# Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol


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# Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol

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**ABSTRACT**

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights represents a milestone in efforts to redress the imbalance in justiciability mechanisms for economic, social, and cultural rights at the international level. Six years after the Optional Protocol entered into force, the Committee on Economic, Social and Cultural Rights has an opportunity to develop the foundations of both its admissibility and merits jurisprudence. This article analyzes its evolving jurisprudence in light of the imperative to build the normative legitimacy of the Committee's work under the Optional Protocol. The challenge of navigating the tensions between respecting the sovereignty of states in the realm of domestic budgetary and social policy decisions and intervening to require accountability for economic, social, and cultural rights violations lies at the heart of the normative legitimacy of the Committee's jurisprudence. Based on a close analysis of its emerging jurisprudence, it is argued that the Committee has developed sound

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admissibility criteria, and a solid model of review to guide it in applying the reasonableness standard in Article 8(4) of the Optional Protocol. This jurisprudential approach has enabled the Committee to chart a skillful course thus far between sovereignty and accountability. This bodes well for strengthening the normative legitimacy of the Optional Protocol and advancing the broader project of the justiciability of economic, social, and cultural rights.

## I. INTRODUCTION

The adoption in 2008 and the coming into force on 5 May 2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR or OP)[1] was a historic development in advancing accountability under international human rights law for violations of economic, social, and cultural rights.[2] Despite forming an integral part of the International Bill of Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR, or the Covenant)[3] has not enjoyed parity in respect of its accountability mechanisms with its sister Covenant, the International Covenant on Civil and Political Rights (ICCPR).[4] In particular, the ICESCR did not provide for an individual communications procedure similar to the first Optional Protocol to the ICCPR, which was adopted and entered into force simultaneously with the ICCPR.[5]

Until the coming into force of the OP-ICESCR, the system of supervision under the ICESCR was confined to the periodic reporting procedure. While reporting procedures under international human treaties fulfill a range of valuable functions,[6] they cannot substitute for a determination by

1. *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted* 18 June 2008, G.A. Res. 63/117, U.N. GAOR, 63d Sess., Agenda Item 58, UN Doc A/RES/63/117 (*entered into force* 5 May 2013) [hereinafter OP-ICESCR].
2. On the history of the OP, see 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*, 32 HUM. RTS. Q. 144 (2010).
3. International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force 3* Jan. 1976) [hereinafter ICESCR].
4. International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR].
5. Optional Protocol to the International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976). A further difference between the two Covenants is the legal status of their supervisory bodies.
6. On the objectives of reporting procedures, *see* General Comment No. 1, *Reporting by States Parties*, *adopted* 17 Feb. 1989, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., U.N. Doc. E/1989/22 (1989). *See generally* The Un Committee On Economic, Social And Cultural Rights: The Law, Process And Practice 154–94 (Marceo Odello & Francesco Seatzu eds., 2013).

an independent expert body of whether a state has violated the rights of an individual or group in a concrete set of facts and circumstances. Nor do reporting procedures create the possibility of concrete remedies to victims and others similarly placed.[7] Apart from the potential for redress to victims, judicial and quasi-judicial procedures have a special role to play in developing the normative content and obligations imposed by the relevant rights in the context of complex factual scenarios. Arguably, the lack of an individual communications mechanism with respect to the ICESCR has also contributed to the reticence of national courts to recognize the justiciability of economic, social, and cultural rights (ESCRs). For many scholars and civil society movements working on ESCRs, the adoption of the OP-ICESCR thus represented a unique opportunity to advance global accountability for ESCRs violations.[8]

In order to fulfill these aspirations and expectations, the Committee on Economic, Social and Cultural Rights (CESCR or the Committee) must establish the legitimacy of its new quasi-judicial role through crafting a body of jurisprudence under the OP that commands the respect of multiple stakeholders—states parties to the OP, prospective states parties, civil society organizations, and national judiciaries. A key challenge for the Committee in this context is navigating the tensions between allowing states parties an acceptable realm to exercise sovereignty over their domestic socio-economic policy and budgetary decisions and achieving meaningful accountability for violations of socio-economic rights. These tensions are present in all international human rights' adjudicatory procedures. However, they have cast a particularly long shadow over the emergence of an international communication procedure in the context of ESCRs, given deep-seated perceptions that socio-economic policies of states are matters of sovereign political choice.[9] The normative legitimacy of the Committee's jurisprudence

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7. Article 8 of the Universal Declaration of Human Rights recognizes that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess, art.8, U.N. Doc. A/RES/3/217A (1948). CESCR affirmed the importance of domestic remedies for violations of economic, social and cultural rights in General Comment No. 9, *The Domestic Application of the Covenant*, *adopted* 1 Dec. 1998, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 19th Sess., ¶ 7, U.N. Doc. E/C.12/1998/24 (1998). On the evolution of remedies for economic, social and cultural rights, see The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights, (John Squires, Malcolm Langford & Bret Thiele eds., 2005).
8. *See, e.g.,* Claire Mahon, *Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 8 Hum. Rts. L. Rev. 617 (2008). On the global civil society campaign for the adoption of the OP-ICESCR spearheaded by ESCR-Net, see Timeline of the Campaign for the OP-ICESCR, ESCR-Net https://www.escr-net.org/timeline-campaign-op-icescr.
9. On the historical roots and contemporary ideological developments in states' reluctance to subject economic and social policy decisions to normative constraints, see Kerry Rittich, *Social Rights and Social Policy: Transformations on the International Landscape, in* Exploring Social Rights: Between Theory and Practice 107 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).

will thus be crucial to the broader project of strengthening accountability for economic, social, and cultural rights through judicial or quasi-judicial mechanisms and be instrumental in persuading more states to ratify or accede to the Optional Protocol.[10]

This article commences by tracing the key controversies in the drafting history of the OP-ICESCR and analyzes how these controversies influenced the eventual adopted text of the OP. It proceeds to examine the nature and significance of the concept of the "normative legitimacy" in the context of the adjudicative mandate of international human rights treaty bodies, focusing on its specific implications for the mandate of the CESCR under the OP-ICESCR. Thereafter, the emerging jurisprudence of the Committee under the OP on admissibility and merits is analyzed. This analysis aims to identify the key jurisprudential techniques adopted by the Committee to navigate the tensions between sovereignty and accountability. The article concludes by describing the main features of the Committee's jurisprudence and evaluates its potential for enhancing the normative legitimacy of the Committee's quasi-adjudicative role under the OP.

## II. DRAFTING HISTORY AND FEATURES OF THE OP-ICESCR TEXT

Throughout the drafting of the OP, states voiced concern regarding the potential implications of a communications procedure for their sovereign power to make decisions in the spheres of socio-economic policy and the allocation of resources. A number of attempts were made during the OP negotiations to restrict its scope of application—for example, through allowing states parties to select the rights in the Covenant that would be subject to the OP's procedures (the *à la carte* approach).[11] Other restrictive proposals were to limit the application of the OP to "gross violations" of Covenant rights[12]

10. As of 8 November 2019, there were twenty-four states parties to the OP-ICESCR compared to the ICCPR, which has 116 states parties (thirty-five signatories). United Nations Treaty Collection, ratification status as of 28 Mar. 2019. *Status of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, *supra* note 1; *Status of the International Covenant on Civil and Political Rights*, *supra* note 4.
11. *Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its First Session*, U.N. ESCOR, Comm'n on Hum. Rts., 60th Sess., Agenda Item 10, ¶ 65, U.N. Doc. E/CN.4/2004/44, (2004) [hereinafter *Report on its First Session*]. States that expressed themselves in favor of the *a la carte* approach were Canada, Greece and the Russian Federation: *Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Third Session*, U.N. ESCOR, Comm'n on Hum. Rts., 62d Sess., Agenda Item 10, ¶ 30, U.N. Doc. E/CN.4/2006/47 (2006) [hereinafter *Report on its Third Session*].
12. *Report on its Third Session*, *supra* note 11, ¶ 57.

or to certain obligations such as non-discrimination,[13] core obligations, or the duties "to respect and protect" economic, social, and cultural rights.[14]

Ultimately, a comprehensive approach to the application of the OP to the Covenant won the day.[15] Nevertheless, certain compromises were made in the drafting process to accommodate states' concerns regarding excessive intrusions on their sovereignty under the OP. These included provisions on admissibility that had not previously been included in any UN treaty-based human rights communications procedure[16] as well as the conferral on the CESCR of a novel discretion in international human rights law terms to 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."[17] Scholars have also regretted the fact that the text of the OP does not reflect the more progressive territorial jurisdictional scope of the Covenant, which does not limit its scope of application to individuals within the territory or subject to the jurisdiction of the relevant state party.[18] In contrast, Article 2 of the OP-ICESCR only permits communications by or on behalf of individuals or groups of individuals "under the jurisdiction of a state party," claiming to be "victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party."[19]

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13. *Id.* ¶ 29.
14. *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*, U.N. ESCOR, Comm'n on Hum. Rts., 61st Sess., Agenda Item 10, ¶ 101, U.N. Doc. E/CN.4/2005/52 (2005).
15. On the eventual ambiguity of the final OP text with regard to its application to the right to self-determination in Article 1 of the Covenant, see Arne Vandenbogaerde & Wouter Vandenhole, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An Ex Ante Assessment of its Effectiveness in Light of the Drafting Process,* 10 Hum. Rts. L. Rev. 207, 222–23 (2010).
16. For example, Article 3(2)(a) of the OP imposes a time-limit of one year after the exhaustion of domestic remedies for submission of communications to the Committee, "except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit." OP-ICESCR, *supra* note 1, art. 3(2)(a).
17. OP-ICESCR, *supra* note 1, art. 4. This article was based on Article 12 of Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, *opened for signature* 13 May 2004, C.E.T.S. 194 (2004) (*entered into force* 1 June 2010). *See* Mahon, *supra* note 8, at 636; Christian Courtis & Julieta Rossi, *Individual Complaints Procedure, in* The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary 37, 58–61 (Malcolm Langford, Bruce Porter, Rebecca Brown, & Julieta Rossi eds., 2016).
18. The CESCR has in a number of contexts affirmed the extra-territorial application of Covenant obligations, most recently in its General Comment No. 24. General Comment No. 24, *State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, adopted* 19 May-23 June 2017) U.N. ESCOR, Comm'n. on Econ., Soc. & Cult. Rts., 61st Sess., ¶ ¶ 25–37, U.N. Doc. E/C.12/GC/24 (2017). See the criticism of Vandenbogaerde & Vandenhole, *supra* note 15, at 232–33; Courtis & Rossi, *supra* note 17, at 49–51.
19. OP-ICESCR, *supra* note 1, art. 2. On the potential for the redress of extra-territorial violations of Covenant rights under the OP-ICESCR, *see* Christian Courtis & Magdalena Sepúlveda, *Are Extra-Territorial Obligations Reviewable under the Optional Protocol to the ICESCR?*, 27 Nordic J. Hum. Rts. 54 (2009).

The most striking and unique feature of the OP-ICESCR is the incorporation of an express provision prescribing the assessment standard to be applied by the CESCR to the examination of communications under the OP. Article 8(4) of the OP 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.[20]

This provision was included in response to states' concerns that the OP would remove or restrict a legitimate realm of sovereign discretion in economic, social, and cultural policy-making. During the negotiations, certain states, particularly the United States, proposed a threshold of "unreasonableness" as the relevant review standard under the Optional Protocol while others wanted an express reference to a "margin of appreciation" or "margin of discretion."[21] Ultimately, Article 8(4)— inspired by similar language in South Africa's landmark Constitutional Court judgment of *Government of the Republic of South Africa v. Grootboom*[22]—reflected the agreed compromise language.[23] The inclusion of this reasonableness review standard (along with other provisions) have led Arne Vandenbogaerde and Wouter Vandenhole to argue that the negotiations process watered down the text of the OP-ICESCR to the extent that it no longer represents an effective mechanism to redress violations of economic, social, and cultural rights but rather reflects "long-standing ideological prejudices against ESC rights."[24]

However, the inclusion of an express review standard in the text of the OP does not necessarily undermine its efficacy, but rather is in line with the doctrine of the Committee to allow states a reasonable margin of policy latitude in implementing the Covenant.[25] For example, in its 2007 Statement

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20. OP-ICESCR, *supra* note 1, art. 8(4). Subsequently, a similar provision was incorporated into the Optional Protocol on the Rights of the Child on a communications procedure. This provision, Article 10(4), applies to the examination of communications alleging violations of economic, social and cultural rights in the Convention. *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted* 19 Dec. 2011, G.A. Res. 66/138, U.N. GAOR, 66th Sess., art. 10(4), U.N. Doc. A/RES/66/138 (*entered into force* 14 Apr. 2014).
21. Vandenbogaerde & Vandenhole, *supra* note 15, at 223–26; *see also* de Albuquerque, *supra* note 2, at 170–71, 174–75; Brian Griffey, *The "Reasonableness" Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* 11 Hum. Rts. L. R. 275, 291–303 (2011).
22. Government of the Republic of South Africa v. Grootboom 2000 (1) SA 46 (CC) ¶ 41 (S. Afr.).
23. Bruce Porter, *Reasonableness and Article 8(4), in* The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *supra* note 17, at 173, 178–84.
24. Vandenbogaerde & Vandenhole, *supra* note 15, at 219. The authors argue that there have been a number of departures in the text of the OP from established *UN acquis* in communications procedures, which they attribute to an "at times absolutist search for consensus." *Id.* at 32.
25. A choice of means is implicit in the concepts of the duty "to take steps" and the realization of Covenant rights "by all appropriate means" in Article 2 of the ICESCR. ICESCR,

on the obligation of states parties to take steps to the "maximum available resources" under the Optional Protocol to the Covenant, the Committee reaffirmed that it "always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances."[26] The Committee demarcates this realm of policy choice by specifying a set of circumstances that gives rise to burdens of justification on a state party such as a failure to fulfill "minimum core obligations,"[27] "differential treatment based on prohibited grounds,"[28] and the adoption of "deliberately retrogressive measures."[29]

Moreover, the OP-ICESCR text incorporates features that are not present in earlier UN communications mechanisms that strengthen its capacity to advance accountability for violations of the Covenant. In particular, Article 8(1) creates the possibility of third-party submissions (*amicus curiae* briefs) through providing that the Committee may examine the communications received "in the light of all documentation submitted to it, provided that this documentation is submitted to the parties concerned." In addition, Article 8(3) of the Optional Protocol vests in the Committee a discretion to consult a wide array of "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." This openness to submissions from civil society and to alternative sources of information enriches the factual and normative sources from which the Committee can draw in developing its jurisprudence.[30]

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*supra* note 3, art. 2(1). *See also,* General Comment No. 3, *The Nature of States Parties Obligations, adopted* 13–14 Dec. 1990, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 5th Sess., 49th & 50th mtg., ¶ 8, U.N. Doc. E/C.12/1990/8 (1990).

26. *An Evaluation of the Obligation to Take Steps to the 'Maximum of Available Resources' Under an Optional Protocol to the Covenant,* U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 38th Sess., ¶ 11, U.N. Doc. E/C.12/2007/1 (2007).
27. General Comment No. 3, *supra* 25, ¶ 10.
28. General Comment No. 20, *Non-Discrimination in Economic, Social and Cultural Rights*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 42d Sess., Agenda Item 3, ¶ 5, U.N. Doc. E/C.12/GC/20 (2009).
29. General Comment No 3, *supra* note 25, ¶ 9; General Comment No. 19, *The Right to Social Security,* U.N. ESCOR, Comm. on Econ., Soc, & Cult. Rts., 39th Sess., ¶ 42, U.N. Doc. E/C.12/GC/19 (2008); *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights, adopted* 24 June 2016, U.N. ESCOR, Comm. on Econ., Soc, & Cult. Rts., 58th Sess., ¶ 4, U.N. Doc E/C.12/2016/1 (2016) [hereinafter *Public Debt*].
30. Although *amicus*-briefs are accepted in the communications procedures of other UN human rights treaties such as the Human Rights Committee and the Committee on the Elimination of Discrimination against Women, they are introduced through the parties to the communication, and not through third parties. *See* Courtis & Rossi, *supra* note 17, at 68. The recently adopted Rules of Procedure of the Human Rights Committee make express provision for the receipt of third-party submissions under the Optional Protocol. *See Rules of Procedure of the Human Rights Committee, adopted* 9 Jan 2019, Hum. Rts. Comm., 124th Sess., 3567th mtg., Rule 96, U.N. Doc. CCPR/C/3/Rev.11 (2019) [hereinafter *Rules of Procedure*].

Ultimately, the efficacy of an international quasi-adjudicatory mechanism such as the OP-ICESCR does not depend on its textual provisions alone but also on its interpretation by the relevant supervisory body. The interpretative approach adopted by a supervisory body such as the CESCR is key to building the legitimacy of the relevant mechanism and its decisions. The following part examines the factors that contribute to the normative legitimacy of quasi-judicial bodies in international human rights law and considers their applicability in the context of the OP-ICESCR. A clearer understanding of the concept of normative legitimacy in this context provides a helpful theoretical lens through which to evaluate the emerging jurisprudence of CESCR under the OP.

## III. NORMATIVE LEGITIMACY AND THE OP-ICESCR

The traditional institutional legitimacy conundrum of judicial review at domestic levels[31] manifests differently in the context of communications procedures under the UN human rights treaties. The supervisory bodies are composed of nationals elected by state parties to the relevant treaty with reference to "equitable geographical [representation] . . . and to the representation of the different forms of civilization and of the principal legal systems."[32] In the case of CESCR, the Committee is not a creature of the treaty itself but was established in 1985 by resolution of the United Nations Economic and Social Council (ECOSOC).[33] Its members are elected, not by the states parties to the relevant treaty as with the other UN treaties, but by the fifty-four members of ECOSOC.[34] Given their location and composition, treaty-supervisory bodies are far more remote than national level judiciaries, deepening their legitimacy deficits.

On the other hand, the views and remedial recommendations adopted by human rights treaty bodies under communications procedures are not formally legally binding. They represent authoritative determinations by independent supervisory organs of the obligations imposed by the relevant treaty. The duty of states parties to comply with their treaty obligations implies a duty to cooperate in good faith with the relevant treaty-body in

31. For an excellent assessment of institutional legitimacy issues in the context of judicial review of socio-economic rights, see Aoife Nolan, Children's Socio-Economic Rights, Democracy and the Courts 93–133 (2011).
32. See ICCPR, *supra* note 4, art. 31, for additional criteria for elections of members of the Human Rights Committee.
33. *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*, ESCOR Res. 1985/17, 22d plen. mtg. (1985).
34. *See* ICESCR, *supra* note 3, § IV.

relation to its formally adopted views.[35] In the case of the OP-ICESCR, a state party is obliged to give "due consideration to the views of the Committee, together with its recommendations" and must submit within six months "a written response, including information on any action taken in the light of the views and recommendations of the Committee."[36] The state party may ultimately, after thorough and good faith consideration of the views and recommendations of the Committee, elect not to give effect to these views in domestic law.[37]

The aforementioned soft binding force of treaty-body views under communications procedures gives rise to significantly fewer legitimacy concerns than the strictly binding decisions that emerge from international or regional human rights courts.[38] It allows for a more differentiated and dialogic relationship between human rights treaties bodies and what Andreas Follesdal describes as the national "compliance community."[39] The latter includes the national legislatures, the executive and administrative authorities, courts, and civil society.[40] These diverse constituencies may respond in different ways to the views issued by a treaty body under a communications procedure. For example, even if the executive and legislature, after careful consideration, decide not to comply with the relevant views, those views may influence the decisions of domestic courts or administrative decision-makers[41] or may form the basis of civil society advocacy for legislative or policy reforms.

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35. On the general principle of good faith in compliance with treaty obligations, see Vienna Convention on the Law of Treaties, art. 26, U.N. Doc. A/CONF.39/27 (1969), 1155 U.N.T.S. 331 (*entered into force* 27 Jan. 1980), *reprinted in* 8 I.L.M. 679 (1969). On the obligations of states parties under the Optional Protocol to the ICCPR, see General Comment No. 33, *The Obligations of States Parties Under the Optional Protocol to the International Covenant on Civil and Political Rights*, 25 June 2009, U.N. GAOR, Hum. Rts. Comm., 94th Sess., ¶ 11, 13, 15, U.N. Doc. CCPR/C/GC/33 (2009).
36. OP-ICESCR, *supra* note 1, art. 9(2).
37. For a nuanced analysis of the status of the 'views' of UN treaty bodies, see Rosanne Van Alebeek & André Nollkaemper, *The Legal Status of Decisions by Human Rights Treaty Bodies in National Law, in* U.N. Human Rights Treaty Bodies: Law and Legitimacy 356, 382–87 (Helen Keller & Geir Ulfstein eds., 2012).
38. Compare the articles establishing the binding force of the judgments of the European Court of Human Rights, the African Court on Human and Peoples' Rights, and the Inter-American Court of Human Rights: Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* 16 Sept. 1963, art. 46, Eur. T.S. 46, 7 I.L.M. 978 (1968) (*entered into force* 2 May 1968); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights *adopted* 10 June 1998, art. 30 *(entered into force* 25 Jan. 2004); American Convention on Human Rights, *signed* 22 Nov. 1969, art. 68, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (*entered into force* 18 July 1978).
39. Andreas Follesdal, *The Legitimacy Deficits of the Human Rights Judiciary: Elements and Implications of a Normative Theory,* 14 Theoretical Inquiries L. 339, 342 (2013).
40. *Id.* at 342–43.
41. *Id.*at 354. On the obligation of administrative decision-makers to take the ICESCR in making administrative decisions, *see* General Comment No. 9, *supra* note 7, ¶ 9.

Follesdal argues that judicial or quasi-judicial bodies with weak enforcement powers require high levels of perceived normative legitimacy to prompt voluntary compliance with their decisions.[42] Normative legitimacy, according to Follesdal, "concerns the nature of the various forms of *normative 'pull'* or compliance-eliciting force that the concept 'legitimacy' exerts with regard to the international judiciary."[43] The central question posed by the concept of normative legitimacy is why the decisions of an international treaty body should "count as (defeasible) reasons for other actors when they decide what to do?"[44] This implies that, given the formally non-binding nature of UN treaty-bodies' views under communications procedures, their decisions should be capable of influencing the actions of relevant actors "without the threat of sanctions."[45]

How is this normative legitimacy to be achieved in the context of the Committee's jurisprudence under the OP-ICESCR, given the deep-seated political convictions of states that matters of economic and social policy fall pre-eminently within the domain of the sovereign decision-making power of states? Procedurally, the Committee must develop admissibility requirements that are aligned to the general practice of UN human rights treaty bodies and that are fair to both authors of communications and states parties.[46] In the exercise of its merits jurisdiction, the Committee must respect the sovereignty of states as the primary actors responsible for national law and policy-making according to democratically chosen priorities. If the Committee is perceived to be usurping the policy-making role of states parties, it runs the risk of systemic non-compliance with its views as well as a failure of states to ratify the OP-ICESCR thereby undermining its legitimacy.[47] At the same time, excessive deference to state decision-making impacting economic, social, and cultural rights will undermine its normative legitimacy with key constituencies of its national "compliance community," particularly victims of rights violations, civil society organizations, and national social movements.[48]

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42. Follesdal, *supra* note 39, at 346.
43. *Id.* at 345, referencing Thomas M. Franck, The Power of Legitimacy Among Nations 24 (1990). Follesdal distinguishes normative legitimacy from social legitimacy which concerns whether the public generally regarding the judicial or quasi-judicial body as worthy of support. That is, "does the judiciary command general public belief that it has *rightful authority* or secure general compliance?" Follesdal, *supra* note 39, at 345.
44. *Id.*
45. *Id.* at 346 (italics used for emphasis omitted).
46. On the contribution of fair procedures and rules to the legitimacy of treaty bodies, see Helen Keller & Geir Ulfstein, *Introduction, in* U.N. Human Rights Treaty Bodies: Law and Legitimacy, *supra* note 37, at 1, 8.
47. On the interaction between effectiveness and legitimacy in the context of U.N. human rights treaty bodies, see *id.* at 9.
48. On the significance for victims of violations of economic, social, and cultural rights of the Committee avoiding inappropriate deference to governments' own assessments of the reasonableness of their policy choices, see Porter *supra* note 23, at 191–200.

National and international civil society mobilization plays a crucial role in catalyzing the change-inducing effects of international or regional human rights treaties.[49] Accordingly, the central challenge for the Committee in constructing its normative legitimacy is to allow appropriate space for national policy choices while asserting its own authority to assess whether the relevant choices are consistent with Covenant obligations. In doing so, its assessment of communications under the OP must be guided by a set of coherent, predictable criteria underpinned by persuasive human rights reasoning. As Geir Ulfstein observes, the persuasiveness of the reasoning of treaty-bodies is particularly important for their normative legitimacy, as they cannot rely on the binding character of their findings.[50] While this holds true for all the UN human rights treaty bodies, it is particularly important in the context of the Committee's quasi-adjudicative role under the OP-ICESCR given the longstanding political and legal aversions to the justiciability of economic, social, and cultural rights.[51]

In light of the factors discussed above that influence the normative legitimacy of an international human rights communications procedure, the following part analyzes the emerging jurisprudence of CESCR up to and including its sixty-forth session in 2018. The approach of the Committee to admissibility and procedural issues is considered first, before proceeding to an analysis of its main decisions on the merits and accompanying remedial recommendations.

## IV. THE JURISPRUDENCE

At the end of its sixty-fourth session, the Committee had adopted seventeen Views under the OP.[52] Of these, thirteen were declared inadmissible, and

49. *See* Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices, in* The Power of Human Rights: International Norms and Domestic Change (Thomas Risse, Stephen C. Ropp, & Kathryn Sikkink eds., 1999); Sally Engle Merry, Human Rights & Gender Violence: Translating International Law into Local Justice (2006); Frans Viljoen, *The African Human Rights System and Domestic Enforcement, in* Social Rights Judgments and the Politics of Compliance: Making It Stick 351 (Malcom Langford, César Rodríguez-Garavito & Julieta Rossi eds., 2017).

50. Geir Ulfstein, *Individual Complaints, in* U.N. Human Rights Treaty Bodies: Law and Legitimacy, *supra* note 37, at 73, 113. In a similar vein, see Dinah Shelton, *The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies, in* Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum VOL I 553, 574–75 (Holger P. Hestermeyer et. al. eds., 2012).

51. *See*, e.g., the extended argument against the adoption of the OP-ICESCR. Michael J. Dennis & David P. 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?,* 98 Amer. J. Int'l L. 462 (2004).

52. *Committee on Economic, Social and Cultural Rights, Report on the 63rd and 64th Sessions*, U.N. ESCOR, Comm. on. Econ., Soc., & Cult. Rts., 63–64th Sess., ¶ ¶ 76–80, U.N. Doc. E/C.12/2018/3. At the end of 2018, the Committee had registered sixty-three communications. *Id.*

four decisions on the merits were adopted. Violations of Covenant rights were found in three communications and no violation in one communication. The Committee's jurisprudence on admissibility and communications not revealing a clear disadvantage will be considered first, before proceeding to an analysis of its merits jurisprudence.[53]

## A. Admissibility Criteria and Communications not Revealing a Clear Disadvantage

### *1. Admissibility Criteria*

Admissibility criteria under international human rights communications procedures primarily aim to ensure that there is compliance with the formal requirements established by the relevant protocol for admitting communications. These requirements include ensuring that the communication falls within the temporal jurisdiction of the relevant treaty (*ratione temporis*); that the communication is compatible with the provisions of the relevant treaty (*ratione materiae*); that the state has had a fair opportunity to redress the alleged violation through domestic legal remedies (the exhaustion of the domestic remedies rule); that there is no completed or pending examination of the communication either by the Committee or under other procedures of international investigation or settlement (*res judicata* and *litispendence*); and that the communication is sufficiently substantiated and does not represent an abuse of the petition procedure.[54] All these admissibility requirements are contained in Article 3 of the OP-ICESCR.

In its jurisprudence under consideration, the Committee has provided a relatively settled interpretation of almost all of the aforementioned admissibility requirements. The *ratio temporis* admissibility criterion in Article 3(2)(b) of the Optional Protocol requires the Committee to declare a communication inadmissible when "the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date."[55]

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53. The Committee has also considered a number of interim measures requests under Article 5 of the Optional Protocol. In 2018, the Committee received 111 requests for interim measures, and granted 59 of the requests received. 110 of these interim measures requests were in respect of Spain. E-mail from Ms. Maria Muñoz Maraver, CESCR, Petitions Unit, Office of the High Commissioner for Human Rights, to author (7 Nov. 2019) (on file with author).
54. On admissibility requirements in the context of communications procedures of the UN human rights treaties, see generally Olivier De Schutter, International Human Rights Law: Cases, Materials, Commentary 890 (3d ed. 2019).
55. OP-ICESCR , *supra* note 1, art. 3(2)(b). In *Communication No. 1/2013*, U.N. Doc. E/C.12/57/D/1/2013 (2016), the Committee treated the continued payment of a reduced monthly non-contributory disability benefit to a prisoner after the entry into force of the OP for Spain as a continuing violation for the purposes of Article 3(2)(b). Rodríguez v. Spain, *Communication No. 1/2013: Views Adopted by the Committee at its Fifty-Seventh*

The Committee clarified that a fact that may constitute a violation of the Covenant "does not have a continuing character merely because its effects or consequences extend in time."[56] However, a communication will be admissible *ratio temporis* where a domestic court or tribunal has a substantive opportunity to remedy the violation of Covenant rights after the date of entry into force of the Optional Protocol for the state party.[57] In order to constitute "facts" falling within the temporal jurisdiction of the Committee, the relevant domestic legal proceedings must be capable of redressing the violations alleged, as opposed to a consideration of purely formal points or errors of law,[58] or abstract proceedings with no possibility of providing reparation for the violations alleged by the authors.[59]

Article 3(1) entrenches the exhaustion of domestic remedies rule and provides that the Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. An express exception is created where the application of such remedies is "unreasonably prolonged."[60] The text of Article 3(1) does not create an express exception for remedies that are inaccessible or ineffective. However, in line with the practice of other international and regional human rights communications mechanisms,[61] the Committee has held that the onus is on the state party to raise this ground of inadmissibility at the outset, to clearly set out which remedies should have been exhausted, and to show why the relevant remedies "are appropriate and effective."[62] The Committee has further clarified that domestic remedies for the purposes of the rule are:

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*Session,* U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 57th Sess., ¶ 8.4, U.N. Doc. E/C.12/57/D/1/2013 (2016) [hereinafter Rodríguez v. Spain].

56. Merino Sierra v. Spain, *Views Adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Concerning Communication No. 4/2014,* U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 59th Sess., ¶ 6.7, U.N. Doc. E/C.12/59/D/4/2014 (2016) [hereinafter Merino Sierra v. Spain]; Flores v. Ecuador, *Views Adopted by the Committee at its Sixty-Second Session Concerning Communication No. 14/2016, adopted* 4 Oct. 2017, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 62d Sess., ¶ 9.7, U.N. Doc. E/C.12/62/D/14/2016 (2017) [hereinafter Flores v. Ecuador]. The Committee expressly relies in this regard on the approach adopted by the International Law Commission in its draft articles on state responsibility. United Nations, Yearbook of the International Law Commission 60, ¶ 6 (2001).
57. I.D.G. v. Spain, *Communication No.2/2014: Views Adopted by the Committee at its Fifty-Fifth Session,* U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 55th Sess., ¶ 9.3, U.N. Doc. E/C.12/55/D/2/2014 (2015) [hereinafter I.D.G. v. Spain]; Calero v. Ecuador, *Views Adopted by the Committee under the Optional Protocol to the Covenant Concerning Communication No.10/2015*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 63rd Sess., ¶ ¶ 9.4–9.5, U.N. Doc. E/C.12/63/D/10/2015 (2018) [hereinafter Calero v. Ecuador].
58. I.D.G v. Spain*, supra* note 57, ¶ 9.3.
59. Flores v. Ecuador, *supra* note 56, ¶ 9.10.
60. OP-ICESCR, *supra* note 1, art. 3(1).
61. *See* Courtis & Rossi, *supra* note17, at 52–54.
62. I.D.G v. Spain, *supra* note 57, ¶ ¶ 9.4–9.5.

> All remedies available within the domestic legal order, both ordinary and extraordinary, as may be pursued by the alleged victim or his representatives in direct relation with the events that initially gave rise to the claimed violation and that, *prima facie*, may be reasonably considered as effective for remedying the claimed violations of the Covenant.[63]

This definition is also relevant for the purposes of the time bar in Article 3(2)(a) of the OP as the starting point for calculating the one-year time period when the "author or his legal representative have sufficient knowledge of the final ruling" of the domestic court "to be able to prepare a communication for submission to the Committee and provide proof of the exhaustion of domestic remedies."[64] However, although the obligation to exhaust domestic remedies only applies when the relevant remedies are effective, the mere perception that domestic remedies are ineffective, for example, due to delays in the court system, does not exempt the author from the obligation to exhaust them.[65]

In *Calero v. Ecuador*, the Committee had an opportunity to consider the *ratione materiae* admissibility requirement in Article 3(2)(d) of the Covenant.[66] It rejected the state party's submission that the author's complaints regarding a lack of due process and timely access to information concerning her right to benefits under the Ecuadorian social security scheme were not related to a violation of a Covenant right. According to the Committee, the procedural irregularities and lack of effective judicial remedies were, "intimately linked" and "inseparable" from the violation of the right to social security under Article 9 of the Covenant.[67] This decision unequivocally establishes that procedural safeguards are an integral component of the economic, social, and cultural rights protected in the Covenant. A communication will accordingly be compatible with the Covenant when it alleges serious procedural irregularities in the protection of Covenant rights by states parties.

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63. Medina v. Ecuador, *Views Adopted by the Committee at its Sixty-third Session Concerning Communication No.7/2015*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 63d Sess., ¶ 8.7, U.N. Doc. E/C.12/63/D/7/2015 (2018) [hereinafter Medina v. Ecuador].
64. Rodríguez v. Spain, *supra* note 55, ¶ 8.3 The Committee held that when "the author . . . has the right to be notified, or is notified, by means of a copy of the final decision of a national court that marks the exhaustion of domestic remedies, the starting point for calculating [the Article 3(2)(a) time period] must be considered to be the day following the date of notification." The exception to the one-year time bar is where the author can demonstrate that it had not been possible to submit the communication within this time limit. *Id.*
65. A.M.B. v. Ecuador, *Communication No. 3/2014: Views Adopted by the Committee at its Fifty-eighth Session*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 58th Sess., ¶ 7.6, U.N. Doc. E/C.12/58/D/3/2014 (2016). The author did not pursue available administrative remedies based on a general statement by the president of the Council of the Judiciary regarding delays in administrative court proceedings. *See id.* ¶¶ 5.4, 6.3, 7.5.
66. Calero v. Ecuador, *supra* note 57, ¶¶ 9.6–9.7.
67. *Id.* ¶ 9.7.

The admissibility criteria contained in Article 3(2)(e) essentially requires authors to formulate their communications based on well-founded and properly substantiated allegations. This is important both to afford the state a fair opportunity to respond to credible allegations of violations of Covenant rights and enable the Committee to have a sufficient factual basis for evaluating the communication in terms of the Protocol.[68] In this context, the Committee has been careful to attempt to demarcate its role clearly from that of the domestic judicial authorities. Thus, it has held that its own role is confined to analyzing whether the events described in a particular communication, including the application of national legislation, disclose a violation by the state party of the economic, social, and cultural rights in the Covenant.[69] It is the responsibility of the domestic courts to assess the facts and evidence in each individual case, as well as to interpret the applicable domestic laws. The Committee will only intervene when the assessment of evidence or the interpretation of domestic law by the domestic courts "was manifestly arbitrary or equivalent to a denial of justice" amounting to a violation of a Covenant right.[70] Authors of communications bear the primary responsibility to provide the Committee "with sufficient information and documentation to demonstrate that one of these situations applies."[71] It is insufficient for authors to rely solely on an assertion that a domestic court has incorrectly interpreted the applicable facts or domestic law. They must show that the interpretation or application of domestic law to the relevant facts amounts to a violation of the obligations imposed by the Covenant.[72] In *Calero v. Ecuador,* the state party argued that "the communication was manifestly ill-founded" in that the Committee was essentially being called upon to act as "a fourth level of jurisdiction" in seeking to have domestic administrative and judicial decisions overturned.[73] This argument was rejected on the basis that the author was not calling into question the evaluation of the evidence or the interpretation of domestic law by the national authorities.[74] Her allegation was rather that the relevant legislation and the interpretation thereof by the social security institutions and domestic courts amounted to a violation of her right to social security in Article 9 of the Covenant.[75]

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68. Coelho v. Portugal, *Communication No. 21/2017*: *Views Adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Concerning Communication No. 21/2017,* U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 61st Sess., ¶ 4.3, U.N. Doc. E/C.12/61/D/21/2017 (2018) [hereinafter Coelho v. Portugal].
69. Rodríguez v. Spain, *supra* note 55, ¶ 12; I.D.G. v. Spain, *supra* note 57, ¶ 13.1; Medina v. Ecuador, *supra* note 63, ¶ 8.10.
70. Medina v. Ecuador, *supra* note 63, ¶ 8.10
71. *Id.*; V*iews Adopted by the Committee at its Sixty-fourth Session Regarding Communication No. 19/2016*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 64th Sess., ¶ ¶ 6.4–6.5, U.N. Doc. E/C.12/64/D/19/2016 [hereinafter Fernández Martínez v. Spain].
72. *Id.*
73. Calero v. Ecuador, *supra* note 57, ¶ 4.4.
74. *Id.* ¶ 9.9.
75. *Id.*

The Committee further found the allegations to be sufficiently substantiated even though the author had not explicitly raised the allegation of gender discrimination in relation to her right to social security in terms of Article 2(2) of the Covenant.[76] In this regard, the Committee held that it was "empowered to examine the possible violation of articles not invoked by the parties, provided that it does not look beyond the claims made in the communication."[77] The key consideration was that the documentation submitted disclosed facts that clearly revealed a possible violation of the Covenant and in respect of which the parties in adversarial proceedings "had the opportunity to present their respective observations and comments."[78] The Committee considered that the facts presented and the information contained in the case file raised issues under Article 2(2) of the Covenant.[79] The lack of an express reliance on gender discrimination in relation to the author's right to social security could potentially have raised difficulties under the exhaustion of domestic remedies rule. However, the potential inadmissibility of the communication under this ground was not considered as the state party had not objected to admissibility in terms of Article 3(1).[80]

In relation to the *res judicata* and *litispendence* admissibility requirement in Article 3(2)(c),[81] the Committee has adopted a similar approach to that of the Human Rights Committee by holding that a complaint will be inadmissible as a result of being:

> Examined by another procedure of international investigation or settlement if the examination by that procedure: (i) related to the same matter, i.e., related to the same parties, the same events and the same substantive rights; and (ii) went beyond the examination of the purely formal criteria of admissibility and involved a sufficient consideration of the merits.[82]

### *2. Communications Not Revealing a Clear Disadvantage*

The Committee's interpretation of Article 4 of the Optional Protocol should alleviate concerns that this provision will constitute a procedural bar to the consideration of communications under the OP-ICESCR.[83] The Committee

76. The issue of gender discrimination in the social security system of Ecuador was pertinently raised in the third-party intervention of the International Network on Economic, Social and Cultural Rights (ESCR-Net). *See* Calero v. Ecuador, *supra* note 57, ¶ ¶ 7.1–7.2. The state party objected to this ground on the basis that the author had not expressly raised this ground before the national courts or the Committee. *Id.* ¶ ¶ 8.1–8.2.
77. *Id.* ¶ 9.10. The Committee cited a wide range of international and regional international law sources in relation to the application of the principle of *iura novit curia*. *Id.* 8 n.14.
78. *Id.* ¶ 9.10. *See* supporting citations at *id.* 10 n.17.
79. *Id.* ¶ 9.10.
80. *Id.* ¶ 9.11.
81. According to this provision, a communication is inadmissible if "[t]he same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement." OP-ICESCR, *supra* note 1, art. 3(2)(c).
82. Merino Sierra v. Spain, *supra* note 56, ¶ 6.4.
83. *See* Mahon and Courtis & Rossi cited *supra* note 17 and accompanying text.

has held that this provision does not constitute an admissibility requirement for communications under the OP according to a "literal and systematic interpretation."[84] Instead, it vests in the Committee "the discretionary power not to consider a communication that fails to meet a minimal level of severity if necessary in order to focus its resources on best discharging its functions."[85] A number of factors will be considered in exercising its discretion including the Committee's existing jurisprudence, the circumstances of the case, especially "the nature of the rights allegedly violated, the seriousness of the alleged violations, [and] the possible effects of the violation on the alleged victim's personal situation."[86]

### *3. Conclusion*

It is submitted that the Committee's jurisprudence on admissibility and procedural provisions of the OP such as Article 4 represents a balanced approach that is largely consistent with that of other international and regional human rights treaty bodies. In submitting communications, authors bear the responsibility of ensuring that available, effective domestic remedies are exhausted and that allegations are consistent with the subject-matter jurisdiction of the Covenant and properly substantiated. At the same time, it is evident that the Committee does not endorse a rigid procedural approach, preferring a system with built-in flexibilities designed to promote access to justice for alleged victims of violations of Covenant rights. It clearly perceives the purpose of the admissibility and procedural dimensions of the Covenant to ensure fairness between the parties in a manner that respects both the text of the Optional Protocol and the general body of international human rights law applicable to communications procedures.

The Committee has also been open to receiving third party submissions and to alternative sources of information.[87] As noted in the analysis of the merits decisions in the following part, the Committee has admitted third party submissions from coalitions of NGOs, particularly the International Network for Economic, Social and Cultural Rights (ESCR-Net), and has even accepted a third party submission from one of the thematic special procedures of the Human Rights Council, the UN Special Rapporteur on the

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84. Djazia and Bellili v. Spain, *Views Adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with Regard to Communication No. 5/2015*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 61st. Sess., ¶ 11.5, U.N. Doc. E/C.12/61/D/5/2015, (2017) [hereinafter Djazia and Bellili v. Spain].
85. *Id.*
86. *Id.* In this regard, the Committee cited the following jurisprudence of the European Court of Human rights: Gagliano Giorgi v. Italy, 2012-II, Eur. Ct. H.R. 200, ¶ ¶ 54–56; Giusti v. Italy, No. 13175/03, ¶ 34, 18 Oct. 2011.
87. *See supra* note 30 and accompanying text.

Right to Housing.[88] In this regard, the Committee's approach finds express support in the provisions of Articles 8(1) and (3) of the Optional Protocol.

The admissibility jurisprudence of the Committee creates a solid foundation for constructing its normative legitimacy. Admissibility requirements—such as the exhaustion of domestic remedies rule and the requirement that an author's communication be founded in a violation of Covenant rights rather than an incorrect interpretation of domestic law—respects the primacy of domestic law and remedies. At the same time, the Committee's generous approach to third party interventions and its refusal to interpret Article 4 as a procedural bar to the admissibility of communications is likely to build its legitimacy with community and civil society stakeholders. However, the more significant challenge faced by the Committee is negotiating the tensions between sovereignty and accountability in interpreting the substantive provisions of the Covenant and applying the reasonableness review standard in Article 8(4) of the OP through its merits jurisprudence. The following part examines how the Committee has responded to this challenge.

## B. Merits and Remedial Recommendations

### *1. I.D.G. v. Spain*

This first substantive decision of the Committee on the merits illustrates the role that procedural safeguards can play in protecting Covenant rights[89] and demonstrates how reliance on procedural standards can assist adjudicatory bodies to protect economic, social, and cultural rights without unnecessary intrusion in the substantive policy choices of states.

Ms. I.D.G.'s communication arose out of the 2007 to 2008 financial crisis in Spain, leading to record unemployment rates and a flood of foreclosures and evictions arising from defaults on mortgage payments.[90] The author complained that she had not received proper legal notice of the commencement of special mortgage enforcement procedures with respect

88. Djazia and Bellili v. Spain, *supra* note 84, ¶ 8.1. The Committee adopted interim guidance on third party interventions at its 59th session (19 Sept.-7 Oct. 2016). *Guidance on Third-Party Interventions*, Comm. On Econ., Soc. & Cult. Rts., 59th Sess. (2016). Initially, the Committee erroneously derived its competence to authorize third party submissions from Article 8(3) of the OP. S*ee* I.D.G. v. Spain, *supra* note 57, ¶ 6.1. However, the reference was altered in subsequent communications to a more generic reference to Article 8. An analysis of the text of Article 8 suggests that the correct source for the competence of the Committee to receive third party submissions is Article 8(1) of the OP.

89. *See generally*, Sandra Liebenberg, *Participatory Justice in Social Rights Adjudication* 18 Hum. Rts. L. Rev. 623 (2018).

90. I.D.G. v. Spain, *supra* note 57, ¶ ¶ 3.2, 6.2. *See also*, Human Rights Watch, Shattered Dreams: Impact Of Spain's Housing Crisis On Vulnerable Groups 3, 14–28 (2014).

to her home.[91] As a result, she was unable to mount a legal defense to these proceedings based on the right to housing in Article 11 of the Covenant.[92] After three unsuccessful attempts made by the Madrid Courts Central Notification and Enforcement Service to serve the relevant notice in person at the address of the mortgaged property, the trial court in Madrid authorized a public posting of the notification on the court notice board.[93] The author only became aware of the legal proceedings approximately six months later when she received notice of the auction of her home.[94]

A third-party submission by the ESCR-Net was authorized by the Committee.[95] It focused on the broader economic and social context of the housing crisis in Spain, as well as arguments pertaining to the substantive incompatibility of Spanish law governing mortgage enforcements against family homes with Article 11 of the Covenant.[96] In addition to emphasizing the importance of due process, the third party also made proposals regarding the incorporation of a proportionality analysis in the judicial assessment of mortgage foreclosure orders in individual cases.[97]

However, the Committee declined this invitation to consider the substantive aspects of Spanish mortgage enforcement law, confining its analysis to the issue of due process, particularly what constituted adequate notice of mortgage enforcement proceedings against a person's home.[98] Its first step was to affirm that the duty of states parties to adopt "appropriate measures" to give effect to Covenant rights in terms of Article 2(1) of the Covenant included the provision of effective judicial remedies.[99] Referring to its General Comment No. 7 on forced evictions,[100] the Committee recalled that adequate and reasonable notice and legal aid constituted essential procedural guarantees in legal proceedings that could lead to forced evictions.[101] It held that procedural protections were "equally applicable and appropriate" in other situations such as "mortgage foreclosure procedures, which could seriously affect the right to housing."[102]

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91. I.D.G. v. Spain, *supra* note 57, ¶ 3.3.
92. *Id.*
93. *Id.*, ¶ 2.5.
94. *Id.*, ¶ 2.6.
95. Third party submission by International Network for Economic, Social & Cultural Rights (Red-DESC) to Committee on Economic, Social and Cultural Rights, regarding I.D.G. v. Spain, *Communication No.2/2014* (4 Feb. 2015) (submission only available in Spanish and on file with the author).
96. I.D.G. v. Spain, *supra* note 57, ¶ 6.2.
97. *Id.* ¶ ¶ 6.3–6.4.
98. *Id.* ¶ 10.6.
99. *Id.* ¶ 11.3, *citing* General Comment No. 9, note 7, ¶ 2.
100. General Comment No. 7, *The Right to Adequate Housing: Forced Evictions*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 16th Sess., Annex IV, ¶ 1, U.N. Doc. E/C.12/1997/4 (1997).
101. I.D.G. v. Spain, *supra* note 57, ¶ 12.1.
102. *Id.*

The Committee proceeded to elaborate the essential requirements of proper notice in this context. It held that "all reasonable measures" and "every effort" should be made to ensure that the key notices and orders in administrative and judicial proceedings provide people with an effective opportunity to participate in such proceedings in defense of their rights.[103] It acknowledged that public posting of notices of judicial proceedings could be consistent with the right to effective judicial protection. However, public notice—particularly of the setting in motion of legal proceedings—should be "a measure of last resort" in human rights cases, which require judicial oversight.[104] Accordingly, public notice should be "strictly limited to situations in which all means of serving notice in person have been exhausted." [105] It must ensure "sufficient exposure" over a long-enough time period so that "the affected person has the opportunity to take full cognizance of the start of [legal] proceedings" and take the necessary steps to be a party to them.[106]

While acknowledging the repeated efforts of court officials to serve notice of the mortgage enforcement proceedings personally on the author, the Committee concluded that the state party was unable to show that it had "exhausted all available means" to effect personal service.[107] This irregularity in the notice procedure would not necessarily imply a violation of Article 11 of the Covenant if it had "no significant impact on the author's right to defend her full enjoyment of her home" through, for example, another procedural mechanism or remedy.[108] In this regard, the state party argued that there were other available domestic remedies through which the author could have challenged the mortgage enforcement proceedings. However, the Committee found that these other domestic remedies were ineffective in that they did not offer the possibility of suspending or stopping the auction of the author's home.[109]

The Committee concluded that the inadequate notice amounted to a violation of the author's right to housing that was not subsequently remedied by the state party.[110] It proceeded to issue both individual and general recommendations.[111] In respect of the author, the Committee recommended that the state party ensure that the auction of her property not proceed without due procedural protection and process, taking into account the Committee's

103. *Id.* ¶ 12.2.
104. *Id.* ¶ 12.3.
105. *Id.*
106. *Id.* ¶ 17(b).
107. *Id.* ¶ 13.3.
108. *Id.* ¶ 13.4.
109. *Id.* ¶ 13.6.
110. *Id.* ¶ 13.7.
111. The Committee's remedial competence is derived from OP-ICESCR, *supra* note 1, art. 9(1). *See* Viviana Krsticevic & Brian Griffey, *Remedial Recommendations, in* The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary 327 (Malcolm Langford, Bruce Porter, Rebecca Brown & Julieta Rossi eds., 2016).

General Comments Numbers 4 and 7.[112] Finally, with a view to guaranteeing non-repetition of similar violations in the future, the Committee recommended that Spain adopt appropriate legislative or administrative measures to align domestic mortgage enforcement law with the procedural principles outlined in its Views along with those set out in General Comment No. 7.[113]

Ultimately, the Committee focused only on the procedural question of the adequacy of the notice of legal proceedings. It did not engage with the broader substantive question as to whether Article 11 of the Covenant required Spanish courts to undertake a proportionality analysis in all mortgage enforcement cases involving a family home. Such an analysis would have entailed scrutinizing whether a foreclosure and sale of the author's home was necessary in the circumstances, including whether other less drastic alternatives were available.[114] Instead, the Committee engaged in a searching scrutiny of the procedural dimensions of Spanish mortgage enforcement law and process and developed a stringent "last resort" standard for public posting of notices where a person's home is threatened.[115] This represents a cautious, incremental approach by the Committee to the building of its normative legitimacy. In the absence of a frontal challenge to the substantive compatibility of Spanish mortgage enforcement law with Article 11 of the Covenant, the Committee sought to advance accountability for the right to housing through a rigorous interpretation of the requirements of procedural fairness in evictions arising from mortgage foreclosure proceedings.

### *2. López Rodríguez v. Spain*

*López Rodríguez v. Spain* presented an opportunity for the Committee to develop the models of review applicable to a reduction of an individual's social security benefits coupled with claims of discrimination in respect of this reduction. The Ministry for Equality and Social Welfare of the Regional Government of Andalusia had reduced the cash amount of the non-contributory disability allowance of a disabled prisoner following his imprisonment. The legal basis for the reduction was a provision in the General Social Security Act that required the authorities to take into account "assets and entitlements [. . .] of a welfare nature" being received by beneficiaries in calculating the benefits due to them.[116] Prior court decisions had confirmed that the costs of prisoners' upkeep could be treated as part of their income and revenue and accordingly deducted from their non-contributory social security allowances. The author alleged that the reduction in his disability benefits

112. I.D.G. v. Spain, *supra* note 57, ¶ 16.
113. *Id.* ¶ 17.
114. See the international and comparative law jurisprudence cited in the third-party submission of ESCR-Net. *Id.* ¶ ¶ 12–15.
115. I.D.G. v. Spain, *supra* note 57, ¶ 12.3.
116. Rodríguez v. Spain, *supra* note 55, ¶ 2.4.

violated the Covenant on two grounds. First, he argued that it constituted a violation of his right to social security in Article 9 of the Covenant[117] in that the authorities of a state party were bound to ensure that prisoners and members of their family retained their entitlement to social security benefits acquired prior to their admission to prison.[118] Second, the author alleged that the reduction constituted discriminatory treatment in violation of Article 2(2) of the Covenant read in conjunction with Article 9. He argued that he was being treated less favorably in relation to the following three groups:

> (a) other persons deprived of their liberty, who do not have to pay the cost of their upkeep in prison; (b) prisoners living in other autonomous communities whose non-contributory disability benefits are not reduced; and (c) persons at liberty who are temporarily housed in publicly funded facilities or who use public services such as hospitals, shelters, community kitchens or drug rehabilitation centres, where they receive free meals without any reduction in the benefits granted to them under the social security system.[119]

In relation to the complaint that the reduction constituted a direct infringement of Article 9 of the Covenant, the Committee—without expressly referring to Article 4 of the Covenant[120]—applied a traditional limitations analysis.[121] It held that restrictions to rights must be provided by law, be reasonable and proportionate,[122] and should guarantee "at least a minimum

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117. According to Article 9 of the Covenant, state parties "recognize the right of everyone to social security, including social insurance." ICESCR, *supra* note 3, art. 9.
118. Rodríguez v. Spain, *supra* note 55, ¶ 9.2.
119. *Id.*
120. Article 4 of the ICESCR, *supra* note 3, reads:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

On the interpretation of Article 4, *see* Manisuli Ssenyonjo, Economic, Social and Cultural Rights in International Law 150–53 (2d. ed. 2016).

121. Typical elements of a limitations inquiry applied by human rights adjudicatory bodies under constitutional and international law include whether: (i) the measure that restricts or interferes with rights is authorized by national law (the legality test); (ii) the limiting measure pursues or is consistent with a legitimate aim such as promoting the general welfare in a democratic society (the legitimate aim test); (iii) the measure is suitable or rationally related to the achievement of the legitimate aim in question (the suitability or rationality test); (iv) the limiting measures are necessary in the sense that there are not less restrictive measures available to the state to achieve the legitimate aim (the "less restrictive measures" or "minimal impairment" test); and (v) the burdens imposed by the measure on the affected person's rights are disproportional to its benefits (proportionality in the strict sense). *See* Yutaka Arai-Takahashi, *Proportionality, in* The Oxford Handbook Of International Human Rights Law 446, 450–52 (Dinah Shelton ed., 2015). In the context of constitutional law, see Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 243–370 (2012).
122. As will be seen, the Committee does not draw a sharp distinction between the concepts of reasonableness and proportionality, appearing to view proportionality as a species of reasonableness review, requiring heightened scrutiny of the state's justifications and

level of benefits."[123] It held that "reasonableness and proportionality . . . should be evaluated on a case-by-case basis" and should take "account of the beneficiary's personal situation."[124] Applying these criteria to the facts of the communication, the Committee was of the view that the reduction of the author's allowance was authorized by the General Social Security Act and pursued a purpose that was compatible with the Covenant, namely, the preservation of public resources necessary for the realization of individuals' rights.[125] In considering whether the means adopted to achieve this aim were reasonable, the Committee held that, in the case of non-contributory social security benefits, a margin of discretion should be accorded to states parties in deciding on the "appropriate use of tax revenue."[126] According to the Committee, it was not unreasonable in light of the need to allocate state resources effectively to reduce non-contributory benefits in circumstances where some of a beneficiary's needs were being provided directly by the state in prison.[127] However, this discretion to replace cash with in-kind support was not absolute and could constitute a violation of the right to social security in Article 9 if its effects were disproportionate.[128] The Committee found that there was no evidence that the measure had disproportionately negative effects on the author by impairing the satisfaction of his own or his family's basic needs[129] or affecting him particularly because of his disability.[130] Accordingly, it concluded that the information provided by the author did not support a finding that the reduction in his social security benefits constituted a violation of Article 9 of the Covenant.

The Committee's analysis in this context suggests that it will not apply a rule-like doctrinal analysis[131] in assessing the compatibility of reductions in social rights with the Covenant. Its analysis is framed in terms of the flexible,

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a balance between the harms imposed and the benefits of measure in furtherance of a legitimate public purpose (proportionality in the strict sense). On the affinities between reasonableness and proportionality, see Barak, *supra* note 121, at 371–78.

123. Rodríguez v. Spain, *supra* note 55, ¶ 11.3.
124. *Id.*
125. *Id.* ¶ 13.3.
126. *Id.*
127. *Id.*
128. *Id.* ¶ 13.4.
129. *Id.* In describing the general obligations imposed by Article 9, the Committee referred to the general duty of states to ensure access to a social security scheme that provides a minimum essential level of benefits to individuals and families to enable them to satisfy their basic needs. *Id.* ¶ 10.3. The doctrine of minimum core obligations harks back to the Committee's foundational General Comment No. 3, *supra* note 25, ¶ 10. On the concept of minimum core obligations in the context of the right to social security, see General Comment No. 19, *The Right to Social Security,* U.N. ESCOR, Comm. on Econ., Soc, & Cult. Rts., 39th Sess., ¶ 59(a), U.N. Doc29, E/C.12/GC/19 (2008).
130. Rodríguez v. Spain, *supra* note 55, ¶ 13.4.
131. On the distinction between rules and standards, see Giacinto della Cananea, *Reasonableness in Administrative Law, in* Reasonableness and Law 295, 307–08 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009).

case-specific analysis of a limitations inquiry. A wide latitude is afforded to the state in setting the conditions for non-contributory social security benefits in the light of their implications for public budgets. The Committee's reasoning suggests that the limits of this latitude lie in the deprivation of minimum essential needs or the imposition of a discriminatory burden—in this particular case, on the grounds of disability.

A similar approach was adopted in the assessment of the author's discrimination claims. The Committee commenced its analysis by recalling its doctrine in General Comment No. 20 that "not every instance of differential treatment constitutes discrimination, if the criteria for such differential treatment are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."[132] It held that the fact that the author was both a person with a disability and deprived of his liberty exposed him to a greater risk of discrimination, thereby warranting stricter scrutiny of his discrimination claims.[133] In relation to all three elements of the discrimination claim, the Committee concluded that the author had not laid a proper legal or factual basis to support his claims of discrimination. The author had not shown that there was a legal difference in treatment or that the comparator groups were appropriate.[134] In relation to the third ground, the Committee noted that there were indeed "significant similarities" between the situation of the author and a recipient of a non-contributory allowance at liberty who "receives board or lodging free of charge in a public service facility such as a hospital."[135] However, it concluded that despite the similarities, there were "also significant differences between the two situations that explain how the State can treat them differently without being guilty of discrimination."[136] First, the indeterminate periods and voluntary nature of usage of these other public services would make it administratively impractical to apply a similar deduction to that applied to prisoners.[137] Furthermore, the Committee held that hospitals and shelters were "an integral, indissociable part" of the services provided by the State to vulnerable groups to ensure protection of their basic rights, such as the right to health and the right to food.[138] It accordingly concluded that it would be unreasonable to deduct the costs of the provision of these services from the social security benefits of those that made use of them.

In conclusion, the reasonableness standard applied by the Committee in relation to the component of the author's claim based directly on the

132. Rodríguez v. Spain, *supra* note 55, ¶ 14.1.
133. *Id.*
134. *Id.* ¶ ¶ 14.2–14.4.
135. *Id.* ¶ 14.6.
136. *Id.*
137. *Id.* ¶ 14.7.
138. *Id.* ¶ 14.8.

right to social security incorporates elements of a proportionality analysis.[139] This model of review seeks to hold the state accountable for acts or omissions that have a disproportionate impact on the enjoyment of Covenant rights in relation to the purposes of the impugned measure. However, the approach adopted by the Committee in *López Rodríguez* placed the burden of producing convincing evidence of a disproportional impact on Covenant rights squarely on the author. Moreover, the Committee did not conduct a rigorous inquiry into whether there were less restrictive measures available to the state party for achieving the legitimate aim of preserving social security resources.[140] In the *Djazia and Bellili v. Spain* communication considered next, the Committee applies a more stringent review standard of "proportionality-inflected reasonableness"[141] and places key evidential and legal burdens on the state, rather than the authors.

### 3. *Djazia and Bellili v. Spain*

The third merits decision of the Committee, *Djazia and Bellili v. Spain*, established a number of important principles pertaining to the eviction of persons from their homes in the context of the right to adequate housing protected under Article 11 of the Covenant. It also provides insights into the review standards and burdens of proof that the Committee will apply in this context.

As with the *I.D.G.* communication, *Djazia* dealt with the impact of the financial crisis in Spain on the right to adequate housing. The authors complained that they and their two minor children had been evicted from private rental accommodation by order of a Madrid court without a proper evaluation of the impact of the eviction, particularly their lack of access to

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139. On the continuum of the reasonableness standard ranging between *weak* reasonableness aimed at excluding only manifestly unfair or irrational consequences to *strong* reasonableness incorporating a proportionality analysis, see Wojciech Sadurski,, *Reasonableness and Value Pluralism in Law and Politics, in* Reasonableness and Law, *supra* note 131, at 129, 131–34. In relation to both claims in *Rodríguez v. Spain*, the Committee's analysis was based on strong reasonableness. On the significance of proportionality as a review standard in socio-economic rights claims, *see* Paul O'Connell, Vindicating Socio-Economic Rights: International Standards and Comparative Experiences 186–191 (2012). Katharine G. Young refers to the blending of elements of a traditional proportionality inquiry with the reasonableness review standard as "proportionality inflected reasonableness." Katharine G. Young, *Proportionality, Reasonableness, and Economic and Social Rights, in* Proportionality: New Frontiers, New Challenges 248, 268–71 (Vicki C. Jackson & Mark Tushnet eds., 2017).

140. This inquiry corresponds with the fourth element of a traditional limitations analysis. *See* Arai-Takahashi, *supra* note 121. The least restrictive measures test has been expressly acknowledged to be part of a limitations analysis under the Covenant in certain General Comments. *See*, e.g., General Comment No. 14, *The Right to the Highest Attainable Standard of Health, adopted* 11 May 2000, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 22d Sess., ¶ 29, U.N. Doc. E/C.12/2000/4 (2000).

141. Young, *supra*, note 139, at 269.

alternative accommodation.[142] Two third-party submissions were authorized by the Committee, one by ESCR-Net and one by the UN Special Rapporteur on Adequate Housing "as component of the right to an adequate standard of living, and on the right to non-discrimination in this context."[143] These submissions provided important insights into the structural causes of homelessness in Spain and the obligations of a state party in response to evictions by private parties such as lessors.[144]

The Committee commenced by affirming the principle that, even when an eviction application is initiated by a private party, the state retains responsibility for ensuring that its domestic law regulating evictions is compatible with Article 11 of the Covenant.[145] The Committee proceeded to consider the nature of the state's obligations in the case of an eviction of vulnerable persons from their homes by private parties. It held that an eviction order issued by a court in respect of a tenant could be justifiable in situations of serious non-compliance with the rental contract such as "persistent non-payment of rent or of damage to rented property without just cause."[146] However, the applicable domestic law should incorporate the procedural and substantive safeguards that the Committee has stipulated in relation to forced evictions.[147] According to the Committee, evictions should be a "last resort" when there are "no less onerous alternative means or measures available."[148] In addition, "a real opportunity [must be provided] for genuine prior consultation between the authorities and the persons concerned."[149]

Critically, an eviction should not render individuals homeless. When those affected do not have the means to acquire alternative housing, states parties are under a duty to take reasonable measures to provide alternative housing, irrespective of whether the eviction application is brought by public or private parties.[150] Consistent with "[A]rticle 2(1) of the Covenant, States parties must take all necessary steps, to the maximum of their available resources, to uphold this right."[151] The Committee expressly acknowledged

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142. Djazia and Bellili v. Spain, *supra* note 84, ¶ 3.1–3.2. It was uncontested that subsequent to their eviction, the family stayed in a short-stay shelter for ten days, slept in the family car for four days whereupon they resided with an acquaintance for several weeks. *Id.* ¶ 12.5.
143. *Id.* ¶ 8.1.
144. *Id.* ¶ ¶ 8.1–8.3.
145. *Id.* ¶ ¶ 14.1–14.2.
146. *Id.* ¶ 15.1.
147. *General Comment No. 4*: *The Right to Adequate Housing,* U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 6th Sess., ¶ ¶ 17–18, U.N. Doc. E/1992/23 (1991); General Comment No. 7, *supra* note 100, ¶ 13.
148. Djazia and Bellili v. Spain, *supra* note 84, ¶ 15.1.
149. *Id.*
150. *Id.* ¶ 15.2. *See* in this regard, the similar ratio of the South African Constitutional Court in City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd. 2011 (2) SA 104 (CC) (S. Afr.).
151. Djazia and Bellili v. Spain, *supra* note 84, ¶ 15.3.

the range of policy options available to the state to achieve this purpose. However, the measures selected should be capable of fulfilling the right to alternative housing as "swiftly and efficiently as possible."[152] Alternative housing policies in the case of evictions should be "commensurate with the need of those concerned and the urgency of the situation and should respect the dignity of the person."[153] Short-term measures to secure alternative housing should be accompanied by "consistent and coordinated measures to resolve institutional shortcomings [as well as the] structural causes of the lack of housing."[154] The interdependence of rights was also emphasized by the Committee, particularly the obligation of the state to protect the family in accordance with Article 10(1) of the Covenant.[155]

Crucially, the Committee noted that the burden to justify the reasonableness of the measures taken in accordance with Article 8(4) of the OP rested on the state party.[156] In circumstances where it failed to secure alternative accommodation to an evicted person who faces homelessness, it must show that it considered the specific circumstances of the case and that, "despite having taken all reasonable measures, to the maximum of its available resources, it has been unable to uphold the right to housing of the person concerned."[157]

Applying these interpretive principles to the facts of the communication, the Committee held that the eviction was justifiable in the circumstances, as the authors were unable to pay their monthly rent and advance notice had been given by the lessor of her intention not to renew the lease upon its expiration. In addition, the legal processes had been fair.[158] However, there was no obligation on the courts under Spanish law to consider the impact of the eviction, nor to suspend the eviction order until alternative accommodation was made available.[159] Moreover, judges were not explicitly mandated to require social services authorities to take coordinated measures to prevent evicted person from becoming homeless.[160] The eviction of the authors without assurances of alternative accommodation would constitute a violation of Article 11 unless the state could justify its failure by showing that it had taken all reasonable measures as described above. According to

152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* ¶ 15.4.
156. *Id.* ¶ 15.5.
157. *Id.*
158. *Id.* ¶ 16.1–16.3
159. The Committee noted that the court had in fact postponed the eviction a number of times and requested the relevant social authorities of the Madrid City Council to assist the authors. However, it had ultimately proceeded to order the eviction in the absence of guarantees of alternative accommodation. *Id.* ¶ ¶16.4–16.5.
160. *Id.* ¶ 16.5.

the Committee, the state's burden of justification was weighty given the fact that very young children were affected.[161]

The Committee concluded that the state had not succeeded in discharging the aforementioned burden of justification. In the first place, the authorities could not show that Mr. Djazia had failed to satisfy reasonable conditions or criteria set by the public authorities accessing social housing.[162] The state's main argument rested on the fact that there was a large backlog of social housing in Madrid, owing to limited resources for public housing.[163] However, the Committee considered that the State party had failed to demonstrate sufficient urgency in responding to the urgent housing need of persons in the position of the authors.[164] Of particular concern to the Committee was the fact that the Madrid Housing Institute had sold part of its public housing stock to investment companies, thereby reducing the availability of public housing at a time of particularly high demand.[165] This constituted a retrogressive measure, triggering a stringent burden of justification in accordance with the Committee's existing doctrine.[166] In this regard, the Committee held:

> In times of severe economic and financial crisis, all budgetary changes or adjustments affecting policies must be temporary, necessary, proportional and non-discriminatory. In this case, the State party has not convincingly explained why it was necessary to adopt the retrogressive measure . . . , which resulted in a reduction of the amount of social housing precisely at a time when demand for it was greater owing to the economic crisis.[167]

Accordingly, the Committee concluded that "the State party [had] violated the authors' right under article 11(1), read separately and in conjunction with articles 2(1) and 10(1) of the Covenant."[168] In addition to the severe impact on the family of an eviction into a situation of homelessness, the Article 10

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161. *Id.* ¶ 16.6.
162. *Id.* ¶¶ 17.2–17.3.
163. According to the state party, the Madrid Housing Institute received an average of 8000 requests for public housing and were only able to allocate an average of 260 housing units. *Id.* ¶ 17.4.
164. *Id.* ¶ 17.5.
165. It noted that in 2013, the Institute had sold 2,935 houses and other properties to a private company for 201 million euros, justifying the measure by a need to balance the budget. *Id.*
166. Letter from Chair of Committee to State Parties (16 May 2012); *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant,* U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 38th Sess., ¶¶ 6, 8, 11, U.N. Doc. E/C.12/2007/1 (2007); *Public Debt, Austerity Measures and the International Covenant on Economic, Social and Cultural Rights, adopted* 24 June 2016, U.N. ESCOR, Comm. on Econ., Soc, & Cult. Rts., 58th Sess., ¶ 4, U.N. Doc E/C.12/2016/1 (2016).
167. Djazia and Bellili v. Spain, *supra* note 84, ¶ 17.6 (footnotes omitted).
168. *Id.* ¶ 19.

violation was based on the fact that the only option presented to the family was to split them up, with Ms. Bellini and the children placed in a women's shelter and Mr. Djazia in a homeless shelter.[169] This was inconsistent with the state's duty to grant the "widest possible protection to the family" in accordance with Article 10(1).[170]

In respect of the authors, the Committee recommended that the state party assess their current situation and, after genuine consultation with them, "grant them public housing or any other measure enabling them to enjoy adequate accommodation, taking into account the criteria established in these Views."[171] A number of general recommendations were made, aimed at redressing the structural causes of the violations.[172] These included amendments to the legal framework for the eviction of tenants, particularly the imposition of a legal duty on judges to consider the impact of the eviction and its compatibility with the Covenant. The Committee also recommended the adoption of a comprehensive, measurable, and time-bound housing plan for low-income persons.[173]

The Committee did not impose absolute obligations on the state party, even in the context of the threat of homelessness facing an evicted family. It provided scope for Spain to justify its legal, policy, and budgetary decisions. However, the justificatory space in this context was narrow and the standard of scrutiny high. Spain was required to show that it had taken all necessary measures to secure alternative accommodation commensurate with the needs of the affected persons and to the maximum of its available resources. Procedural duties of genuine consultation with those facing eviction were also emphasized. The *Djazia and Bellili v. Spain* communication establishes that where the authors or third parties produce evidence that the failure to provide alternative accommodation is attributable to deliberately retrogressive measures, an even stricter standard of accountability will be applied. Such measures require compelling reasons of economic crisis to justify their imposition, and the measures themselves must be temporary, proportional, and non-discriminatory. The Committee established a stringent set of substantive and procedural standards for holding the state accountable for averting homelessness while still allowing the state a justificatory opportunity in respect of the relevant policy choices.

### *4. Calero v. Ecuador*

The *Calero v. Ecuador* communication provided the Committee with a further opportunity to elaborate on the duties imposed on states parties by

169. *Id.* ¶ 17.7.
170. *Id.*
171. *Id.* ¶ 20.
172. *Id.* ¶ 21.
173. *Id.* ¶ 21(d).

the right to social security in Article 9 of the Covenant as well as a number of broader doctrinal questions. The latter included the model of review applicable to minimum core obligations, the nature of the proportionality inquiry applicable to legislative sanctions terminating membership of a social security scheme, and the operation of burdens of proof pertaining to indirect gender discrimination.

The situation of Ms. Calero typifies the experience of many women worldwide who experience profound difficulties in making uninterrupted contributions to social security schemes due to the gendered burden of domestic, childcare, and other family responsibilities that they carry.[174] After an initial period of contributing as an employee to the Ecuadorian Social Security Institute (the Institute), Ms. Calero joined the voluntary contribution scheme, making monthly payments while performing unpaid domestic work at home. She had a break in contributions to the voluntary scheme of eight consecutive months (August 1989 to March 1990) before resuming her contributions and making sixty-five further voluntary contributions to the Institute. She subsequently re-joined the scheme for employees after entering into a new employment relationship. In November 2001, the author, who was in ill-health, resigned from her employment and applied to the Institute for a special reduced retirement pension in terms of Article 121 of the Codified Statute of the Ecuadorian Social Security Institute (the Statute). This option, which officials of the Institute advised the author to exercise, is available to affiliates who have made more than 300 monthly contributions and are more than forty-five years old.

However, her request for special early retirement was rejected by the Benefits Commission of the Institute. It held that the author's voluntary affiliation had terminated in August 1989 in accordance with Article 158 of the Statute, which provides that voluntary affiliation terminates if the insured person fails to pay contributions for six consecutive months. Essentially, the Institute retrospectively terminated the applicant's membership of the voluntary affiliation scheme following her break in contributions over ten years earlier. Her subsequent sixty-five contributions to the voluntary scheme were ruled invalid, resulting in her accumulating only 238 monthly contributions instead of the 300 required to qualify for early retirement. The author pursued various domestic legal remedies against the denial of her retirement request, culminating in a rejection by the Constitutional Court of her application for a special protective remedy on 17 July 2014.

A third-party intervention by ESCR-Net was admitted by the Committee.[175] According to their submission, the rules pertaining to voluntary affiliation to the Institute were inconsistent with the state's obligations to ensure non-

174. Beth Goldbatt, Developing the Right to Social Security: A Gender Perspective 10–14 (2016).
175. Calero v. Ecuador, *supra* note 57, ¶ 7.1.

discriminatory access to the social security system, particularly for women who perform unpaid care work.[176] They also emphasized the state's positive obligation to take steps to ensure social security coverage for persons who have no access to, or are unable to benefit from, existing social security systems, in particular older persons. Finally, the procedural duties applicable to the right to social security were described.

The state party argued that its actions were in accordance with domestic social security law and that the author should be presumed to know the existing law, including the consequences of a break in contributions of more than six months. It also rejected the claim of gender discrimination on the ground that the voluntary affiliation scheme was open to anyone, irrespective of the type of work performed, and everyone qualified for the same social services and benefits.

According to the Committee, the primary legal question raised by the communication was whether the denial of the author's request for special retirement constituted a violation of Article 9 of the Covenant because the Institute failed to inform her in a timely manner that her voluntary affiliation had terminated in August 1989 and continued to receive her contributions.[177] This primary question, in the Committee's view, was linked to three other questions: (i) whether the sanction established by law to terminate the voluntary affiliation of a person if the insured person fails to pay contributions for six consecutive months is proportionate; (ii) whether the lack of a robust non-contributory scheme in the state party that could have provided cover for the author was relevant; and (iii) whether the conditions of voluntary affiliation imposed on the author constituted discriminatory treatment on the grounds of gender in violation of Article 2(2) in conjunction with Article 9 of the Covenant.[178]

The Committee answered the primary legal question in the affirmative, finding that Ecuador had violated the author's right to social security under Article 9 by failing to inform her in an appropriate and timely fashion of the termination of her voluntary affiliation and by creating a legitimate expectation that she was eligible for special retirement.[179] This reasonable expectation was created by the fact that the Institute continued to receive voluntary contributions from her for more than five years, despite the formal termination of her voluntary affiliation, and by the advice she received from Institute officials that she had met all the requirements for special retirement.[180] The Committee held that the lack of timely information would not necessarily

176. *See supra* notes 76–80 and accompanying text on the admissibility issues raised by the gender discrimination arguments in the third party submissions.
177. Calero v. Ecuador, *supra* note 57, ¶ 10.6.
178. *Id.*
179. *Id.* ¶ 16.3.
180. *Id.* ¶ 16.4.

imply a "violation of [her] right to social security if it had no significant impact on [her] life plan" and the "effective enjoyment" thereof through an old age pension.[181] However, the lack of timely information coupled with the reasonable expectations that had been created by the Institute had placed the author in an untenable situation. It would be difficult for her to make up the invalid contributions through the labor market as an older person experiencing health problems. Her situation was made worse by delays in the administrative and judicial processes, which had taken place over a period of some fourteen years.

The Committee was furthermore of the view that the legislative sanction of termination of voluntary affiliation if the insured person has a break in contributions for more than six consecutive months was not reasonable and proportionate.[182] Assuming that the sanction had the legitimate aim of protecting limited social security resources, the state party had failed to show that this was the only means of achieving this purpose and that there were no less harmful alternatives, such as excluding the months in which no contributions were made from the pension calculation.[183] It held that the sanction of disaffiliation would be "inappropriate and disproportionate" even in the case of an "independent worker with a monetary income, albeit irregular."[184] However, according to the Committee, the disproportionality of the sanction was even clearer in the author's case given her status as an unpaid domestic worker.[185]

The failure of the state party to provide the author with access to an alternative non-contributory pension program "exacerbated" the violation of her right to social security.[186] The Committee held that access to non-contributory old age benefits for older persons who, when reaching the prescribed retirement age, did not qualify for an insurance-based pension and did not have access to other sources of income constituted a minimum core obligation imposed by the right to social security.[187] It also highlighted the special significance of non-contributory schemes for women given that they are more likely to be affected by poverty and the inability to contribute regularly to pension schemes due to the burden of unpaid domestic care work they carry. In order to attribute the lack of such a non-contributory program to a lack of available resources, a state party 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."[188]

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181. *Id.* ¶ 16.3.
182. *Id.* ¶ 17.1.
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.* ¶ 18.
187. *Id.* ¶ ¶ 14.1–14.3 read in conjunction with ¶ ¶ 11.1–11.2.
188. *Id.* ¶ 14.3 *citing* General Comment No. 19, *supra* note 129, ¶ 60.

The Committee concluded that the author was also a victim of gender discrimination in the enjoyment of her right to social security. Moreover, the author was an older person experiencing ill-health and thus experienced intersectional discrimination on the grounds of gender and age.[189] The Committee reaffirmed its previous approach that, in cases where a particular group is more vulnerable to discrimination than the population at large, "special or strict scrutiny is required."[190] It held that, when information is presented that *prima facie* indicates that a neutrally formulated legal provision might in fact affect a clearly higher percentage of women than men, the burden falls on the state party to show that the situation does not constitute indirect discrimination on the grounds of gender.[191] According to publicly available information among persons of working age outside the labor market, those engaged exclusively in unpaid domestic care work were almost entirely female.[192] The Committee found that the state party had not shown that the conditions for continued affiliation to the voluntary scheme were reasonable and proportionate in the case of women engaged in unpaid domestic work. While the sanction of disaffiliation for a break in contributions would adversely affect all contributors, it had a potentially devastating effect on women who had no personal monthly income owing to their status as unpaid domestic workers.[193] It accordingly concluded that the state party had failed to demonstrate that the conditions of the voluntary contributory scheme did not constitute indirect discrimination on the grounds of gender.

Separate violations of Article 9 and of Articles 2(2) and 3, read together with Article 9, were found.[194] The Committee's primary recommendation in respect of the author was that she be granted an old age pension taking into account the contributions she had made to the Institute, or, alternatively, "other social security benefits enabling her to have an adequate and dignified standard of living, bearing in mind the criteria established in the present Views."[195] A number of general recommendations were also made. In addition to guaranteeing due process, timely access to appropriate information, and judicial and administrative remedies to protect the right to social security, the Committee recommended that Ecuador adopt a number of substantive legislative and policy amendments. These included ensuring that social security conditions and sanctions were proportionate; ensuring

189. *Id.* ¶ 19.2. On the concept of intersectional discrimination (also referred to as 'multiple discrimination') in the Committee's doctrine, see General Comment No. 20, *supra* note 28, ¶¶ 17, 27
190. Calero v. Ecuador, *supra* note 57, ¶ 19.2 *citing* Rodríguez v. Spain, *supra* note 55, ¶ 14.1.
191. *Id.* ¶ 19.4.
192. *Id.*
193. *Id.* ¶ 19.5.
194. *Id.* ¶ 21.
195. *Id.* ¶ 22.

that women (particularly those engaged in unpaid domestic labor) could benefit equally from the social security system; and drafting a comprehensive and participatory plan to ensure, within the limits of available resources, non-contributory health benefits and old-age pensions for older persons and others in vulnerable situations.[196]

In *Calero*, the Committee adopted a bold interpretative approach. It could arguably have confined its findings to the procedural issues of a lack of timely access to information and the creation of legitimate expectations. Instead, as the analysis above indicates, it applied a strong reasonableness assessment in the form of a proportionality analysis to the legislative scheme as well as the implications of the lack of a non-contributory pension scheme on women's equal enjoyment of social security rights.

The Committee adopted a similar model of review as in its previous communications. It affirmed that state parties have a certain "margin of discretion in adopting measures" to ensure that social security schemes are efficient, sustainable, and accessible.[197] In line with this discretion, they can impose conditions for affiliation to social security schemes provided these are "reasonable, proportionate and transparent."[198] Where the conditions lead to termination of membership of the scheme, the state bears the burden of justifying the reasonableness and proportionality thereof. Similarly, where the conditions have a disproportionate impact on a group identified by a prohibited ground of discrimination under Article 2(2) of the Covenant, the state must justify the reasonableness thereof.

In respect of the termination of the author's affiliation to the voluntary scheme and the refusal of her application for early retirement, the state was required to show that it had exhausted less restrictive means of achieving its purpose to preserve social security resources. It was unable to do so in the light of the alternative measure available to it of discounting the months of non-contribution from the author's pension calculation. In relation to the claim of gender discrimination, the state party relied on a formal equality standard of neutrality or equal treatment in the legislation[199] and could not show that the voluntary affiliation pension scheme was responsive to the gendered barriers that women face in accessing social security. The lack of a non-contributory scheme that could have provided a social safety net in these circumstances also weighed heavily in the Committee's finding that the rules of the voluntary scheme were unreasonable in that they had a disproportionately harsh impact on women performing unpaid domestic

196. *Id.* ¶ 23.
197. *Id.* ¶ 12.1.
198. *Id.*
199. On formal and substantive approaches to discrimination, *see* General Comment No. 20, supra note 28, ¶ 8. *See generally*, Sandra Fredman, *Substantive Equality Revisited,* 14 Int'l. J. Const. L. 712 (2016).

care work. In conducting the aforementioned proportionality analysis, the Committee did not make an express reference to Article 4 of ICESCR, which stipulates the criteria applicable when States parties limit the rights in the Covenant. However, the analysis applied by the Committee suggests that it was of the opinion that the author's right to social security had been limited, and that this limitation could not be justified in terms of a proportionality analysis typically applied to a limitation of rights.[200]

## V. CONCLUSION

The Committee's evolving jurisprudence suggests that it is charting a cautious but steady course in constructing its normative legitimacy. It is careful to carve out a space in which state parties to the OP will be allowed to exercise a range of budgetary and social policy choices suited to their domestic circumstances and national priorities. The Committee has generally avoided imposing unqualified obligations on states parties, such as an absolutist interpretation of the minimum core obligation doctrine. Instead, accountability in the Committee's jurisprudence takes the specific form of a set of circumstances that trigger burdens of justification for states parties that can vary in intensity, depending on the nature of the relevant circumstances.[201]

The communications analyzed in the previous part indicate that the Committee will require justification in the following circumstances: noncompliance with procedural duties such as effective notice of judicial proceedings affecting Covenant rights;[202] discriminatory treatment in relation to Covenant rights;[203] a deprivation of rights such as an eviction of a person from their home without the provision of alternative accommodation;[204] and the application of a legislative sanction that results in terminating a person's membership of a social benefits program.[205]

As noted above, the intensity of the scrutiny that the Committee applies to the justifications provided by the state varies. Thus, in the case of noncompliance with procedural duties, deprivation of rights, or the termination of benefits, the Committee's evaluation amounts to a proportionality analysis in which the state's reasons for the conduct in question are weighed against

200. Arai-Takahashi, *supra*, note 121.
201. For a similar analysis of the Committee's approach to its interpretation of the *maximum available resources* clause in Article 2 of the Covenant, see Rodrigo Uprimny, Sergio Chaparro Hernández & Andrés Castro Araújo, *Bridging the Gap: The Evolving Doctrine on ESCR and "Maximum Available Resources," in* The Future of Economic and Social Rights 624, 651–52 (Katharine G. Young ed., 2019).
202. I.D.G. v. Spain, *supra* note 57.
203. Rodríguez v. Spain, *supra* note 55; Calero v. Ecuador, *supra* note 57.
204. Djazia and Bellini v. Spain, *supra* note 84.
205. Calero v. Ecuador, *supra* note 57.

their impact on the authors. At times, the Committee applies a particularly intense form of proportionality analysis in which the state is required to show that it has exhausted less restrictive alternatives. For example, in *Djazia,* the Committee applied this form of strict proportionality in response to evidence that Spain had adopted retrogressive measures, impeding its ability to provide alternative accommodation to a family facing homelessness as a result of an eviction. Similarly, in *Calero,* the Committee closely scrutinized Ecuador's reasons for terminating the author's membership of the relevant social security scheme and found that the state had not exhausted less restrictive alternatives. The particularly strict scrutiny applied in this communication can be attributed to a combination of factors, including the particular vulnerability of the author's personal circumstances, the fact that she experienced systemic gender discrimination, and that no alternative non-contributory social security scheme was available to her.

The Committee's emergent model of review based on justificatory triggers and varying intensities of reasonableness scrutiny aligns with Article 8(4) of the Optional Protocol. The latter expressly requires the Committee to preserve a reasonable realm of policy choice for states parties. This constitutes an acknowledgment of the diversity of ways through which human rights norms can be institutionalized to suit the particular domestic context. However, as Bruce Porter notes, the standard of reasonableness in the context of reviewing human rights obligations does not imply deference to the state's decisions affecting economic, social, and cultural rights. Its role is rather to signal that a line should maintained between "adjudication and governance."[206] In other words, the Committee should not be attempting to prescribe particular social, economic, or cultural policies or prescribe how programs should be designed and administered. Its role is rather to consider—in the light of the information presented by the authors, the state party, and any third-party information—whether the state's actions or omissions are reasonably justifiable in the light of the procedural and substantive obligations imposed by the Covenant.[207]

Imposing burdens on states parties to justify the reasonableness of their policy choices affecting economic, social, and cultural rights is a model well suited to negotiating the tensions between sovereignty and accountability. However, precisely because reasonableness is an imprecise and flexible standard, it is crucial that a set of criteria are developed to guide its application in adjudication.[208] This is necessary both to guard against a potential lapse into deference by adjudicatory bodies and to ensure transparent, predict-

206. Porter, *supra* note 23, at 187.
207. *Id.* at 190–91.
208. On the criteria developed by the South African Constitutional Court to guide the application of the reasonableness standard of review in the context of its socio-economic rights jurisprudence, *see* Liebenberg, *supra* note 89, at 151–57.

able accountability standards. The latter are important to all components of the Committee's "compliance community," including victims of human rights violations, national governments, national and international NGOs and social movements, as well as national judiciaries.

The analysis of the jurisprudence indicates that the Committee is developing a set of criteria mediated by presumptions and burdens of proof for extracting accountability from states parties. Negative deprivations, failures to ensure minimum essential levels of Covenant rights, discriminatory treatment or indirect discriminatory impact, and retrogressive measures are presumed to constitute *prima facie* breaches of the Covenant. In order to rebut this presumption, the state has the burden of producing evidence and arguments to support the reasonableness of their policy choices. The analysis of the jurisprudence suggests that the Committee will vary the intensity of its scrutiny of these policy choices according to the vulnerability of the affected group and the severity of the impact of the act or omission on them. Thus, when the affected group is particularly disadvantaged or vulnerable and the impact of the measure is severe, the Committee's scrutiny of the state's justifications resembles the proportionality analysis typically applied to limitations of rights.[209] As noted in the analysis of the jurisprudence in this article, the Committee is not consistent in referring explicitly to Article 4 of the Covenant (the limitations provision in the Covenant). The coherence and rigor of the Committee's evolving jurisprudence under the Optional Protocol would benefit from greater clarity on the role of Article 4 in its legal analysis of communications.

The set of criteria for guiding the application of the reasonableness standard can be expected to evolve in future jurisprudence. The clarity, predictability, and consistent application of these criteria are crucial to the normative legitimacy of the Optional Protocol. Cumulatively they constitute the compass that enables the Committee to chart a skilful course between respect for state sovereignty and ensuring meaningful accountability for economic, social, and cultural rights violations. This bodes well for strengthening the normative legitimacy of the Optional Protocol and advancing the broader project of the justiciability of economic, social, and cultural rights.

209. Arai-Takahashi, *supra* note 121.