⁹ This obligation also applies in times of crisis.³¹⁰ In addition, it is also often acknowledged that all the rights in the Covenant have certain dimensions that do not necessitate financial resources to be respected.³¹¹ The best example might be the case of the right to adequate housing, which comprises the right to be protected from forced evictions. As the Committee pointed out, ‘the availability of resources will rarely be relevant,’ to justify forced evictions.³¹²

Therefore, it can be put forward that states’ discretion in allocating resources is

³⁰⁵ In the Committee’s understanding, the resources available ‘refer to both the resources existing within a State and those available from the international community through international cooperation and assistance’. See General Comment 3 op cit (n265) para 13.

³⁰⁶ CESCR Statement E/C.12/2007/1 op cit (n296) para 4.

³⁰⁷ Sepúlveda op cit (n264) 313.

³⁰⁸ CESCR General Comment 3 op cit (n265) para 11.

³⁰⁹ CESCR General Comment 3 op cit (n265) para 12.

³¹⁰ Sepúlveda op cit (n264) 314.

³¹¹ Craven op cit (n89)109.

³¹² Committee on Economic, Social and Cultural Rights *The right to adequate housing (art. 11.1 of the Covenant): forced evictions* (1997) E/1998/22, annex IV General Comment 7 para 8.

limited. As it has been expressed in the Limburg Principles, '[i]n the use of available resources due priority shall be given to the realization of rights recognized in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services.'³¹³

Indeed, in the consideration of the states reports, the Committee has sometimes indicated that the implementation of social plans should be given priority in the context of allocating limited resources.³¹⁴ Thus, the manner in which governments allocate and use resources must be done in compliance with their obligations towards the rights enshrined in the Covenant. Sepúlveda explained that this must be done in an effective and efficient way, and – as the Committee has stated – this should prevent 'corruption that negatively affects the implementation of the rights'.³¹⁵

However, in the context of the Optional Protocol, the CESCR might experience some problems in measuring whether states comply with the obligation to allocate the maximum of their available resources, as this task 'requires both highly technical information and expertise'.³¹⁶ In reviewing states reports, the Committee has developed a number of indicators that could be useful in the context of reviewing communications. But this implies that relevant information is provided to the Committee.³¹⁷

c. The obligation to fulfil

The Committee's reading of article 2(1) 'unquestionably imposes binding and enforceable obligations on states parties'.³¹⁸ This is also shown through the Committee's explanation of the tripartite typology of states duties imposed by the Covenant.³¹⁹ For the first time in general comment 12 on the right to adequate food, the CESCR declared explicitly that all the rights impose 'three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfil*. In

³¹³ The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights (reprinted in 1987) 9 *Human Rights Quarterly* para 28.

³¹⁴ Sepúlveda op cit (n264) 334.

³¹⁵ Sepúlveda op cit (n264) 315.

³¹⁶ Sepúlveda op cit (n264) 316.

³¹⁷ Sepúlveda op cit (n264) 316-319.

³¹⁸ Dennis and Stewart op cit (n12) 491.

³¹⁹ The tripartite typology of the obligations to respect, protect and fulfil has been proposed by A. Eide in 1987. See Sepúlveda op cit (n264) at 161-162.

turn, the obligation to *fulfil* incorporates both an obligation to *facilitate* and an obligation to *provide*.³²⁰ The interpretation of those obligations has to be taken into account when one thinks about the adjudication of the complaints under the OP-ICESCR. According to the Committee, the obligation to respect ‘requires States parties not to take any measures that result in preventing’ access to the enjoyment of the rights.³²¹ The obligation to protect ‘requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to’ the enjoyment of the rights.³²² But most of all, it is the interpretation of the obligation to fulfil that might have the greater implication. As Dennis and Stewart have pointed out, the obligation to fulfil ‘is by far the most onerous and the most questionable in the light of the Covenant’s negotiating history’.³²³ In the Committee’s words, the obligation to fulfil entails an obligation to facilitate, meaning that ‘the State must pro-actively engage in activities intended to strengthen people’s access to’ the enjoyment of the rights. As already mentioned, the obligation to fulfil also implies an obligation to provide. Regarding the right to adequate food, the Committee declared that:

[W]henever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly. This obligation also applies for persons who are victims of natural or other disasters.³²⁴

The Committee reiterated this statement in the next general comments on substantive rights. Therefore, in the Committee’s understanding of the obligation to fulfil ESR, ‘as a general rule, States parties are obliged to’ provide food, education, health, water and social security to individuals or groups who would be ‘unable, for reasons beyond their control, to realize the right themselves by the means at their disposal’.³²⁵ According to Dennis and Stewart, this is a feature of the Committee’s transformative reading of the ICESCR. They argued that ‘[t]hus conceived, the Covenant’s obligations are neither aspirational nor discretionary, but have become unmistakably mandatory and subject to immediate enforcement in whole or in

³²⁰ CESCR General Comment 12 op cit (n291) para 15.

³²¹ Ibid; Sepúlveda op cit (264) 197.

³²² CESCR General Comment 12 op cit (n291) para 15.

³²³ Dennis and Stewart op cit (n12) 491.

³²⁴ CESCR General Comment 12 op cit (n291) para 15.

³²⁵ Ibid; Committee on Economic, Social and Cultural Rights *The Right to Education (Art. 13)* (1999) E/C.12/1999/10 CESCR General Comment 13 para 47; CESCR General Comment 14 op cit (n291) para 37; Committee on Economic, Social and Cultural Rights *The Right to Water (Art. 11-12)* (2002) E/C.12/2002/11 CESCR General Comment 15 para 25; CESCR General Comment 19 op cit (n283) para 50.

substantial part.³²⁶ This might become a problem if the Committee relies on its own interpretation the obligation to fulfil – and particularly the obligation to provide – in reviewing complaints under the Optional Protocol.

The obligation to provide is very close to another contentious interpretation of the Covenant made by the CESCR: the minimum obligations.

d. Minimum core and minimum obligations

First of all, I shall start with a brief explanation of what the notion of minimum core means, although the literature did not provide for a common definition. Russell presented a dominant view when he defined the minimum core of a right as ‘the essential element or elements without which a right loses its substantive significance as a human right and in the absence of which a State party should be considered to be in violation of its international obligations.’³²⁷ He added that the concept has also been depicted as a ““floor” below which conditions should not be permitted to fall’.³²⁸ In an attempt to give a less abstract definition, Bilchitz pled for the adoption of ‘an approach that gives content’ to the rights in placing the ‘interests of the individuals at the centre’.³²⁹ He argued that such an approach would recognise ‘that [ESR] protect interests of differing degrees of urgency for individuals’.³³⁰ This very short presentation of some of the interpretations of the minimum core concept is useful at this stage, as the following analysis will show that the Committee did not develop a clear definition.

The Committee’s use of the minimum core approach raises several questions that cannot be ignored if it has to develop a workable standard of review for the implementation of the Optional Protocol.

³²⁶ Dennis and Stewart *op cit* (n12) 491.

³²⁷ S Russell ‘Minimum state obligation: international dimensions’ in D Brand and S Russell (ed) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 15.

³²⁸ *Ibid.*

³²⁹ D Bilchitz ‘Placing basic needs at the centre of socio-economic rights jurisprudence’ (2003) 4 *ESR Review* 3.

³³⁰ *Ibid.*

In its third general comment, in addition to the obligations already discussed, the Committee identified the separate obligation to ensure the minimum core of the rights enshrined in the Covenant.³³¹ It explained:

[T]hat a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.³³²

At that time – as it is actually still the case – the concept of minimum core did not have a clear definition and the Committee’s formulation did not really provide a better explanation. General comment 3 only stated that ESR had minimum essential levels that amounted to individuals’ basic needs and that states which would fail to ensure this minimum would be in breach of their obligations under the Covenant. In addition, scarce resources would only justify the non-compliance with those obligations if the state can show that everything as been made to use the resources at its disposal for the realisation of its minimum obligations. It is also stressed that those efforts must have been given priority. Therefore, the CESCR acknowledged that in some situations, the failure to guarantee the essential level of a right could be justified.

The Committee only started to develop the elements of the minimum core concept and the extent of states minimum obligations nine years after general comment 3,³³³ in its general comment 12 on the right to food.³³⁴ From that stage, it included the

³³¹ CESCR General Comment 3 op cit (n265) para 10.

³³² Ibid.

³³³ General comment 4 dedicated to the right to adequate housing does not use the concepts of minimum core or minimum obligation. However, when it discusses the concept of adequacy, it identifies ‘certain aspects of the right that must be taken into account ... in any particular context’. Those are the following: ‘(a) Legal security of tenure; (b) Availability of services, materials, facilities and infrastructure; (c) Affordability; (d) Habitability; (e) Accessibility; (f) Location; (g) Cultural adequacy’. Some elements of the minimum core of the right to adequate housing could therefore be deducted from this analysis.

³³⁴ CESCR General Comment 12 op cit (n291) para 17.

notion in all its subsequent general comments on substantive rights.³³⁵ Its analysis evolved over the years and took different approaches.³³⁶

In general comment 12, the Committee explained that ‘the core content of the right to adequate food implies’ that it is available and accessible.³³⁷ While the CESCR recalls the principal state obligation towards any ESR, namely ‘to take steps to achieve *progressively* the full realization of the right’, it further declares that ‘[e]very State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger’.³³⁸ This statement creates a new obligation, which is that states have to ensure everyone’s access to a sufficient level of food so as to avoid situation of hunger. Therefore, if the government cannot guarantee this access, it violates its obligation.

Following Young’s typology, the Committee’s formulation of the minimum core in general comment 12 could be categorized as an ‘essence approach’, giving priority to the “‘essential” minimum of each right’.³³⁹ In this sense, it adopted a ‘needs-based core’ analysis, seeing the notion of survival as a determinant.³⁴⁰ This approach failed to provide a determinate core to the right because no agreement had been reached on how the needs should be assessed³⁴¹ and on what should be included in the core content of each right. Furthermore, in focusing on survival, this approach fails to take into account other important aspects of ESR such as the value of human dignity.³⁴² The result of the exercise was therefore quite abstract.³⁴³ The problem with that approach is that it obliges states to ensure a minimum whereas this minimum is not defined.

³³⁵ CESCR General Comment 13 op cit (n325) para 57; CESCR General Comment 14 op cit (n291) para 43; CESCR General Comment 15 op cit (n325) para 37; CESCR General Comment 19 op cit (n) para 59-61.

³³⁶ K G Young ‘The minimum core of economic and social rights: a concept in search of content’ (2008) 33 *The Yale Journal of International Law* 140-164.

³³⁷ CESCR General Comment 12 op cit (n291) at para 8.

³³⁸ CESCR General Comment 12 op cit (n291) at para 14.

³³⁹ Young op cit (n336) 126.

³⁴⁰ Young op cit (n336) 128.

³⁴¹ Young op cit (n336) 174.

³⁴² Young op cit (n336) 130.

³⁴³ Sepúlveda op cit (n264) 368.

In an attempt to sidestep the difficulties that it would experience in defining the core elements of the rights, the CESCR chose another approach in its subsequent general comments. According to Young, the Committee used an obligation approach, which ‘investigates whether a minimum obligation ... can correlate to the minimum core’.³⁴⁴ This is illustrated in general comment 13 on the right to education where article 13 of the Covenant is literally taken up as it is.³⁴⁵ There is not much to say about general comment 13, apart maybe that the fact that all the obligations set forth in the article are labelled as minimum obligations is a little bit confusing.

In general comments 12 and 13, the minimum core obligations are not particularly detailed and are stated without any qualification,³⁴⁶ meaning that, as explained above, they are subjected to the availability of the resources limitation. However, in general comment 14 on the right to the highest attainable standard of health, the CESCR’s approach shifted in at least two ways.³⁴⁷

The first change is that the Committee drew up an extensive and non-exhaustive list of detailed elements – such as providing essential drugs – which are said to be part of the core obligations to the right to health.³⁴⁸ Here two problematic aspects of the Committee’s understanding of the minimum core concept as shown through its latest general comments must be noted: first, it is too ambitious;³⁴⁹ and second, it does not take into account the fact that countries have different levels of socio-economic development. While some countries are able to ensure all the aspects mentioned without encountering significant problems, others are simply too far from it.

The second change in the CESCR’s approach is its introduction of non-derogable obligations. It states that core obligations are non-derogable and therefore, resources constraints cannot justify the failure to comply with them.³⁵⁰ In the words of the Committee, ‘a State party cannot, under any circumstances whatsoever, justify

³⁴⁴ Young op cit (n336) at 140-164.

³⁴⁵ CESCR General Comment 13 op cit (n325) para 57.

³⁴⁶ Langford and King op cit (n142) 493.

³⁴⁷ CESCR General Comment 14 op cit (n291).

³⁴⁸ CESCR General Comment 14 op cit (n291) para 43-44.

³⁴⁹ P de Vos ‘The essential components of the human rights to adequate housing – a South African perspective’ in D Brand and S Russell (ed) *Exploring the core content of socio-economic rights: south african and international perspectives* (2002) 23-24.

³⁵⁰ CESCR General Comment 14 op cit (n291) para 47.

its non-compliance with the core obligations ... which are non-derogable'.³⁵¹ This new approach has been criticised by authors like Dennis and Stewart, who accused the Committee of revisionism.³⁵² Indeed, one can question the authority of its experts to read the Covenant in such a way as to declare that there are certain obligations, which are non-derogable 'under any circumstances whatsoever'. Although it is understandable in the perspective of setting norms for the improvement of ESR, it might become a problem in the context of a complaint mechanism. Indeed, if in reviewing a communication, the Committee finds that a government – although facing resources scarcity – has violated the non-derogable obligation of, for example, providing essential drugs, what might be the reaction of the concerned state? It might simply deny by arguing that such an obligation does not exist in the Covenant.

In its latest general comment on a substantive right, the Committee took a backward step concerning the issue of non-derogable obligations. In general comment 19 on the right to social security, there is no mention of non-derogability and the initial approach established in general comment 3 is taken up. The Committee reaffirmed that:

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations.³⁵³

Until now, the minimum core and the minimum obligation have been quite present in the CESCR's work. However, its approach has not been very convincing. First, it was too abstract, as the concept did not find a clear content. Then, the Committee did not manage to adopt one clear and consistent way of introducing its view in its different general comments. Finally, although the recognition of a minimum core obligation to ESR would certainly have positive effects – for example it might help identifying situations that should be addressed in priority –, using it as a standard in the adjudication of complaints might be very problematic.

Looking at the literature on the subject, it seems that the debate on the definition and the content of a minimum core for ESR will not find an issue in a foreseeable future.

³⁵¹ Ibid.

³⁵² Dennis and Stewart op cit (n12) at 491-493.

³⁵³ CESCR General Comment 19 op cit (n283) 60.

However, the question is: does the ICESCR really provide for such an obligation? Dennis and Stewart contended that in interpreting the Covenant as including the minimum core obligation, the Committee adopted a 'transformatory' reading of article 2(1).³⁵⁴ Then, one can ask oneself how it reached the conclusion that such an obligation actually existed. Two reasons can be identified: the Committee suggested that first, its experience in the review of the country reports regarding states obligations under the Covenant called for it; and second, that if the Covenant was to be read without establishing such an obligation, it would lose its 'raison d'être'.³⁵⁵ Bilchitz argued that those two reasons were not satisfying and engendered 'uncertainty as to the purpose of recognizing a minimum core obligation'.³⁵⁶ Indeed, quite surprisingly, the Committee did not base its justification for the recognition of the minimum core on arguments related to people's needs and interests. Even if those concerns were certainly in the backdrop of its analysis, the fact that it did not express them did not help for a clear understanding of what the minimum core approach implied.

It is not clear yet what view the CESCR will adopt once confronted with the review of complaints from individuals and groups. But given the positions of the states during the discussions leading to the adoption of the Optional Protocol, it appears that the Committee might have to review some of its previous statements on states minimum obligations.

³⁵⁴ Dennis and Stewart op cit (n12) 492.

³⁵⁵ D Bilchitz *Poverty and fundamental rights: the justification and enforcement of socio-economic rights* (2007) 185.

³⁵⁶ Ibid.

6) The South African Constitutional Court's jurisprudence on the obligations of the state towards ESR as a source of legal interpretation for the UN Committee on Economic, Social and Cultural Rights

a. Introduction

The previous chapter has identified the reasons explaining why the CESCR's interpretation of states obligations as developed in its general comments might not be an appropriate approach in reviewing individual complaints under the OP-ICESCR. If they are to be effective, the Committee's recommendations to the states will have to take account of the justiciability concerns outlined in part II.

The South African Constitution distances itself from most other national constitutions as it recognises ESR as justiciable. This characteristic put the South African judgements on ESR under the spotlight. Be it praised or criticised, the South African jurisprudence on ESR is almost always taken as an example to show how those rights can be adjudicate in practice.

In the present chapter, I look at the reasonableness test, which is the standard of review developed by the South African Constitutional Court in its ESR judgements. I will show how it has been applied in cases dealing with the duty to fulfil ESR³⁵⁷. Although the Court is still young – only 15 years old –, the Committee might find its experience helpful and even take it as a legal inspiration in its new task of reviewing individual complaints. It could therefore assist clarifying the CESCR's own reasonableness standards outlined in its latest general comments and in its 2007 statement.³⁵⁸ I will then expose the reasons given by the Court for the rejection of the minimum core obligation to show that the Committee might have to change its approach on this issue in the context of the Optional Protocol. I will conclude by stressing how, in adopting a flexible approach, the Court managed to deal with the justiciability concerns towards the adjudication of ESR. But first, I will make few remarks on ESR in the South African Bill of Rights and on the idea of transformative constitutionalism.

³⁵⁷ D Brand 'Socio-economic rights and the courts in South Africa: justiciability on a sliding scale' in Fons Coomans (ed) *Justiciability of Economic and social rights: experiences from domestic systems* (2006) 219.

³⁵⁸ CESCR General Comment 19 op cit (n283) para 68; CESCR Statement E/C.12/2007/1 op cit (n296).

b. Socio-economic rights in a transformative Constitution

ESR have been integrated in the South African Bill of Rights after a long constitutional negotiating process that culminated with the Constitutional Court acting as an ‘independent arbiter’ in *Certification of the Constitution of the Republic of South Africa (Certification case)*.³⁵⁹ In this judgement, the Court dismissed arguments supporting the non-justiciability of ESR. Rejecting that the inclusion of ESR in the Bill of Rights would result ‘in a breach of the separation of powers’,³⁶⁰ the judges stated that ESR ‘are, at least to some extent, justiciable’ and that ‘[t]he fact that ESR will almost inevitably give rise to [budgetary] implications does not seem ... to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion’.³⁶¹

In overruling the objections raised in *Certification*, the Court closed the debate on whether South Africans should benefit from enforceable ESR. However, many important questions remained. In particular, how those rights would be adjudicated and enforced. The Court gave some answers in its first socio-economic cases, as I will show below.

Before turning to that point, I will briefly comment on the concept of ‘transformative constitutionalism’, which has been used to describe the nature of the South African Constitution.³⁶² This term means that the document has been drafted in the perspective of social change.³⁶³ ‘Unlike many classic liberal constitutions, its primary concern is not to restrain State power, but to facilitate a fundamental change in the legacy of injustice produced by over three centuries of colonial and apartheid rule.’³⁶⁴ According to Klare, the notion ‘connotes an enterprise of inducing large-scale social change through nonviolent political process grounded in law’.³⁶⁵

The political aspect of the idea of transformative constitutionalism needs to be emphasised for its pertinence in helping to understand the Court’s mindset

³⁵⁹ *Certification* supra (n28) para 13.

³⁶⁰ *Certification* supra (n28) para 77.

³⁶¹ *Certification* supra (n28) para 78.

³⁶² K E Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146-188; Puis Langa ‘Transformative constitutionalism’ (2006) 17(3) *Stellenbosch Law Review* at 351-360.

³⁶³ Langa op cit (n362) 352.

³⁶⁴ S Liebenberg ‘Protecting Economic, Social and Cultural Rights under Bills of Rights: The South African Experience’ (2007) 16 (3) *Human Rights Defender* 2.

³⁶⁵ Klare op cit (n362) 150.

regarding ESR. As Justice Langa has stated, social change implies a ‘transformation of the legal culture’ and ‘an acceptance of the politics of law’.³⁶⁶ He also declared that ‘[t]here is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked’.³⁶⁷

The South African Constitution can thus be seen as a legal tool used by judges to review political choices, when it is appropriated. Moreover, the courts have the duty and the privilege to elaborate a ‘transformative jurisprudence’³⁶⁸. It means that they can influence social change through their decisions.

c. Reasonableness test

The duty to fulfil implies that the state takes measures to realise ESR progressively. But this is not the whole story. The measures have to be adequate.³⁶⁹ Therefore, the key question asked by the reasonableness review is whether the steps taken by the state are reasonably capable of realising ESR progressively.³⁷⁰ This is a test has been elaborated to assess policies or legislative decisions against ESR.³⁷¹ In the space of less than two years, it has become South African Constitutional Court’s favourite model of review for the adjudication of ESR cases. The Court specified that it ‘must be determined on the facts of each case’.³⁷² It has been established in *Grootboom*³⁷³ – dealing with ‘the right to have access to adequate housing’ enshrined in section 26 of the Constitution³⁷⁴ – and has been taken up and developed in the following ESR

³⁶⁶ Langa op cit (n362) 353.

³⁶⁷ Ibid.

³⁶⁸ W Forbath The ‘transformative’ constitution and the politics of social rights in South Africa (2008) 4.

³⁶⁹ Brand op cit (n357) 220.

³⁷⁰ S Liebenberg ‘South Africa: Adjudicating Social Rights Under a Transformative Constitution’ in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2008) 83; Liebenberg op cit (n364) 3.

³⁷¹ Brand op cit (n357) 220.

³⁷² *Grootboom* supra (n241) para 92.

³⁷³ *Grootboom* supra (n241).

³⁷⁴ Section 26 of the South African Constitution reads:

- ‘(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.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.’

landmark cases such as *Minister of Health v. Treatment Action Campaign (TAC)*³⁷⁵ and *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development (Khosa)*³⁷⁶ – dealing with the ‘the right to have access to health care services’ and ‘the right to have access to social security’ respectively, both enshrined in section 27 of the Constitution.³⁷⁷

In *Grootboom*, after having exposed how ‘the right to have access to adequate housing’,³⁷⁸ as stated in subsection 26(1), should be understood and addressed in the South African context,³⁷⁹ the judge came to the analysis of subsection 26(2), which ‘speaks to the positive obligation imposed upon the state’.³⁸⁰ It understood this obligation as requiring ‘the state to devise a comprehensive and workable plan to meet its obligations’. But it added that ‘subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one’ as it is defined by ‘three key elements’.³⁸¹ Those elements are precisely what form the internal limitation clause. Given that the obligation of the state is one to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of the right,³⁸² the reasonableness standard review must therefore encompass those elements.³⁸³

i. Reasonable legislative and other measures

In *Grootboom*, The Court considered the element of ‘reasonable legislative and other

³⁷⁵ *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR (CC).

³⁷⁶ *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC).

³⁷⁷ Section 27 of the South African Constitution provides:

- ‘(1) Everyone has the right to have access to-
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.’

³⁷⁸ Constitution of the Republic of South Africa, 1996, section 26(1).

³⁷⁹ *Grootboom* supra (n241) para 34-37.

³⁸⁰ *Grootboom* supra (n241) para 38.

³⁸¹ *Ibid.*

³⁸² *Ibid.*

³⁸³ Christiansen op cit (n5) at 321-376.

measures’ and stated that ‘[a] reasonable programme ... must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available’.³⁸⁴ Such a programme must be coordinated, comprehensive, coherent and ‘directed towards the progressive realisation of the right of access to adequate housing within the state’s available means’.³⁸⁵ The Court went on by giving some indications on how the measures should be evaluated, taking into account the doctrine of the separation of powers.

The judgement reads:

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the question will be whether the legislative and other measures taken by the state are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.³⁸⁶

In this passage, the Court set out the basis of the reasonableness review: the state enjoys a broad margin of discretion in its policy choices, as long as the measures chosen are reasonable.³⁸⁷ But legislative measures alone are not sufficient. They must be ‘supported by appropriate, well-directed policies and programmes ... reasonable both in their conception and their implementation’.³⁸⁸ The Court continued explaining that:

In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.³⁸⁹

³⁸⁴ *Grootboom* supra (n241) para 39.

³⁸⁵ *Liebenberg* op cit (n364) 3; *Grootboom* supra (n241) para 40-41.

³⁸⁶ *Grootboom* supra (n241) para 41.

³⁸⁷ S Liebenberg ‘Beyond civil and political rights: protecting social, economic and cultural rights under bills of rights – the South African experience’ (2007) *Protecting Human Rights – Centre for Comparative Constitutional Studies* 8.

³⁸⁸ *Grootboom* supra (n241) para 42.

³⁸⁹ *Grootboom* supra (n241) para 43.

The Court concluded its analysis of the reasonableness of the measures by adding that such an evaluation had to ‘be understood in the context of the Bill of Rights as a whole’.³⁹⁰ Relying on the South African constitutional founding values of human dignity, freedom and equality, the Court declared:

Those whose needs are the most urgent ... must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.³⁹¹

As Liebenberg noted, the condition that ‘a reasonable government programme must cater for those in urgent need’ is ‘[t]he element of the reasonableness test that comes closest to a threshold requirement’,³⁹² meaning that it could be a decisive factor.

Wesson went even further by arguing that *Grootboom* can only be understood fully through this element. The ratio of the judgement he stated, is that governmental programmes ‘should not exclude a “significant sector of society” ... [that] cannot be expected to meet [its] socio-economic needs independently, on the basis of [its] own resources’.³⁹³ This would be what led the Court to the ‘finding that those whose needs are most basic should not be excluded – in the sense of not being specifically, or adequately, catered for – from the state’s housing program’.³⁹⁴

Therefore, in *Grootboom*, on the basis of this element, the Court held that – although rational and comprehensive in many respect – the housing ‘programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need’.³⁹⁵

The justification for this requirement is to be found in the interpretation of the value of human dignity.³⁹⁶ In *Grootboom*, the Court pointed out that section 26 was not the

³⁹⁰ *Grootboom* supra (n241) para 44.

³⁹¹ *Ibid.*

³⁹² Liebenberg op cit (n387) 10.

³⁹³ M Wesson ‘Grootboom and beyond: reassessing the socio-economic rights jurisprudence of the South African Constitutional Court’ (2004) 20 *South African Journal of Human Rights* 293.

³⁹⁴ *Ibid.*

³⁹⁵ *Grootboom* supra (n241) para 69.

³⁹⁶ Liebenberg op cit (n387) 11.

only relevant provision that had to be taken into account in the reasonableness test.³⁹⁷ It explained that it was ‘fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings’ and added that this was the backdrop against which state’s conduct towards the Grootboom community should be seen.³⁹⁸ Thus, through this judgement, the Court affirmed the significance of the value of human dignity in any assessment of the reasonableness of state’s actions.³⁹⁹

Those few passages of *Grootboom* established the foundations of the reasonableness review. The Constitutional Court took up this analysis in *TAC*, where it added the requirement of transparency. It stated that ‘a concerted, co-ordinated and co-operative national’ health plan to face HIV/AIDS challenges ‘can be achieved only if there is proper communication, especially by government’ and that for such a programme ‘to meet the constitutional requirement of reasonableness, its contents must be made known appropriately.’⁴⁰⁰

An additional element of the reasonableness test can be found in *Khosa*, where the Court declared that the ‘denial of access to social grants to permanent residents’ amounted to unfair discrimination and therefore did ‘not constitute a reasonable legislative measure’.⁴⁰¹ Unfair discrimination can thus be considered as a factor that has to be included in the reasonableness test.⁴⁰²

To summarise, the criteria established by the South African Constitutional Court to evaluate the reasonableness of the measures taken by the government towards ESR can be outlined as follows:

- ‘The programme must be comprehensive, coherent, coordinated’;
- ‘Appropriate financial and human resources must be made available’;
- ‘It must be balanced and flexible and make appropriate provision for short, medium and long-term needs’ and ‘must respond to the extreme levels of

³⁹⁷ *Grootboom* supra (n241) para 83.

³⁹⁸ *Ibid.*

³⁹⁹ Porter op cit (n238) 51.

⁴⁰⁰ *TAC* supra (n375) para 123.

⁴⁰¹ *Khosa* supra (n376) para 82.

⁴⁰² J Dugard and T Roux ‘The record of the South African Constitutional Court in providing an institutional voice for the poor: 1995-2004’ in R Gargarella et al. (ed) *courts and social transformation in new democracies : an institutional voice for the poor?* (2006) 115.

- deprivation of people in desperate situations’;
- ‘It must be reasonably conceived and implemented’; and
- ‘It must be transparent, and its contents must be made known effectively to the public.’⁴⁰³
- The measures taken by the state must not amount to unfair discrimination.⁴⁰⁴

The Court drew most of its analysis of the reasonableness on the measures taken by the state. But the two other elements found in the internal limitation clause – namely the ‘progressive realisation’ of the right and the ‘availability of the resources’ – are also influencing the assessment.⁴⁰⁵ This is in line with the Court’s interpretation that the positive obligations of the state are both defined and limited by subsections 26(2) and 27(2).⁴⁰⁶ While those provisions require the state to take reasonable measures, they also make ‘it clear that the obligation imposed upon the state is not an absolute or unqualified one’.⁴⁰⁷ Therefore, while both the notions of ‘progressive realisation’ and ‘availability of the resources’ can justify a governmental failure to ensure access to ESR, ‘they can also support a finding of unreasonable acts or omissions by the State.’⁴⁰⁸

ii. Progressive realisation of the right

In *Soobramoney v Minister of Health (Kwazulu-Natal) (Soobramoney)*⁴⁰⁹ – the first case concerning a social right presented before it – the Court had already expressed its views on the progressive realisation of ESR when it stated that, through the wording of subsections 26(2) and 27(2), ‘the Constitution accepts that it cannot solve all of [South African] society’s woes overnight, but must go on trying to resolve these problems’.⁴¹⁰

In *Grootboom*, the Court attempted to give a more elaborated explanation. It explained that according to section 26, ‘what must be achieved’ by the government is the progressive realisation of the right of adequate housing, because an immediate

⁴⁰³ Liebenberg op cit (n387) 10; Brand op cit (n357) 222.

⁴⁰⁴ Dugard and Roux op cit (n402) 115.

⁴⁰⁵ Liebenberg op cit (n370) 84; Liebenberg op cit (n387) 11.

⁴⁰⁶ Liebenberg op cit (n370) 84.

⁴⁰⁷ *Grootboom* supra (n241) para 38.

⁴⁰⁸ Liebenberg supra (n387) 11.

⁴⁰⁹ (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696.

⁴¹⁰ *Soobramoney* supra (n409) para 43.

realisation is impossible.⁴¹¹ As the next passage shows, the Court considered that the constitutional goal regarding ESR is that everyone enjoys his or her basic needs, and consequently, this is what has to be progressively realised. The judgement reads:

The term “progressive realisation” shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.⁴¹²

It means that – taking the other factors into account – to be reasonable, the measures taken by the state would have to serve the progressive realisation of the right in question. Moreover, the Court endorsed the CESCR’s interpretation of the requirement of progressive realisation contained in general comment 3.⁴¹³

iii. Within available resources

The Court’s views on the question of resources availability in relation to the right to health care of a single individual as expressed in *Soobramoney* shows well that budgetary constraints imply governmental choices and prioritisation in the allocation of resources. The Court estimated that given the many socio-economic claims the state has to address with its limited resources, ‘[t]here will be times when this [will require] it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society’.⁴¹⁴

In *Grootboom*, the Court stressed the importance of the resources criteria in evaluating governmental actions regarding socio-economic issues because it could not be asked to the state to ‘do more than its available resources permit’.⁴¹⁵ It went on saying that ‘both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources’.⁴¹⁶ The judgment then quoted *Soobramoney*, where the Court stated that ‘[g]iven [the] lack of resources and the

⁴¹¹ *Grootboom* supra (n241) para 45.

⁴¹² *Ibid.*

⁴¹³ CESCR General Comment 3 op cit (n265) para 9.

⁴¹⁴ *Soobramoney* supra (n409) para 31.

⁴¹⁵ *Grootboom* supra (n241) para 46.

⁴¹⁶ *Grootboom* supra (n241) para 46.

significant demands on them ... , an unqualified obligation to meet [access to housing, health care, food, water, and social security] would not presently be capable of being fulfilled'.⁴¹⁷

In the Court's perspective, goals and means must be balanced. Therefore reasonable measures will have to be designed to reach the goal expeditiously and effectively while taking the availability of the resources into account.⁴¹⁸

The difficulty lying in the resources availability factor implies that the Court assesses whether the state has the necessary resources to enforce one right or another. In practice, the Court has had a tendency to avoid going deeply into budgetary issues. In general, the judges accepted the arguments given by the state for its choices in allocating resources, without really questioning them.⁴¹⁹ Two exceptions can however be found in *TAC* and *Khosa*, where the Court was forced to tackle the issue. In *TAC*, the Court rejected state's argument that it did not have sufficient resources to extend its programme to facilities other than the pilot sites on the grounds that first, it showed a lack of political will rather than a lack of resources and second, because the resources needed became actually available.⁴²⁰ In *Khosa*, after having considered all the elements put before it, the Court dismissed the argument of the state that it did not have sufficient financial means to provide social assistance grants to permanent residents by pointing out that 'even at the most pessimistic estimate of the additional cost occasional burden on the state would in relative terms be very small'.⁴²¹

The Court's general cautious approach towards budgetary issues is well summarised by the following passage from *TAC*:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate

⁴¹⁷ *Soobramoney* supra (n409) para 46.

⁴¹⁸ *Grootboom* supra (n241) para 46.

⁴¹⁹ Brand op cit (n357) 223.

⁴²⁰ Ibid; *TAC* supra (n375) para 118-120.

⁴²¹ Brand op cit (n357) 224.

constitutional balance.⁴²²

In other words, while the judiciary will not directly question governmental choices about resources allocation, its task of assessing the reasonableness of state's conduct might lead to decisions that would oblige the state to rearrange its budget.⁴²³

d. Rejection of the minimum core approach

As shown in the previous chapter, the minimum core concept is an important component of the CESCR's interpretation of states obligations towards ESR. Although such an approach is justified on the grounds that it gives content to ESR, it can become quite problematic when faced with justiciability concerns. The South African Constitutional Court has identified those limits from the outset of its ESR jurisprudence. This led the judges to reject the minimum core concept. The reasons for this rejection have been given in *Grootboom* and in *TAC*, where the amici curiae invoked the minimum core notion in their heads of arguments. This was done in an attempt to give substance to the rights of access to housing and access to health care respectively.

In *Grootboom*, the amici curiae⁴²⁴ suggested 'that the proper approach' to evaluate if the state was in breach of an obligation to provide shelter to people living in dire circumstances was 'to determine the content of the relevant rights in the Constitution'.⁴²⁵ They stated that 'the needs of vulnerable members of society, and social groups living in unfavourable conditions' must be prioritized according to the notion of minimum core and that '[t]here is an obligation to provide for the core of immediate absolutely basic human needs'.⁴²⁶

The arguments of the amici curiae⁴²⁷ in *TAC* were more developed. They stated that a proper reading of subsections 27(1) and (2) 'creates free-standing individual rights

⁴²² *TAC* supra (n375) para 38.

⁴²³ Brand op cit (n357) 224.

⁴²⁴ In *Grootboom*, the amici curiae were the Human Rights Commission of South Africa and the Community Law Centre.

⁴²⁵ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) Amicus Brief para 10.

⁴²⁶ *Grootboom* Amicus Brief supra (n425) para 28.

⁴²⁷ The Institute for Democracy in South Africa and the Community Law Centre were the first and the second amicus curiae in *TAC*.

on the one hand and imposes positive duties on the state towards fulfilment of those rights on the other'.⁴²⁸ Thus, sections 26 and 27 would contain two different state obligations: an obligation to give effect to the rights enshrined in subsections 26(1) and 27(1), and a limited obligation to realise those rights progressively, through reasonable measures and within available resources.⁴²⁹ Then, the amici curiae contended that 'all the [ESR] entrenched in ss 26(1) and 27(1), are in the first place directed at the achievement of the value of human dignity'.⁴³⁰ What follows – in the amici curiae's view – is that '[t]he individual constitutional right created by s 27(1)(a) and enforceable against the state under s 7(2), accordingly at least includes a right of access to a minimum core of health care services comprising the minimum necessary for dignified human existence.'⁴³¹

In both cases, the Court rejected those arguments on different grounds. First, it explained that it did not have sufficient information to determine the minimum core concept given the diversity of social needs.⁴³² In addition, it noted that it was difficult to determine 'whether the minimum core obligation should be defined generally or with regard to specific groups of people'.⁴³³ However, it acknowledged that there might be cases where it would 'be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable', provided that enough information is given to the Court.⁴³⁴

Here, the Court pointed out one of the problems raised in the previous chapter, namely the difficulty to define clearly the elements of a minimum core of a right. This is not a difficulty that only applies to the South African courts. The Court stated that, contrary to itself, the CESCR managed to gather enough information to develop the concept.⁴³⁵ I actually disagree with that statement as the reading of the Committee's general comments clearly shows some confusion towards the definition of the concept. In fact, the CESCR has not been able to build a comprehensible approach regarding the minimum core idea and that is one of the reasons why it

⁴²⁸ *Minister of Health v. Treatment Action Campaign* 2002 (10) BCLR (CC) Amicus Brief para 14.

⁴²⁹ *TAC* supra (375) para 29.

⁴³⁰ *TAC* Amicus Brief supra (428) para 40.

⁴³¹ *TAC* Amicus Brief supra (428) para 42.

⁴³² *Liebenberg* op cit (n370) 83; *Grootboom* supra (241) para 32-33.

⁴³³ *Grootboom* supra (241) para 33.

⁴³⁴ *Ibid.*

⁴³⁵ *Grootboom* supra (241) para 32.

should not be applied in the review of individual communications under the OP-ICESCR.

Secondly, in *TAC*, the Court did not agree with the amici curiae's reading of sections 26 and 27 because it would suggest 'that the content of the right in subsection (1) differs from the content of the obligation in subsection (2)'.⁴³⁶ It argued that the sections have to be read together and therefore do not create separate obligations.⁴³⁷

Recalling *Grootboom*'s conclusion, it stated that:

[T]he [ESR] of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1).⁴³⁸

I agree with the Court that subsections (1) and (2) should be read together and that they both speak about the same right. However, I do not think that this is an argument that could actually dismiss the notion of minimum core. I suggest that the Court's interpretation of the link between the two subsections allows for the adoption of the minimum core concept because nothing prevents the right in question to comprise some essential elements. The question is elsewhere, in particular: how those elements would be defined?

Thirdly, the Court considered that the immediacy imposed by minimum core obligations would create unrealistic duties on the government.⁴³⁹ It argued that given the fact that resources constraints prevent the state to do more than it can achieve, individuals are not entitled to claim for an immediate fulfilment of their rights.⁴⁴⁰ The Court made it clear: '[i]t is impossible to give everyone access even to a "core" service immediately. All that is possible, and all that can be expected of the state, is that it act[s] reasonably to provide access to the [ESR] on a progressive basis.'⁴⁴¹

Here the Court tackled another major problem raised by the minimum core idea. In the context of Optional Protocol, it would be very difficult to convince states to comply to minimum obligations if they have to be in effect immediately. It is not

⁴³⁶ *TAC Amicus Brief supra* (n428) para 42.

⁴³⁷ *TAC supra* (n375) para 29; Wesson *op cit* (n393) 302.

⁴³⁸ *TAC supra* (n375) para 34.

⁴³⁹ Liebenberg *op cit* (n370) 83.

⁴⁴⁰ *TAC supra* (n375) para 32.

⁴⁴¹ *TAC supra* (n375) para 35.

to contest the legitimacy such obligations would have in the reality. Here, I am discussing its real applicability and its acceptance by the states. If it is clear that a majority of countries would not be able to comply with such immediate obligations, the Committee might not want to include them as standards for the review of the communications under the OP-ICESCR.

The fourth reason given by the Court to explain its unwillingness to adopt the minimum core approach was based on its incompatibility with the institutional competencies and the role of the judiciary.⁴⁴² It declared that ‘the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards ... should be, nor for deciding how public revenues should most effectively be spent’.⁴⁴³ Advocating for a balanced relationship between the three spheres of the state, it advanced that the courts should only ‘require the state to take measures to meet its constitutional obligations and ... subject the reasonableness of these measures to evaluation’.⁴⁴⁴

With this last argument, the Court linked the issue of the minimum core with one of the main justiciability concerns. By implying that adopting the minimum core approach might threaten the doctrine of the separation of powers, the Court chose to respect the traditional limits of the role of the judiciary. This deference to the government has been widely criticised, especially in the very unequal socio-economic South African context and given the transformative role of the Constitution.

It must be noted that the Court looked briefly into the question of the minimum core of ESR in the recent case of *Mazibuko v City of Johannesburg*⁴⁴⁵ related to the right to access sufficient water enshrined in section 27, where the applicants suggested that 50 litres of water per person per day was the necessary amount for a dignified life.⁴⁴⁶ Without basing their argument on the minimum core concept, they contended ‘that the Court should adopt a quantified standard determining the content of the

⁴⁴² Liebenberg op cit (n370) 83.

⁴⁴³ *TAC* supra (n375) para 37.

⁴⁴⁴ *TAC* supra (n375) para 38.

⁴⁴⁵ (06/13865) [2008] WLD.

⁴⁴⁶ *Mazibuko* supra (n445) para 56.

right' to access sufficient water.⁴⁴⁷ The Court dismissed the applicants' request, declaring that the 'argument must fail for the same reasons that the minimum core argument failed in *Grootboom* and [TAC]'.⁴⁴⁸

The Court's rejection of the minimum core approach has been criticised on the basis that it fails to give content to ESR.⁴⁴⁹ Those critics deplore the reasonableness review used by South African judges for the same reason: according to them, it is too abstract.⁴⁵⁰ From a pure human rights perspective, those concerns are legitimate. It is true that the reasonableness test is focused on the measures adopted by the states rather than on the rights per se, and thus, the interests of vulnerable groups might seem to be pushed into the background.⁴⁵¹ But from a realist perspective, like the one that should be adopted in ESR adjudication at national as well as at international level, the South African Constitutional Court's position towards the minimum core concept seems to me to be justifiable because of its sensitivity to justiciability concerns.

e. A cautious, flexible and realistic approach taking account of the justiciability concerns

In adopting the model that has been outlined, the South African Constitutional Court managed to deal with some of the concerns identified in part II. First, instead of focusing its review on the circumstances of an individual (the plaintiff), the Court concentrated on the elements of state programmes.⁴⁵² This allowed getting round the polycentricity problem discussed earlier. As Christiansen explained:

The Court's approach helps to avoid piecemeal and serial litigation regarding similar circumstances and also allows the Court to request improvement of government programs even if there is no appropriate individual remedy. Moreover, applying a flexible reasonableness standard to government programs allows more judicial discretion to broadly investigate the failings of the program, even if particular faults are not directly related to the plaintiff.⁴⁵³

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid.

⁴⁴⁹ See, for example, D Bilchitz 'Giving Socio-Economic Rights Teeth: the Minimum Core and its Importance' (2002) 119 *South African Law Journal* 484; D Bilchitz 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; Bilchitz op cit (n355).

⁴⁵⁰ Pieterse op cit (n34) 410.

⁴⁵¹ Bilchitz op cit (n449) 496; Liebenberg op cit (n370) 90.

⁴⁵² Christiansen op cit (n5) 377.

⁴⁵³ Christiansen op cit (n5) at 377-378.

However, as already pointed out, this feature of the Court's jurisprudence has been criticised for its lack of sensitivity towards individuals' needs. It is true that in tackling the problem from the perspective of national plans and policies, the Court does not really show the intent to put human rights at the centre of its work. But, one might contend that, in declaring that state's actions are unreasonable and therefore unconstitutional when they fail to take account of the situation of people living in desperate need, the Court demonstrated that human rights and social justice principles can actually be integrated in its model of review.⁴⁵⁴ This shows the flexibility of the reasonableness test, as it has the potential to incorporate different elements according to the specificity of the case.

Secondly, the reading of the Court's judgments – especially *Grootboom* and *TAC* – shows that the judges took the information problem as a serious limit to their ability to define the content of a right and particularly its minimum core.⁴⁵⁵ A limit the CESCR had never explicitly recognised, but will probably have to concede. There is particularly one aspect of the Court's strategy to deal with the information challenge that might be very useful to adopt in the context of the Optional Protocol. If – like the Court did – the Committee places 'the burden of proof upon the government when it claims a lack of available resources', this will address 'the information problem by requiring the state, the only party with that particular (and critical) information, to present it to the [Committee] in order to justify its arguments'.⁴⁵⁶ This would also relieve the plaintiff of providing information he or she would certainly not be able to obtain.

Thirdly, the Court also paid attention to the boundary between law and politics when confronted to the remedy issue as it showed deference to the legislature.⁴⁵⁷ Although the remedy aspect of the adjudication process is not the focus of this work, it is interesting to note that the Court favoured to give guidelines on how a programme should be conducted rather than to order specific actions.⁴⁵⁸

⁴⁵⁴ Christiansen op cit (n5) 378.

⁴⁵⁵ *Grootboom* supra (241) para 32; *TAC* supra (n375) para 37.

⁴⁵⁶ Christiansen op cit (n5) at 379-380.

⁴⁵⁷ Christiansen op cit (n5) 384.

⁴⁵⁸ *Ibid.*

For those reasons, the South African Constitutional Court's approach in ESR cases has been correctly qualified as being cautious and realistic.⁴⁵⁹ It shows the willingness 'to take account of the variety of cases ... and of the different extent to which [it] is constrained by its incapacity and illegitimacy in each different case'.⁴⁶⁰ As Christiansen explained, 'the unique but adaptable manner in which the Court's social rights jurisprudence accommodates classic non-justiciability arguments ... advances social justice within South Africa and creates an exportable model of social rights enforcement'.⁴⁶¹

As outlined in this chapter, this appears clearly when one looks at the application of the standards of review in the ESR landmark cases. The Court's method of review has showed a great flexibility and the possibility to be applied on a case-by-case basis.⁴⁶² The choice of the reasonableness test and the rejection of the minimum core obligation allowed the Court to find a middle ground between the different camps of the justiciability debate – although they might not acknowledge it. The Court's jurisprudence 'is less radical' in the sense that it is 'less a departure from the standard concerns regarding the justiciability of [ESR]', and yet it 'is also more radical because, by demonstrating a viable model of social rights adjudication that incorporates the concerns of its detractors in a substantive manner, the South African jurisprudence more explicitly challenges their broadly held non-justiciability viewpoints'.⁴⁶³

It is this balancing approach between enforcement of ESR and respect of state's political affairs⁴⁶⁴ – or between 'judicial vigilance and deference'⁴⁶⁵ – that created the exportable potential of South African jurisprudence.⁴⁶⁶ And this is precisely what could inspire the CESCR when reviewing communications under the OP-ICESCR. In imposing to itself some limitations that allow it to internalise the elements of the

⁴⁵⁹ S Gloppen 'Social rights litigation as transformation: South African perspectives' (2005) 3 *CMI Working Papers* 13; S Humphreys 'Are social rights compatible with the rule of law? A realist inquiry' (2006) 10 *Hauser Global Law Working Paper* 26.

⁴⁶⁰ Brand op cit (n357) 227.

⁴⁶¹ E C Christiansen 'Exporting South Africa's Social Rights Jurisprudence' (2008) 5 (1) *Loyola University Chicago International Law Review* 29.

⁴⁶² Brand op cit (n357) 227.

⁴⁶³ Christiansen op cit (n5) 385.

⁴⁶⁴ R J Goldstone 'A South African perspective on social and economic rights' (2006) 13 (2) *Human Rights Brief* 4.

⁴⁶⁵ Pieterse op cit (n34) 383.

⁴⁶⁶ Christiansen op cit (n461) at 29-30.

justiciability discussion,⁴⁶⁷ the Court developed a model that could be taken as an example by the Committee. One of the greatest challenges the CESCR will have to face when confronting to the assessment of the complaints is precisely how to deal with the justiciability concerns. Those concerns are to be taken seriously by the experts if the new procedure has to impact positively on ESR violations in member states. This is even truer when one thinks about the quasi-judiciary and international nature of the Committee, as this leads some sceptic states to question the legitimacy of the body in reviewing domestic socio-economic policies.

My proposition is not that the Committee should adopt the South African approach with complete confidence, without criticising or developing its own characteristics. What I am suggesting is that it takes account of this useful practical experience for crafting its own jurisprudence that would, consequently, be more sensitive to the justiciability of ESR concerns.

Moreover, I believe that the model developed by the South African judges shows a greater potential to take account of states' *realism* – in the meaning of the theory of international relations –, than the approach set out in the CESCR's general comments. Being sensitive to realistic governmental interests, without giving up on the human rights principles, might be profitable for the Committee if the procedure put in place by the Optional Protocol is to have a positive impact on the ground.

However, I can only agree with Liebenberg when she states that the reasonableness model could gain in substance if greater attention was given to 'the purposes and values which [ESR] are intended to promote'.⁴⁶⁸ Without being constrained by the rigidity of the minimum core approach, this could counterbalance the fact that the reasonableness standard – as developed so far – does not always integrate a genuine human rights perspective.

⁴⁶⁷ Christiansen op cit (n5) 377.

⁴⁶⁸ Liebenberg op cit (n364) 5.

7) Conclusion

In this work, I have shown that the OP-ICESCR creates a new framework in which the Committee will have to develop new ways of interpreting states obligations. The CESCR's position towards certain aspect of the obligations of the states – for example the minimum core obligation – might not be flexible enough to be acceptable by states parties. I have explained that if it is to be effective, the Committee's assessment of individual complaints has to take into consideration some of the justiciability concerns. Although the Committee's point of view is usually absolutely understandable from a pure human rights perspective, it entails the risk that states will simply reject it for its lack of sensitivity towards realistic interests.

In this paper, I have tried to answer to this problem by looking into the South African jurisprudence on ESR. I have pointed out the main aspects of the reasonableness standard of review, as well as the reasons for South African judges' rejection of the minimum core approach. This analysis has confirmed that, although still young, the South African jurisprudence on ESR is a rich source of interpretation. It is flexible, balanced, realist, exportable and has the potential to take account of human rights on one hand, and political interests on the other. I have suggested that in paying attention to those jurisprudential developments, the Committee could be better equipped to examine complaints of alleged ESR violations in the – very realist – environment of the United Nations.

The subject of this paper is resolutely contemporary. The members of the CESCR are certainly asking themselves some of the questions that have been discussed here. However, one might have to wait some time before witnessing the real implementation of the OP-ICESCR. The text will only enter into force when ten states parties to the Covenant will have ratified or accessed to it.⁴⁶⁹ South Africa has maybe paved the way for interpreting states obligations towards ESR, but it seems unlikely that it will be part of the first states to ratify the Optional Protocol. The reason for this is quite paradoxical: South Africa is still not party to the ICESCR.

⁴⁶⁹ OP-ICESCR op cit (n1) art 18.

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