# Can Minimum Core Obligations Survive a Reasonableness Standard of Review Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights?

*Lisa Forman*

IN 2013, AFTER TWENTY years of debate, an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights came into operation, enabling the international justiciability of this Covenant's rights for the first time. Under this mechanism, individuals within ratifying countries can submit complaints to the Committee on Economic, Social and Cultural Rights alleging violations of Covenant rights, including health. The Protocol ushers in a new era for the international justiciability of this right, with the potential to advance its normative development and offer material gains to applicants. In this light, the Committee's enforcement may prove an important crucible for the evolution of rights like health. Yet the Committee's interpretive approach to this right may conflict with the adjudicative approach laid out in relation to the Protocol. For example, Protocol guidelines adopt a 'reasonableness approach' to adjudication (drawn from the South African Constitutional Court), which may contradict the Committee's core obligations approach to interpreting economic, social, and cultural rights. This analysis remains speculative given the nascent nature of the mechanism. Accordingly my paper will contrast the Committee's adjudicative rules against earlier interpretations of the right to health to analyze its potential approach to enforcement, and to consider the implications for individual complainants, domestic litigation,

EN 2013, APRÈS VINGT ans de débats, un protocole facultatif du Pacte international relatif aux droits économiques, sociaux et culturels a pris forme. Pour la première fois, on prévoit la possibilité d'intenter des poursuites internationales aux termes de ce pacte. Selon ce mécanisme, les personnes qui habitent les pays signataires peuvent porter plainte auprès du Comité des droits économiques, sociaux et culturels pour violation présumée des droits prévus dans le Pacte, y compris le droit à la santé. Le Protocole marque le début d'une ère nouvelle : la possibilité d'intenter des poursuites internationales au nom de ce droit, avec possibilité de progrès dans le développement de normes et de gains financiers pour les demandeurs. Ainsi, l'application des droits que fera le Comité pourrait s'avérer un important creuset pour l'évolution des droits comme le droit à la santé. Cependant, l'approche interprétative que prend le Comité face à ce droit peut entrer en conflit avec l'approche quasi judiciaire énoncée relativement au Protocole. Par exemple, les lignes directrices du Protocole adoptent une approche de « caractère raisonnable » à l'arbitrage (tirée du Tribunal constitutionnel de l'Afrique du Sud/South African Constitutional Court), qui peut être en contradiction avec les obligations premières du Comité, à savoir interpréter les droits économiques, sociaux et culturels. Cette analyse demeure cependant de l'ordre

and indeed, the evolution of the right to health more generally.

de la spéculation étant donné la nature embryonnaire du mécanisme. Par conséquent, ce texte mettra en opposition les règles d'arbitrage du Comité et les interprétations antérieures du droit à la santé afin d'analyser son approche possible à l'application des règles et de prendre en considération les implications pour les plaignants, les litiges nationaux et, de fait, l'évolution du droit de la santé de manière plus générale.

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## I. INTRODUCTION

In 2013, an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) came into operation, which will allow people in ratifying states to lodge claims of violations of economic, social, and cultural rights with the United Nations Committee on Economic, Social and Cultural Rights (CESCR).[1] While CESCR's recommendations issued under the optional protocol will not be legally binding, they may offer material benefits for claimants and increased accountability for health policy and decision-making. The protocol will also provide an important new source of interpretation with the potential to advance understanding of economic, social, and cultural rights like health, and accordingly to influence courts and policy makers at multiple levels.

Yet the optional protocol took decades to pass given broad contestation over the justiciability of economic, social, and cultural rights. In an effort to resolve such concerns, the protocol, alone amongst similar mechanisms, specifies a standard of review based on reasonableness. This standard is not explicitly articulated in the ICESCR, and is drawn from South

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1 *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, GA Res 63/117, UNGAOR, 63rd Sess, Supp No 53, UN Doc A/RES/63/117 (2008).

African jurisprudence on socioeconomic rights. South African courts interpret the reasonableness standard to require states to act reasonably to meet the basic needs entitlements in the national constitution. While judicial enforcement has enabled some progressive outcomes, the standard effectively turns rights like health, into more procedural than substantive guarantees. This outcome is animated in the South African Constitutional Court's rejection of minimum core obligations discussed in part IV below.[2] These are obligations that the CESCR interpreted into economic, social, and cultural rights to reflect their most essential prioritized aspect that should be protected from limitless restrictions in the name of progressive realization and resources. It is therefore a pressing question whether and how the Committee will incorporate a reasonableness standard into a core obligations-consistent framework around the right to health, particularly when it comes to resource-demanding claims that fall into the purview of basic needs. This paper will explore these questions in light of disparities at the United Nations between economic, social, and cultural rights on the one hand, and civil and political rights on the other; the passage of the optional protocol and reasonableness standard; the origins of the reasonableness standard in South African jurisprudence, and its emergence in CESCR interpretations. Finally, it will consider the potential implications of the reasonableness standard for a minimum core obligations approach to the right to health.

## II. DISPARITIES BETWEEN ECONOMIC, SOCIAL, AND CULTURAL, AND CIVIL AND POLITICAL RIGHTS

The 1948 Universal Declaration of Human Rights protects civil and political, as well as economic, social, and cultural rights, and was to be the basis of a single binding human rights treaty.[3] However, Cold War politics saw these sets of rights split into two separate treaties in the form of the International Covenant on Civil and Political Rights (ICCPR)[4] and the Inter-

2 See e.g. *South Africa and Others v Grootboom and Others*, [2000] ZACC 19, 11 B Const LR 1169 (S Afr Const Ct) [*Grootboom*] and *Minister of Health & Others v Treatment Action Campaign & Others*, [2002] ZACC 16, 10 B Const LR 1075 (S Afr Const Ct) [*Treatment Action*], discussed below.

3 *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71.

4 *International Covenant on Civil and Political Rights*, GA Res 2200A(XXI), UNGARO, Supp No 16, UN Doc A/6316 (1966) 52 [*ICCPR*].

national Covenant on Economic, Social and Cultural Rights (ICESCR).[5] Contestation saw these treaties take almost 30 years to come into effect: both treaties were drafted in the 1950s, opened for signature in 1966, and came into effect in 1976. While the rhetoric of the indivisibility and interdependence of these two sets of rights pervades the international human rights system, there are significant institutional and textual differences when it comes to their interpretation and enforcement. For example, while both treaties came into effect in 1976, the Human Rights Committee (HRC), which oversees the ICCPR, was established that same year, as was the ICCPR's first optional protocol, which created an individual complaints mechanism for violations of civil and political rights. In contrast, it took 11 years before ICESCR had a comparable oversight body with the CESCR becoming operational in 1987, and 37 years before the ICESCR's optional protocol came into operation in 2013. These differences are both symbolic and practical: on the one hand, they belie the rhetoric of indivisibility between the two sets of rights. On the other, civil and political rights have had a several decades head-start in terms of jurisprudential development, leading to significant disparities in the depth of understanding between the two sets of rights.

These institutional disparities are matched by key textual differences. Under the ICCPR, states undertake to respect and ensure its rights and take necessary steps to give them effect.[6] However, ICESCR's implementation article contains no such undertaking for states to respect and ensure its rights, instead requiring them to take steps to the maximum of available resources to achieve progressively full realization of Covenant rights.[7] This circumscribed duty was included in the ICESCR at its drafting, because drafters believed that economic, social, and cultural rights were fundamentally different from civil and political rights, in that they were dependent for realization upon resources.[8] Yet even at drafting the article was critiqued as a weak guarantee of Covenant rights, giving "too

5 *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A(XXI), UNGARO, Supp No 16, UN Doc A/6316 (1996) 49 [*ICESCR*].

6 *ICCPR*, *supra* note 4, art 2.

7 *ICESCR*, *supra* note 5, art 2.1.

8 United Nations General Assembly Official Records, "Annotations on the Text of the Draft International Covenants on Human Rights", Agenda Item 28 (Part 11) Annexes Tenth Session, New York (1955), UN Document A/2929, Chapter I: An Outline of the History of the Draft Covenants.

many loop-holes for States parties wishing to evade their obligations" by pleading a lack of resources and permitting indefinite delays.[9]

Indeed, core obligations are a key part of the CESCR's efforts to counter the potential predations of this article and have played a key role in defining the nature and scope of these rights and duties in relation to progressive realization within resources. However ICESCR's article 2 has continued to complicate the interpretation and enforcement of the right to health, and has given ideological opponents ample ammunition to attack the justiciability of this right, particularly using the negative/positive distinction between the sets of rights. This latter characterization sees social rights as positive rights requiring extensive state action and resources, so that judicial enforcement would reallocate budgets and alter social policy, breach the appropriate democratic separation of powers, and wreck budgets. As a result, courts in North America are extremely deferential to social and economic policy,[10] and reluctant to recognize and enforce "positive" obligations pertaining to social welfare.[11]

Some of these debates have been resolved through strong refutations of the negative/positive distinction, the growing specificity of interpretations of rights like health, and most significantly, increased enforcement over the past 20–25 years. In its early years, the Committee itself was not immune from these questions, with some members questioning whether all ICESCR rights were legal and/or justiciable, rather than merely moral or social.[12] Such questions did not distract from the Committee's larger sense that its primary project was to define the nature and scope of these rights and to ensure institutional mechanisms to monitor and enforce them. Yet within its first three years of operation, the Committee understood that effective realization could not only rely on general comments

9 *Annotations on the text of the draft International Covenants on Human Rights*, UNGAOR Annex, Agenda Item 28, UN Doc A/2929 (1955) 16 at para 23.

10 See e.g. *Dandridge v Williams* (1970), 397 US 471 at 487, where the US Supreme Court refused to review the way that social grants were formulated or administered, reasoning that "[t]he intractable economic, social and even philosophical problems presented by public welfare assistance program are not the business of this Court."

11 See e.g. *Gosselin v Québec (AG)*, 2002 SCC 84, 4 SCR 429, where the Canadian Supreme Court refused to recognize that the right to security of the body places positive obligations on the government to provide social welfare.

12 See Committee on Economic, Social and Cultural Rights, *Report on the Third Session*, UNESCOR, 1989, Supp No 4, UN Doc E/1989/122; E/C.12/1989/5 (at a discussion on right to food in 1989, members said that the lack of clarity in formulation of this right made it unclear if "an individual had an international legal right or merely a moral or social right" at para 319).

and state reporting (its practice these past forty years) but would require an optional protocol for individual complaints.[13]

## III. THE EVOLUTION OF THE OPTIONAL PROTOCOL

While initial discussions at the CESCR focused on concerns that it was premature to discuss a protocol before defining the nature of the Covenant's rights,[14] by 1991 the Committee had begun to seriously engage this question,[15] and over the next decade human rights actors more broadly endorsed an ICESCR optional protocol. In 1992, the Sub Commission on Prevention of Discrimination and Protection of Minorities endorsed an optional protocol as a means of monitoring economic, social, and cultural rights violations. The 1993 Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights recognized all human rights as universal, indivisible, and interrelated, and encouraged the Commission on Human Rights to examine an optional protocol to the ICESCR.[16] By 1996, CESCR had produced its first draft of an optional protocol, and in 2002 an open-ended working group was established to finalize the protocol—meeting over five sessions from 2004 to 2008 and taking input from states, international organizations, NGOs, and UN human rights experts. In June 2008, the Human Rights Council endorsed the protocol, which was adopted by the UN General Assembly on December 10, 2008 and opened for signature on September 24, 2009. The protocol came into force in February 2013, when Uruguay became the tenth ratifying state.

### A. Negotiating history of the Optional Protocol

Accounts of the optional protocol negotiating process suggest a coordinated effort to, first, block its passage, and then to significantly limit its scope

13 See e.g. Committee on Economic, Social and Cultural Rights, 4th Sess, "Summary Record of the 4th Meeting", UN Doc E/C.12/1990/SR.4 (12 February 1990).

14 See e.g. Committee on Economic, Social and Cultural Rights, *Summary Record of the Fourth Meeting*, UNESCOR, 4th Sess, UN Doc E/C.12/1990/SR.4 (1990) (Rattray calls for caution, arguing that the "Committee would be setting out over dangerous ground if it considered preparing an Optional Protocol before it had defined the minimum standards enabling it to establish violations of economic, social and cultural rights" at para 17).

15 Brian Griffey, "The 'Reasonableness' Test: Assessing Violations of State Obligations Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2011) 11 HRLJ 275 at 291.

16 World Conference on Human Rights, *Declaration and Programme of Action*, Doc A/CONF.157/23 (12 July 1993) at para 75.

and impact, which focused particularly on the justiciability of positive obligations and the Committee's competence to make decisions with resource implications.[17] This battle was waged by states like the USA, China, Canada, Australia, and the UK, who had no intention of ratifying the protocol, but who tried to limit the scope of adjudication to an a la carte approach. This approach would allow ratifying states to select parts of the Covenant to enforce. These states also advocated for a reduced level of scrutiny and general deference to policy choices in adjudicating communications engaging article 2(1) and other positive obligations linked to budgetary allocations or legislative measures.[18]

These efforts were countered by arguments that the Committee's recommendations would themselves leave a large margin of appreciation for governments (and not interfere in democratic process or policy making);[19] that the justiciability of economic, social, and cultural rights had been confirmed by national and regional decisions around the world;[20] that an a la carte approach to enforcement would establish hierarchies of rights;[21] that civil and political rights themselves could also be described as imprecise and that this had not interfered with their implementation;[22] and, indeed, that civil and political rights had benefitted from years of interpretation, and that a protocol could similarly aid in clarifying the nature of economic, social, and cultural rights.[23]

17 Bruce Porter, "Reasonableness and Article 8.4" in Malcolm Langford, C Rodriguez & J Rossi, eds, *Making it Stick: Compliance with Social Rights Judgments in Comparative Perspective* (Cape Town: Pretoria University Law Press) [forthcoming in 2016]; Griffey, *supra* note 15 at 292–93.

18 Porter, *supra* note 17 at 3–4.

19 Commission on Human Rights, *Economic, Social and Cultural Rights: Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, UNESCOR, 2004, UN Doc E/CN.4/2004/44 at para 22 [UNESCOR, 2004].

20 *Ibid* at para 29.

21 Commission on Human Rights, *Economic, Social and Cultural Rights: Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session*, UNESCOR, 2005, UN Doc E/CN.4/2005/52 at para 22.

22 UNESCOR, 2004, *supra* note 19 at para 29.

23 *Ibid* at para 53.

### B. Reasonableness as a response to concerns about justiciability

Reasonableness became a central battleground for these concerns, which from the first session were answered with the idea that the Covenant required only reasonable action from states and did not impose an onerous burden,[24] with explicit reference made to its use in South Africa,[25] and as a standard that drew on familiar concepts from civil and political rights adjudication.[26] Indeed, by the third session, reasonableness was being proposed on all sides of the debate: Belgium, Switzerland, the NGO Coalition for an Optional Protocol, and the Centre on Housing Rights and Evictions (COHRE), proposed a "standard of reasonableness similar to that applied by national courts."[27] On the other hand, Canada, Norway, and the UK argued for a test of reasonableness alongside guarantees of a states' margin of appreciation as something that could "safeguard against undue interference with national policymaking."[28]

Interestingly, at the third session CESCR representatives argued against a reasonableness standard, suggesting it was "unnecessary in the light of the Committee's self-restraint," since the Committee's practice in examining state reports already granted "a wide margin of discretion to States parties in taking their policy choices, as well as an opportunity to justify the lack of realization of a Covenant right by reasonable and objective criteria."[29] Yet the reasonableness standard became entrenched in negotiations, and in the final sessions which negotiated text, several versions of this standard were debated. An initial text introduced reasonableness, while adhering closely

24 *Ibid* at para 29 (this argument was made by Paul Hunt, then UN Special Rapporteur, on the right to health).

25 *Ibid* at para 35.

26 Porter, *supra* note 17 (the concept was reiterated at the second session by Louise Arbour, then the UN High Commissioner for Human Rights, who proposed reasonableness as "a potential resolution to the impasse confronting the Working Group on the issue of justiciability of positive measures, in a manner that drew on familiar concepts from civil and political rights adjudication" at 5).

27 Commission on Human Rights, *Economic, Social and Cultural Rights: Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its third session*, UNESCOR, 2006, UN Doc E/CN.4/2006/47 ("Belgium, Switzerland, the NGO Coalition for an Optional Protocol and COHRE suggested providing for a 'standard of reasonableness' similar to that applied by national courts in an optional protocol. Switzerland considered it essential to provide for a wide margin of appreciation for States parties in an optional protocol. The NGO Coalition argued that the margin of appreciation of States parties should be assessed on a case-by-case basis" at para 95).

28 *Ibid* at para 92.

29 *Ibid* at para 96.

to the text of article 2.1—holding that the Committee would "assess the reasonableness of steps taken 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."[30] However, states opposing justiciability (Canada, the UK, Poland, Australia, China, and the US) advocated for shifting to a standard of unreasonableness instead of reasonableness,[31] and argued for a broad margin of appreciation to assess whether obligations under article 2.1 were met.[32] Ultimately, a standard of unreasonableness was seen as placing an insurmountable burden on claimants that would ensure excessive deference, and was removed,[33] as were references to a broad margin of appreciation.[34]

The final text version removed reference to article 2.1 by referring to almost all of the Covenant's rights and replaced explicit reference to a margin of appreciation by saying that, in considering reasonableness, the Committee would bear in mind that a state could adopt a range of possible policy measures to implement Covenant rights. This latter phrase is a direct quote from the South African *Grootboom* decision discussed below, and was apparently offered by an NGO representative on the final day of negotiations after she looked up the decision on her laptop.[35]

30 *Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Open-Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 4th Sess, UN Doc A/HRC/6/WG.4/2 (2007), cited in Porter, *supra* note 17 (this version stated: "When examining communications under the present Protocol concerning article 2, paragraph 1 of the Covenant, the Committee will assess the reasonableness of the steps taken by the State Party, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means" at 6).

31 Porter, *supra* note 17 at 6; *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*, UNHRC, UN Doc A/HRC/6/8 (2007) 95 [UNHRC, 2007].

32 UNHRC, 2007, *supra* note 31 at 33.

33 Porter, *supra* note 17 at 7.

34 UNHRC, Open-Ended Working Group On An Optional Protocol To The International Covenant On Economic, Social And Cultural Rights, *Revised Draft Optional Protocol to the International Covenant on Economic, Social And Cultural Rights*, UN Doc A/HRC/8/WG.4/2 (December 2007).

35 Porter, *supra* note 17 at 11; see also Catarina de Albuquerque, "Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights—The Missing Piece of the International Bill of Human Rights" (2010) 32:1 Hum Rts Q 144.

## IV. THE SOUTH AFRICAN REASONABLENESS STANDARD

The direct grafting of South African jurisprudence into the optional protocol begs the question of what a reasonableness review of social rights looks like in that country.[36] The 2000 *Grootboom* decision, which established reasonableness as the standard for measuring state compliance with constitutional socioeconomic rights, held that the state's primary obligation is "to act reasonably to provide the basic necessities of life to those who lack them."[37] This obligation requires, amongst other things, comprehensive programs to meet short, medium, and long-term needs, focused on the most vulnerable, especially the poor and those experiencing urgent and desperate needs. Excluding large segments of society would be unreasonable, as would excluding the needs of the poor, given their reliance on the state for the basic necessities of life. At the same time, the Constitutional Court recognized that the state could not be required to do more than available resources permit, and that while resources would determine the content and pace of realization, government nonetheless should give adequate budgetary support to social rights and plan and monitor efforts to meet all needs.[38]

This standard is very much consistent with international human rights law's focus on protecting the rights of the most vulnerable and marginalized. However, it critically diverges from this body of law when it comes to core obligations—a key part of the Committee's interpretation of economic, social, and cultural rights and the right to health. In *Grootboom*, the Court rejected arguments by amicus curiae to recognize a minimum core.[39] The Court noted that the CESCR had not defined the minimum core for housing,[40] and suggested that it lacked the competence or information necessary to do so.[41] The Court confirmed this rejection over several subsequent decisions: in the 2002 *Treatment Action Campaign* decision, it emphatically rejected the direct enforceability of the minimum core, citing institutional incapacity and democratic considerations, holding that it

36 The idea of a standard of reasonableness has antecedents in British common law and limited footage in some treaty rights; for example, see ICESCR, *supra* note 5 (article 7 on work sees reasonable limits of working hours; article 10.2 on special protection for mothers during reasonable period before and after childbirth; article 14 on compulsory primary education within reasonable number of years).

37 *Grootboom*, *supra* note 2 at paras 24, 44.

38 *Ibid* at paras 32, 68.

39 *Ibid* at paras 27–33.

40 *Ibid* at para 30.

41 *Ibid* at paras 32–33.

was impossible to give everyone access to even a "core" service immediately, and the state could only be expected to act reasonably to progressively realize access to socioeconomic rights.[42] The Court argued that doing more than this would breach the appropriate separation of powers and extend beyond the "restrained and focused" judicial role contemplated by the Constitution. Certainly, the broader implication of this position is that the Constitutional Court sees core entitlements, to even basic socioeconomic needs that hold irrespective of resources, as unreasonable.

It is important to emphasize that despite rejecting the core, in both *Grootboom* and *Treatment Action Campaign*, the Court found the state in violation of the reasonableness standard.[43] These outcomes suggest that the reasonableness standard might do similar work to the minimum core to the extent that it forces courts to focus on basic and urgent needs of the most vulnerable, marginalized, and poor people in society. However, the standard breaks definitively from the idea of core obligations as non-derogable parts of the right to health which a State party cannot, under any circumstances whatsoever, justify non-compliance with, which is the very strong interpretation the Committee gives of core obligations under the right to health in General Comment 14.[44] The threat of rejecting core obligations in favour of reasonableness is that, as long as a state establishes that it is acting reasonably to progressively realize rights within resources, almost any extent of deprivation could be permitted. Certainly this is the implication of the South African Court's 2009 decision in *Mazibuko*, where the Court found state water policy reasonable, despite recognizing that 100,000 city households still lacked access to the most basic water supply. The Court argued that "[t]he purpose of litigation concerning the positive obligations imposed by social and economic rights [is] to hold the democratic arms of government to account" rather than holding govern-

42 *Treatment Action*, *supra* note 2 at para 35.

43 See *Khosa and Others v Minister of Social Development and Others; Mahluale and Another v Minister of Social Development*, [2004] ZACC 11 at para 38, 6 BCLR 569 (S Afr Const Ct) (similarly in the Khosa case on the right to access social security in section 27, the Court held that excluding permanent residents from receiving social grants was inconsistent with the state's obligations under section 27(1)(c) to provide access to social security for everyone).

44 UNHR, Office of the High Commissioner for Human Rights, *CESCR General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12)*, UN Doc E/C.12/2000/4 (August 2000) at para 47.

ment to an impossible standard of perfection, or requiring courts to take over the tasks properly reserved for government.[45]

## V. RECONCILING REASONABLENESS WITH A MINIMUM CORE APPROACH TO THE RIGHT TO HEALTH

The Committee's adoption of a reasonableness standard of review raises questions about how it will adapt prior frameworks that include minimum core obligations. Some indication of the Committee's planned approach is given in its 2007 statement issued during optional protocol negotiations, to answer state questions about how reasonableness might be interpreted in light of state obligations to take steps to the maximum of resources. Here, the Committee lays out criteria for establishing reasonableness that seems to mesh its own jurisprudence with aspects of South Africa's reasonableness approach, particularly its focus on vulnerability, grave situations, and situations of risk.[46] It is significant, however, that violations of minimum core obligations are not mentioned in these criteria, with the minimum core only appearing as relevant to regressive steps.[47] This interpretation suggests that the Committee sees the minimum core acting primarily as a bar to regression, a far different role than that outlined by the Committee in previous interpretive work.

Clarity on the Committee's approach will presumably be forthcoming through its jurisprudence. In September 2015, the CESCR issued its first case on the right to housing in Spain, finding in favour of the petitioner and holding the state obliged to provide effective remedies in foreclosure procedures.[48] While a fuller analysis of this decision will await its English translation, it is apparent from the decision, written in Spanish, that the Committee extensively referenced South African jurisprudence (at least in part because the case had South African NGO interveners).[49]

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45 *Mazibuko and Others v City of Johannesburg and Others*, [2009] ZACC 28 at paras 160–61, [2010] 3 B Const LR 239.

46 *An Evaluation of the Obligation to Take Steps to the "Maximum Of Available Resources" Under an Optional Protocol to the Covenant*, ECOSOCOR, 38th Sess, Annex, Agenda Item 8, UN Doc E/2008/22 (2008) at para 6.

47 *Ibid* at para 10.

48 ECOSOC, Committee on Economic, Social and Cultural Rights, *Views of the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights concerning Communication No.2/2014*, 55th Sess, UN Doc E/C.12/55/D/2/2014 (October 2015).

49 A range of global NGOs, including from South Africa, were admitted as third party interveners.

Currently, the protocol is ratified by 20 countries, located primarily in Western Europe and Latin America.[50] The protocol is signed by another 26 countries that may move forward to ratification (albeit that there is no guarantee they will do so), while 151 countries have taken no action. It is likely safe to assume that countries like Canada, the US, and Australia have little intention of ratifying the protocol. Yet, it is less clear why so few African and Asian countries, which supported the passage of the optional protocol, have ratified it. One possibility is that they are taking a wait-and-see approach to the Committee's approach to enforcement. The procedure is unlikely to have direct impact on countries like Canada that do not ratify it. However, the Committee's jurisprudence may become indirectly influential in Canada and other non-ratifying states, including by shaping the Committee's concluding observations on state reports from these countries, and supporting domestic legal advocacy and litigation.

## VI. CONCLUSION

It is unlikely that CESCR will reject core obligations that have been an integral part of its own interpretative approach to economic, social, and cultural rights. It would also be fairly easy for the Committee to distinguish its approach to reasonableness from South Africa's, given key differences in treaty text and institutional roles.[51] It is therefore probable that core obligations under the right to health will persist in CESCR's interpretations, albeit in a less central way. Perhaps a more apt question is how enforcement of the right to health will be affected if a reasonableness standard of review sidelines core obligations.

On the one hand, perhaps retiring core obligations is absolutely appropriate as we shift into "version 2.0" of the right to health as an internationally justiciable right. Core obligations have largely acted as a placeholder for the primary concerns that have troubled this right, namely to hold negligent states accountable for their failures to realize the right to health progressively enough, and their failures to use sufficient resources to protect vulnerable people. In this light, the reasonableness standard may articulate an alternative vision of core obligations that ensure fair processes more likely to: produce fair policies; to enable social empowerment to

50 The following 20 countries have ratified the protocol: Ecuador, Argentina, Belgium, Bolivia, Bosnia and Herzegovina, El Salvador, Mongolia, Spain, Portugal, Slovakia, Montenegro, Finland, Cape Verde, Costa Rica, France, Gabon, Italy, Luxembourg, Niger, and San Marino.

51 Porter, *supra* note 17 at 20.

make claims and challenge injustices; and produce judicial and quasi-judicial bodies more inclined to hear and respond to claims falling in the social domain. Such outcomes would not fall so far from the promise of the right to health as to void the initial intention behind core obligations. Thus, if core obligations fall from the interpretive framework of the right to health, it will not matter if reasonable process actually benefits people at least some of the time. However, the impact of doing so will be deleterious if decisions like *Mazibuko* become the norm, and poor and marginalized people are consistently left unprotected from discriminatory and harmful deprivations; if governments can cite unreasonableness in denying health care at any level; and, if the standard enables undue deference to state claims of limited resources, replicating all the problems that core obligations were intended to fix in the first place.

If reasonableness can avoid these pitfalls and does not simply serve expensive health care to wealthy litigants, then it may resolve some of the imagined and real dilemmas of economic, social, and cultural rights adjudication. The real test of the standard will be in how the Committee addresses potentially resource-demanding claims for basic health needs, particularly for costly pharmaceuticals where the problem is not necessarily overly-entitled litigants, as much as it is system failures around accessibility and equity. Whatever the case, the Committee's approach will draw a line in the sand for how adjudicators around the world respond, and will let us know which direction the right to health will take in a new era of enforcement.