

Economic and Social Rights, Budgets and the Convention on the Rights of the Child

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Abstract

Recent years have seen an explosion in methodologies for monitoring children's economic and social rights (ESR). Key examples include the development of indicators, benchmarks, child rights-based budget analysis and child rights impact assessments. The Committee on the Right of the Child has praised such tools in its work and has actively promoted their usage. Troublingly, however, there are serious shortcomings in the Committee's approach to the ESR standards enshrined in the CRC, which threaten to impact upon the efficacy of such methodologies. This article argues that the Committee has failed to engage with the substantive obligations imposed by Article 4 and many of the specific ESR guaranteed in the UN Convention on the (CRC) in sufficient depth. As a result, that body has not succeeded in outlining a coherent, comprehensive child rights-specific ESR framework. Using the example of child rights-based budget analysis, the author claims that this omission constitutes a significant obstacle to those seeking to evaluate the extent to which states have met their ESR-related obligations under the CRC. The article thus brings together and addresses key issues that have so far received only very limited critical academic attention, namely, children's ESR under the CRC, the relationship between budgetary decision-making and the CRC, and child rights-based budget analysis.

1. Introduction

Recent years have seen an explosion in methodologies for monitoring children's economic and social rights (ESR). Key examples include the development of indicators, benchmarks, child rights-based budget analysis and child rights impact assessments. The Committee on the Right of the Child (ComRC/the Committee) has praised such tools in its work and has actively promoted their usage. Troublingly, however, there are serious shortcomings in the Committee's approach to the ESR standards enshrined in the CRC, which threaten to impact upon the efficacy of such methodologies. This article argues that the Committee has failed to engage with the substantive obligations imposed by Article 4 and many of the specific ESR guaranteed in the CRC in sufficient depth. As a result, that body has not succeeded in outlining a coherent, comprehensive *child rights-specific* ESR framework. Using the example of child rights-based budget analysis, the author claims that this omission

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constitutes a significant obstacle to those seeking to evaluate the extent to which states have met their ESR-related obligations under the CRC. The article thus brings together and addresses key issues that have so far received only very limited critical academic attention, namely, children's ESR under the CRC, the relationship between budgetary decision-making and the CRC, and child rights-based budget analysis.

The article opens with a consideration of key issues arising in relation to children as ESR-holders that result from both children's bio-developmental characteristics and their social, political and economic position within society. Next, I address the ESR of children under the CRC and the way in which these have been interpreted and applied (or not) by the Committee on the Rights of the Child. In doing so, it pays particular attention to Article 4 of the Convention which provides that,

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. *With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*²

I then turn to the links that the Committee has made between the attainment of ESR under the CRC and budgetary decision-making, before proceeding to outline the key elements and of child ESR-based budget analysis.

Having highlighted the shortcomings of the ComRC's approach to ESR in terms of both theory and practice, I outline how the Committee might remedy its failure and develop a more convincing approach to children's ESR under the CRC, thereby contributing significantly to the efficacy of child ESR-monitoring methodologies. I conclude with a consideration of the opportunity and challenges afforded by the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in terms of the Committee's work on ESR and budgetary issues.

2. Children and ESR: some important observations

The CRC is a child-specific instrument. However, as we will see below, the ESR included within it were strongly influenced by the International Covenant on Economic, Social and Cultural Rights (ICESCR) which accords a wide range of ESR to 'everyone'.³ Extensive scholarship has now been focussed on ESR generally. Despite this, the specific position of children vis-à-vis such rights has received scant consideration. This relative lack of child-centred analysis with regard to ESR would be unproblematic if there was nothing about children that rendered the content, interpretation and

² Italics inserted by author.

³ The ICESCR makes explicit reference to children in one of its provisions, with Article 10 providing that: 'the States Parties to the present Covenant recognise that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.' However, the use of the language 'everyone' in ICESCR makes it clear that all of the rights in that instrument apply to children.

application of their rights different from those of other (specifically, adult) members of society. But, that is not the case.⁴

There are a number of ways in which children are in a significantly different position from adults with regard to their enjoyment of ESR. First, child and adult members of the same family or society are not necessarily accorded the same ESR; under the CRC children are accorded ESR that differ from those of adults under international human rights law.⁵

In addition, children are more vulnerable to violations of their ESR than adults.⁶ Wringe has noted two factors that must be borne in mind when considering the position of children with regard to their rights. First, due to their nature and condition, children have a reduced capacity to meet their socio-economic needs either by obtaining or creating sustenance from the resources of their environment.⁷ Second, they are less likely to have the skills necessary to gain a stake in the resources of the community by negotiating special rights (i.e. rights which arise from transactions or relationships) for themselves.⁸ These factors severely reduce the ability of children to give effect to their own ESR.

Furthermore, children are often affected in an unlike way to adults by violations of a similar nature, both in the short and the longer term. The physical and psychological effects that children suffer as a result of violations of their ESR will generally be greater than those experienced by adults due to their age and lower level of physical and mental development. This is true both in relation to (a) the immediate impact that violations of ESR may have on a child's physical and psychological state, and (b) the long-term detrimental effects on the child's development and future capacity for autonomy resulting from such violations. As the Committee has noted: 'Childhood is a unique period of physical, mental, emotional and spiritual development and violations of children's rights ... may have life-long, irreversible and even trans-generational consequences'.⁹

Fourth, while the nature of the ESR violations experienced by children and other socio-economically disadvantaged groups may be similar, it is important to bear in mind that children face distinct challenges in terms of the vindication of their ESR compared with many other vulnerable groups. This is due to, amongst other things, their (almost universal) democratic disenfranchisement, their (frequent) legal disenfranchisement,¹⁰ their limited economic power, and their inability to rely on the legal non-discrimination/equality principles employed by other social minority groups to advance

⁴ For a more extensive discussion of many of the issues raised in this section, see A. Nolan, *Children's Socio-economic Rights, Democracy and the Courts* (Oxford: Hart Publishing, 2011), Chapter 1.

⁵ See, e.g., the right to survival and development (Article 6) and the right to the child to rest, leisure, play, recreational activities, cultural life and the arts (Article 31 CRC). Neither of these rights is found in ICESCR.

⁶ 'Children's Rights' in Office of the High Commissioner for Human Rights, *Training Manual on Human Rights Monitoring* (Geneva, OHCHR, 2001).

⁷ Wringe, C., *Children's Rights: A Philosophical Study* (London and Boston, Routledge and Kegan Paul, 1981), 135-6.

⁸ Ibid.

⁹ ComRC General comment No. 16 on State obligations regarding the impact of the business sector on children's rights, UN Doc. CRC/C/GC/16 (2013), para. 4.

¹⁰ For examples of the Committee's recognition of these points, see *ibid.*

their ESR concerns. It is not that children are necessarily more vulnerable than all other social groups but, rather, that they are *differently* vulnerable.¹¹

A fifth crucial point to note is that children who form part of other social minority groups (female, prisoners, people with disabilities) are likely to be more vulnerable to violations of their ESR than children who do not. This is due to their suffering from both the vulnerabilities and disadvantages of the status of childhood and those associated with disability, gender, detention, non-citizenship, status as an indigenous person, mental illness, etc. Indeed, violations of the child's ESR are often the result of deeply-rooted systemic inequality manifested in the experience of multiple discrimination at the individual level. Furthermore, children whose economic and social rights have been violated may become victims of discrimination on that ground also (for instance, due to stigmatic attitudes about street children or persons living with or HIV/AIDS).

Children are a group with evolving needs and capacities – a fact that is clearly reflected in the CRC.¹² Childhood is very clearly not an immutable characteristic; it is notable that not only do the ranks of childhood change continuously due to the new addition of new members and the loss of previous members to adulthood but the ESR-related needs of individual children alter across their childhood. While adults clearly vary in terms of their ESR-related requirements over the course of their lifetime (e.g., as a result of the aging process or becoming disabled), this is not inevitable and is generally to a far lesser degree than over the course of childhood. This needs to be borne in mind when considering how their ESR should be given effect to – both in the shorter and the longer term.

Finally, children have a more restricted ability to make rights claims than adults. This is due both to the incapacity of some children (e.g., the very young) to make claims on their own behalf, as well as the socially constructed exclusion of children from legal and democratic processes which are key to the realisation of ESR.

These observations can be legitimately criticised as generalised and homogenising. That does not mean that they do not reflect accurately the position and challenges faced by many, if not most, children with regard to ESR enjoyment. In light of this, it is vital that they be taken into account when considering the extent of those rights – and the obligations imposed by such. Indeed, a failure to ignore the reality of children's position vis-à-vis their ESR will impact on the appropriate construal of, and the effectiveness of efforts to satisfy, those rights. This is an important factor to bear in mind when considering the rights/obligations provided for under a deliberately child-specific instrument such as the CRC.

3. ESR under the CRC and the Committee on the Rights of the Child

I will now turn to the key framework under consideration in this piece: the CRC. The CRC does not specify which rights are ESR.¹³ However, this article proceeds on the basis that the following rights

¹¹ For a comparison of the position of children vis-à-vis other vulnerable groups in society, see Nolan above n.4, Chapter 1.

¹² See, e.g., Articles 5 and 14(2), CRC.

¹³ The Committee has noted that 'there is no simple or authoritative division of human rights in general or of Convention rights into two categories' and has emphasised the interdependence and indivisibility of all human rights. (ComESCR General Comment No.5, para. 6).

are ESR or have significant ESR elements:¹⁴ the State's duty to ensure to the maximum extent possible the survival and development of the child (Art. 6); the right of disabled children to special care (Art. 23); the right to the enjoyment of the highest attainable standard of health (Art. 24); the right to benefit from social security (Art. 26); the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development (Art. 27), and the right to education (Arts. 28, 29).¹⁵

While the CRC imposes ESR obligations on a range of actors including parents,¹⁶ this article will focus on the state's duties. That is not to ignore the key role that parents play with regard to child ESR satisfaction. However, it is states, not parents, which have the ultimate responsibility under international human rights law for the determination of laws and policies (including budgets) that have key implications for the realisation of children's ESR.¹⁷ Nor will this article address in any depth ESR obligations relating to international cooperation that exist in terms of the CRC.¹⁸ Clearly international cooperation and the operation of supranational bodies such as international financial institutions have implications for the determination of economic policy and the resources available for disbursement on children's ESR, both internationally and domestically.¹⁹ However, for space reasons, no consideration will be given to the obligation of states to contribute in terms of international cooperation in the form of aid/development funding and there will be only passing reference to the obligations of states to take advantage of the resource-related opportunities afforded by international cooperation processes.

ESR under the CRC: tracing the parameters

Prior to February 2013, the Committee on the Rights of the Child had not issued a rights-thematic General Comment on any of the ESR under the Covenant. Whilst it had dealt with ESR-related issues in some of its other statements, it had not spelt out the obligations imposed by a particular ESR in detail. The Committee's General Comment on the right of the child to the enjoyment of the highest

¹⁴ This is based on a consideration of those rights (and elements of rights) in the CRC that are reflected in ICESCR.

¹⁵ Interestingly, a provision outlining the right to food was submitted to the 1983 session of the open-ended Working Group on the Question of a Convention on the Rights of the Child by Algeria but was ultimately not considered by that body, see UN Doc. E/CN/4/1983/62, Annex II.

¹⁶ See, e.g., Articles 18(2) 23(2) and 27(3) CRC. For a consideration of non-state actors in the context of a specific ESR, see ComRC General Comment No.15 on the right of the child to the enjoyment of the highest attainable standard of health (Article 24), UN Doc CRC/C/GC/15 (2003), paras. 79-85.

¹⁷ While voting parents certainly play a role in terms of determining legislative/executive mandates with regard to law and policy, it cannot be argued convincingly that parents – whether individually or as a group – directly and exclusively set policy or budget priorities.

¹⁸ See, e.g., Articles 4, 23 and 28 of the CRC. For an extensive consideration of these obligations, see W. Vandenhoe, 'Economic, Social and Cultural Rights in the CRC: 'Is There a Legal Obligation to Cooperate Internationally for Development?' (2009) 17 *International Journal of Children's Rights* 23; M. Nyongesa Wabwire, *Legal Protection of Social and Economic Rights of Children in Developing Countries: Reassessing International Cooperation and Responsibility* (Antwerp: Intersentia, 2010). For a discussion of international cooperation by the Committee on the Rights of the Child, see General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44 para. 6), UN Doc CRC/GC/2003/5 (2003), paras 60-64; Committee on the Rights of the Child, 'Day of General Discussion – Resources for the Rights of the Child: Responsibility of States', 46th Session (2007) ('Day of General Discussion', <http://www2.ohchr.org/english/bodies/crc/discussion2013.htm>, paras. 50-52.

¹⁹ See, e.g., the role of the EU Fiscal Treaty which requires EU member states to constitutionalise a range of budgetary rules that impact upon national budget structure.

attainable standard of health (Art. 24)²⁰ thus constitutes a valuable addition to their work on ESR. That statement does not, however, stand alone and my analysis below reflects the range of statements in which the Committee has addressed Article 4 and the key obligations imposed by ESR under the CRC.

The first – and, indeed, the most significant – thing to note when looking at how the Committee on the Rights of the Child has addressed ESR under the CRC is its heavy reliance on the work of the Committee on Economic, Social and Cultural Rights (ComESCR). This latter body is mandated to oversee the progress of state adherence to ICESCR.²¹ In contrast, the function of the Committee on the Rights of the Child is to examine the progress made by States Parties in achieving the realisation of obligations undertaken in the CRC.²² While there is clear overlap between the rights set out in the CRC and ICESCR,²³ the Committees are separate bodies with different, instrument-specific mandates.

In its key statement so far on Article 4 CRC, General Comment No.5 on general measures of implementation of the Convention, the Committee on the Rights of the Child highlighted that, ‘there are articles similar to art. 4 ... such as art. 2 of the International Covenant on Economic, Social and Cultural Rights’.²⁴ The Committee emphasised that the ComESCR ‘has issued General Comments in relation to these provisions which should be seen as complementary to the present general comment’, making specific reference to the ComESCR’s General Comments Nos. 3 and 9 on the nature of states parties’ obligations and the domestic application of the Covenant, respectively.²⁵

The Committee went on to state that the second sentence of Article 4 reflects,

a realistic acceptance that lack of resources – financial and other resources – can hamper the full implementation of economic, social and cultural rights in some States; *this introduces the concept of ‘progressive realisation’ of such rights*: States need to be able to demonstrate that they have implemented ‘to the maximum extent of their available resources’ and, where necessary, have sought international cooperation (emphasis added).

It did so despite the fact that there is no reference to the language of progressivity in Article 4.

The Committee noted that the second sentence in Article 4 is ‘similar’ to the wording under ICESCR and that ‘the [ComRC] entirely concurs with the [ComESCR] in asserting that “even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances ...”’.²⁶ Notably, in one of its relatively rare nods to the group –specific focus of the ESR under the

²⁰ For details of the call for submissions and information on the detailed scope and proposed structure of the General Comment, see: <http://www2.ohchr.org/english/bodies/crc/callsubmissionsCRC.htm>.

²¹ See UN Economic and Social Council Resolution 1985/17, 28 May 1985.

²² Article 43, CRC.

²³ Both instruments include the right to an adequate standard of living (Art. 11, ICESCR), the right to education (Art. 13, ICESCR), the right to the enjoyment of the highest attainable standard of physical and mental health (Art. 12, ICESCR) and the right to social security (Art.9, ICESCR) or to benefit from social security. (For relevant provisions of the CRC, see above.)

²⁴ General Comment No.5 on General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, para. 6), UN Doc CRC/GC/2003/5 (2003), para. 5.

²⁵ Ibid, para. 6.

²⁶ Ibid, para. 8.

CRC, the Committee added that, whatever their economic circumstances, ‘States are required to undertake all possible measures towards the realisation of the rights of the child, paying special attention to the most disadvantaged groups’.²⁷

In these statements, the Committee deliberately linked its interpretation of the umbrella obligation in terms of ESR under the CRC (Article 4, CRC) with the ComESCR’s approach to the umbrella obligation applying to such rights under ICESCR (Article 2(1), ICESCR). This would be unproblematic were it not for the fact that, as will be discussed further below, the wording of Article 2(1) is significantly different to that of Article 4 CRC,²⁸ providing that:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The Committee did not consider the question(s) of if and how the differences in wording might or should operate. Nor did it address in any meaningful way the implications that the CRC as a child-specific instrument might have for the interpretation and application of Article 4 CRC.

Thus far, General Comment No.5 is the Committee’s most extensive ‘soft law’ statement with regard to the obligations imposed by Article 4.²⁹ That said, the Committee has fleshed out the framework for ESR under the CRC in greater detail elsewhere, most notably in the recommendations emerging from Day of General Discussion on ‘Resources for the Rights of Children – Responsibility of States’. While these recommendations do not have the status of a General Comment, they constitute a useful indicator of the Committee’s thinking with regard to Article 4 and other ESR obligations under the Convention and have formed an increasing part of subsequent, recent General Comments.

The Recommendations make clear that ‘resources’ for the purpose of Article 4 are to be understood in qualitative and quantitative terms; resources are not simply financial in nature but include technological, economic, human and organisational ones.³⁰ Furthermore, ‘available resources’ are not just limited to those available in the national context but include those available from the international community through international assistance.³¹ Significantly, from a child rights-perspective, the Committee recommended that States ‘assess “available resources” beyond financial measures’, emphasising the importance of systematically supporting ‘parents and families which are among the most important “available resources”’ for children.³²

²⁷ Ibid, para. 8.

²⁸ For a discussion of some of the differences between the wording of Article 2(1), ICESCR and Article 4, CRC, see M. Rishmawi, *Commentary on the United Nations Convention on the Rights of the Child: Article 4: The Nature of States Parties’ Obligations* (Leiden: Brill, 2006), 3-8.

²⁹ The Committee also engaged to a limited extent with ESR or aspects thereof in its General Comment No. 4 on adolescent health and development in the context of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/4 (2003), and General Comment No.3 on HIV/AIDS and the rights of the child.

³⁰ ComRC Day of General Discussion, para. 24.

³¹ Ibid.

³² Ibid, para 25.

The Committee proceeded to delineate a framework strongly based on the work of the ComESCR. Echoing that body's General Comment No.3, the ComRC stated that 'progressive realisation' in terms of Article 4 imposes an immediate obligation for States parties to the Convention to undertake targeted measures to move as expeditiously and effectively as possible towards the full realisation of child economic social and cultural rights (ESCR).³³ In addition, the obligation not to take any retrogressive steps that could hamper the enjoyment of ESCR 'is considered to be inherent in the obligation towards progressive realisation of those rights'.³⁴

The Committee also adopted the concept of the 'minimum core' of ESR, explicitly citing the ComESCR on this point.³⁵ While the language employed by the Committee in its description of the minimum core is slightly different to that used by ComESCR,³⁶ it is clear that it intended to make reference to the latter body's understanding of the minimum core obligation 'to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights' as fleshed out in that body's General Comment No.3.³⁷ The Committee also emphasised that 'complying with obligations relating to the core of a right should not be dependent on the availability of resources'.³⁸ In its most recent statement of the Committee on ESR, General Comment No. 15 on the child's right to the highest attainable standard of health the Committee highlighted a range of 'core obligations' imposed by that right,³⁹ thus echoing the approach of the ComESCR.⁴⁰

The Committee has also followed the ComESCR's lead with regard to delineating other immediate obligations under the CRC. Its reference to the tripartite topology of state obligations, namely that states parties should 'respect protect and fulfil' rights⁴¹ makes it clear that the Committee regards

³³ For similar language from the ComESCR, see its General Comment No.3 on the nature of States parties' obligations (Art.2 (1)), UN Doc. E/1991/23 (1990), para. 9.

³⁴ This point has is reflected implicitly in the work of the ComESCR, see *ibid*.

³⁵ ComRC Day of General Discussion, paras. 48-49.

³⁶ The Committee stated that, 'The Committee on Economic, Social and Cultural Rights (CESCR) has systematically underlined this obligation of States, to guarantee at all times, the guarantee at all times, the minimum level of protection (the minimum core content) in the provision of: essential foodstuffs, equal access to primary health care, basic shelter and housing, social security or social assistance coverage, family protection, and basic education' (*ibid*, para. 48). In fact, the ComESCR stated that: 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.' (ComESCR GC No.3, para. 10).

³⁷ ComESCR General Comment No.3, para. 10.

³⁸ ComRC Day of General Discussion, para. 48. The Committee did, however, appear to confuse the ComESCR's approach to the issues of 'maximum available resources' and 'minimum core obligations' somewhat, stating in the context of its discussion of the latter that 'where the available resources are demonstrably inadequate, the State concerned is still required to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances' (*ibid*). In contrast, the ComESCR made this point about with regard to the enjoyment of ESR generally – not just the 'minimum core' of those rights (ComESCR General Comment No.3, para. 11).

³⁹ ComRC General Comment No.15, para. 73.

⁴⁰ The Committee has adopted this approach in its General Comments since 2000. See ComESCR General Comments 14, 15, 17-19 and 21.

⁴¹ See, e.g., ComRC General Comment No.4, para. 3; ComRC, General Comment No.16, paras. 26-31; ComRC General Comment No.17, para. 54; ComRC General Comment No.15, paras. 1 and 71-74. The ComRC has not, however, always explicitly used the definitions of these obligations adopted by the ComESCR. See, e.g.,

states as being under an immediate duty not to interfere with the enjoyment of ESR and to take steps to prevent third parties from interfering with the enjoyment of such rights.⁴² States parties' obligation of non-discrimination is also of immediate effect.⁴³ With regard to giving effect to this latter obligation, the Committee recognised 'the need for identifying and giving priority to marginalised and disadvantaged groups of children'.⁴⁴

In sum, the Committee's interpretation of Article 4 and hence ESR obligations under the CRC strongly resemble – and indeed almost entirely replicate – that of the ComESCR in relation to ICESCR. This is so even where there are clear divergences in language between these two instruments.

The ICESCR and CRC frameworks: an ideal union or an odd couple?

To appreciate fully the potential issues surrounding the ComRC's treatment of Article 4 and other ESR provisions under the CRC, it is necessary to turn back to the CRC drafting negotiations.⁴⁵ How did this process reflect awareness of the concepts and language set out in ICESCR? What evidence is there of the significance accorded to the differences between the language included in ICESCR and the CRC when considering the appropriateness of the ComRC's interpretation of the CRC?

In considering Articles 4, CRC and 2(1), ICESCR, it is important to note that the Working Group meetings during which the ESR provisions of the CRC were drafted predated the key statements of ComESCR General Comments. General Comment No.3, which was the first detailed attempt at specification of obligations imposed by Article 2(1), was issued in December 1990. As such, the Working Groups did not have access to the detailed delineations of specific provisions in, and issues arising in relation to, ICESCR. That said, it is clear that there was a concern on the part of CRC drafters to render the approach to ESR under the Convention consistent with that of ICESCR.⁴⁶

During the drafting process, reference was made to and/or concern was expressed by delegations with regard to making the draft Convention provisions consistent with those of the ICESCR in a wide range of contexts,⁴⁷ including Article 4 on general measures,⁴⁸ the rights to education,⁴⁹ an adequate

General Comment No.15 where the ComRC states that the obligation to fulfill entails 'facilitation' and 'provision' (at para. 71). This is despite the fact that the ComESCR has made it clear that 'promotion' is also a key element of that duty in the context of health. (See ComESCR General Comment No.14, para. 37 and footnote 23.)

⁴² For more on these obligations under ICESCR, see I. Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 Human Rights Law Review 81.

⁴³ See ComRC Day of General Discussion, para. 47; ComESCR General Comment No.3, para. 1.

⁴⁴ ComRC Day of General Discussion, para. 40.

⁴⁵ The information on the drafting negotiations below is taken from reports of such included in the United Nations, *Legislative History of the Convention on the Rights of the Child, Vols I and II* (Geneva/New York: United Nations 2007) and S. Detrick, *The United Nations Convention on the Rights of the Child: A Guide to the Travaux Préparatoires*. Given that neither document provides a complete account of all discussions (nor, indeed, do the working group reports), the argumentation below is reflective of a thorough, but not necessarily complete, account of the draft negotiations.

⁴⁶ Please note that the article numbers referred to in this section are those ultimately assigned to the respective ESR under the CRC – they do not reflect the Article numbers employed during the draft process.

⁴⁷ While there is no express reference to ICESCR in the Travaux Préparatoires with regard to the right to an adequate standard of living in Article 27, that provision bears a very strong resemblance to Article 11, ICESCR.

⁴⁸ See, e.g., E/CN.4/1324, para. 1 and E/CN.4/L.1575, para. 43.

⁴⁹ See, e.g., E/CN.4/1985/64, paras. 60, 62, 76; E/CN.4/1989/48, paras. 461-463.

standard of living,⁵⁰ health,⁵¹ social security⁵² and disabled children's rights.⁵³ Furthermore, during the meeting of the 1983 Working Group, several delegations supported the idea of a heading applying to all of the provisions of the Convention 'concerning social welfare benefits'⁵⁴ that would 'incorporate language comparable to Article 2 [ICESCR]'.⁵⁵ This approach was not adopted consistently throughout the ESR included in the CRC, however.

There was one element of Article 2(1) ICESCR that was a consistent preoccupation of the CRC drafters: the issue of available resources. Indeed, a concern with resource limitations was reflected frequently in the discussion of all provisions of the CRC and explicitly referred to in the context of particular provisions.⁵⁶ Drafter attention to the resource implications of the implementation of Convention rights was not limited to the ESR context, however. The express division in Article 4 between the state obligations imposed by ESCR and CPR CRC resulted from the response of a number of negotiating states to earlier wording that would have rendered the implementation measures to be taken for *all* Convention rights subject to the availability of resources MAR condition.⁵⁷ The USA, Canada, Sweden and New Zealand, Argentina, Portugal and the United Kingdom, 'stated that civil and political rights guaranteed in the International Covenant on Civil and Political Rights⁵⁸ were not subjected to the availability of resources and that the Covenant's standards should not be weakened in the child's convention.⁵⁹ With regard to ESCR, they recognised that certain of the rights could be implemented only if sufficient resources' were available.⁶⁰

However, while one aspect of Article 2(1) ICESCR – maximum available resources – is very strongly reflected in the CRC ESR negotiations, the same is not true with regard to the concept of progressive realisation. While there is a mention of progressivity, in the context of the rights to education,⁶¹ an adequate standard of living⁶² and social security,⁶³ as well as the inclusion thereof in the wording of

⁵⁰ E/CN.4/1988/WG.1/NGO/2, para. 3.

⁵¹ See, e.g., E/CN.4/1985/64, para 15.

⁵² See, e.g., E/CN.4/1989/48, paras. 441, 446

⁵³ See, e.g., E/CN.4/1983/62, para. 60.

⁵⁴ See E/CN.4/1983/62, para 60.

⁵⁵ Ibid.

⁵⁶ See, e.g., Working Group discussions of the child's right to an adequate standard of living (inter alia E/CN.4/1985/64, paras 43-52), the right to education (inter alia E/CN.4/1985/64, paras 58-67), Article 4 (inter alia E/CN.4/L.1575, paras 44; E/CN.4/1989/48, paras 172-174, the right to social security (inter alia E/CN.4/1984/71, paras 83, 90), and the right to health (see inter alia E/CN.4/1986/39, p.3, in which Bangladesh submitted that that Articles 'such Articles as "health", "standards of living", "compulsory free education" should be made subject to a clause on the economic feasibility in particular countries'). In the context of disabled children's rights, concerns about resources reflected in the wording of Article 23(2)'s on 'subject to available resources' and Article 23(3)'s inclusion of the language 'whenever possible. With regard to Article 6, negotiating states considered the inclusion of language on 'within their capacities' and 'available resources' (see E/CN.4/1988/28, paras 14 and 15, respectively) but this was ultimately not included in the final provision.

⁵⁷ For examples of such wording, see, e.g., E/CN.4/1989/48, annex p.3; E/CN.4/1988/WG.1/WP.1/Rev.2, p. 7.

⁵⁸ This is the sister instrument to ICESCR which contains civil and political rights. Together with the Universal Declaration of Human Rights, these instruments make up the international bill of rights.

⁵⁹ See E/CN.4/1989/48, para. 172.

⁶⁰ Ibid.

⁶¹ See E/CN.4/1989/48, paras. 460, 463 and 466. See the express reference to progressive achievement of the right to education in Section 28(1).

⁶² See, e.g., E/CN.4/1988/WG.1/NGO/2.

the right to health provision,⁶⁴ it received nothing like the attention that the issue of resources did. Indeed, it is notable that the issue of progressivity does not appear to have been raised in relation to disabled children's rights and – most importantly – Article 4 on general measures.⁶⁵ Interestingly, in its technical review, UNICEF argued that 'it is unnecessary to include a resource availability clause in the article defining the nature of States Parties' overall obligations since each of the subsequent provisions of the draft convention dealing with economic or social rights contains a specific phrase effectively limiting the States Parties' obligations in the light of resource availability'.⁶⁶ While this recommendation was not acted upon, it is worth noting that no proposal seems was made vis-à-vis the inclusion (or deletion) of an 'umbrella obligation' of progressive realisation or achievement.⁶⁷ Rather, the patchy references to progressivity in particular ESR provisions under the CRC seem attributable to the limited attention accorded to that concept by participants in the Working Group discussions.

One might ask what this relative neglect of progressive realisation amounts to and whether it really matters? Does the clear concern with resources reflected in Article 4 effectively 'cover' progressive realisation? Ultimately one must conclude that it does not. Progressive realisation was treated as a discrete element of Article 2(1) by the drafters of ICESCR.⁶⁸ The ComESCR has also taken this approach.⁶⁹

The fact that the rate of progressive realisation is necessarily affected by the extent of resources of available to the state does not reduce that concept to simply a restatement of the 'maximum available resources' point. It is thus problematic that the ComRC has failed adequately to acknowledge and address the difference in language (and hence potentially in content) between Article 2(1) ICESCR and Article 4 CRC.

Furthermore, there seems no discernible logic as to why the concept of progressivity is expressly referred to in some ESR provisions (e.g., Articles 24 and 28) but not in others. While this would not matter if Article 4 contained an 'umbrella' reference to progressive realisation in the way that Article 2(1) does, this inconsistency in drafting creates problems for the treatment of progressivity in the context of the CRC generally. Given this, it is hardly surprising that the ComRC should adopt the more coherent, developed framework of ICESCR. It would be better, however, if the ComRC were expressly to justify doing so rather than simply eliding over the notable omission of progressive realisation from Article 4 – an approach that has inevitably proved question-begging. This is arguably

⁶³ See, e.g., ECN.4/1984/71, paras. 86-93. See the implicit incorporation of 'progressivity' in the language of Section 26(1) which refers to the State obligation to 'take the necessary measures to achieve the full realisation of this right'.

⁶⁴ See Article 24(2)'s requirement that states 'shall pursue full implementation of the right' and the reference to 'progressive achievement' in Section 24(4). The inclusion of 'progressive' in this latter provision seems to have been a last minute decision – it was literally the last change made to the wording of the Article (E/CN.4/1989/48 para. 431). The documents contained in United Nations and Detrick above, n. 45, include no material that suggests why this wording was included.

⁶⁵ There was also no reference to progressivity with regard to Article 6.

⁶⁶ See E/CN.4/1989/WG.1/CRP.1.

⁶⁷ While the Travaux Préparatoires do not reflect all Working Group discussion/proposals, it would seem highly unlikely that such a significant proposal would not have been recorded.

⁶⁸ See P. Alston & G. Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 156, 172-177 and 228.

⁶⁹ See, e.g., ComESCR General Comment No.3, para. 9.

particularly necessary given the existence of Article 6 – the right to survival and development – which entails both civil and political and economic and social aspects and the drafting negotiations pertaining to which did not include a discussion of progressivity.⁷⁰

The Committee's confused approach to progressive realization – and ESR obligations more generally – is cast into sharp relief in its General Comment No 15. Here, the Committee stated that,

In accordance with Article 4 of the Convention, States parties shall fulfil the entitlements contained in children's right to health to the maximum extent of their available resources and, where needed, within the framework of international co-operation.⁷¹

At first glance, this statement seems unproblematic and would appear to reflect the language of Article 4. Indeed, it could be praised for the avoidance of the language of progressivity which is not found in Article 4 (although the irony is that Article 24(4) actually makes explicit reference to 'achieving progressively the full realisation of the right' so a focus on progressive realisation is certainly justifiable in this instance). In this instance, however, the Committee misapplies the language of fulfil, essentially equating it to 'realisation' or 'implementation'. Aside from the linguistic confusion, this equation of concepts is an issue due to the fact the obligation to fulfill does not directly correspond to the concept of progressive realization, containing as it does both immediate and progressive elements. While 'fulfil' need not be employed in the sense of the obligation to fulfil, it seems clear that this was what the Committee intended here.⁷² This conceptual confusion is further evidenced in the Committee's statements that: 'states should demonstrate their commitment to progressive fulfillment of all obligations under Article 24'.⁷³ It is thus clear that there are serious issues with regard to the Committee's employment of its chosen framework.

Where are we now?

The discussion so far illustrates that the instrument that the Committee is mandated to monitor is different to ICESCR. As such, the Committee needs to provide a more consistent justification for its whole-hearted adoption of the ESR framework outlined by the ComESCR. I am not suggesting that such a justification does not exist, rather I seek to highlight that it has not yet been provided. It is important to note that the Committee's approach has not received extensive criticism: academics working in the area have frequently adopted the ICESCR framework when discussing children's ESR⁷⁴ or have failed to criticise the Committee's approach on this point.⁷⁵ As such, it is perhaps not surprising that the Committee has felt untroubled in its approach. Given the Committee's mandate,

⁷⁰ For an excellent discussion of the drafting processes and Article 6 generally, see N. Peleg, *The Child's Right to Development* (PhD defended at University College London, 28 January 2013).

⁷¹ ComRC General Comment No.15, para. 71.

⁷² The statement in question follows this passage: 'States have three types of obligations relating to human rights, including children's right to health: to respect the freedoms and the entitlements, to protect both freedoms and entitlements against third parties or against social or environmental threats, and to fulfil the entitlements through facilitation or direct provision.' (ibid, para. 72).

⁷³ Ibid, para. 74.

⁷⁴ See, e.g., M. Nyongesa Wabwire, *Legal Protection of Social and Economic Rights of Children in Developing Countries: Reassessing International Cooperation and Responsibility* (Antwerp: Intersentia, 2010), Chapter 2.

⁷⁵ See, e.g., G. Van Bueren in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (New York: CUP, 2008) 569.

however, its failure to consider in any depth how ‘general’ ESR obligations (as interpreted by ICESCR) should be construed or applied in light of children’s ESR in the context of the CRC is troubling.

Another problem with the Committee’s reliance on the work of the ComESCR is the fact that that model is itself far from perfect. The substantive content of ESR duties such as ‘progressive realisation’, ‘maximum available resources’ and the ‘minimum core obligation’ is complex and subject to contestation.⁷⁶ Furthermore, there is an issue of completeness; significant gaps and confusions have been identified in the ICESCR framework as outlined by the ComESCR.⁷⁷ However, the ComRC appear oblivious to this in its uncritical ‘borrowing’ of that body’s approach. It thus has failed to realise the problems that it has, probably inadvertently, incorporated into the CRC framework of ESR.

The Committee’s failure to engage in a meaningful way with ESR obligations under the CRC is further reflected in its lack of consistent, effective engagement with the language of ESR obligations (e.g., ‘progressive achievement’, ‘maximum available resources’ and ‘minimum core’) in the context of either its General Comments or Concluding Observations thus far.⁷⁸ This gap is perhaps unsurprising: the Committee’s report of its Day of General Discussion on Resources states that –

In the [Foreword of General Comment No.5], the Committee indicated that, given the complexity of the concept of [obligations to develop ‘general measures of implementation’] it was ‘likely to issue more detailed general comments on individual elements in due course’.

It is notable that this has not yet occurred.

One might be moved to say, ‘well, this is all very worrying from a theory perspective, but does it really matter in practice?’ The answer is that it does – a lot. When we consider the purpose of the ESR framework outlined by the ComRC – specifically its function in terms of providing guidance to states, advocates, national human rights institutions for children and others with regard to the implementation of the CRC (and in constituting a framework for the evaluation of such) – the inconsistency and gaps identified above are extremely problematic. Nowhere is this more evident than the highly charged area of budgetary decision-making.

4. The Committee and budgets

⁷⁶ For more on this point, see QUB Budget Analysis Project, *Budgeting for Economic and Social Rights: A Human Rights Framework* (Belfast, QUB, 2010).

⁷⁷ For pieces highlighting confusions and gaps in the ICESCR framework, see, e.g., *ibid*; K. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ (2008) 33 *Yale Journal of International Law* 113; A. Nolan, ‘Putting ESR-Based Budget Analysis into Practice: Addressing the Conceptual Challenges’ in Nolan, O’Connell & Harvey (eds), *Human Rights & Public Finance* (Oxford: Hart Publishing, forthcoming 2013).

⁷⁸ For evidence of this, see C. Price Cohen, *The Jurisprudence on the Rights of the Child, Vol III* (New York: Transnational Publishers, 2005). More recently, none of the Concluding Observations of the Committee from 20 February 2012 to 20 February 2013 included a reference to ‘progressive achievement’ or ‘minimum core’. While there were a small number of references to ‘maximum available resources’, this was solely in the context of the Committee reiterating the duty rather than evaluating state’s compliance with such. (See, e.g., Concluding Observations: Madagascar, CRC/C/MDG/CO/3-4, para. 50; Concluding Observations: Cyprus, CRC/C/CYP/CO/3-4, para 16.)

The Committee has made clear that the CRC has implications for state budget decisions, highlighting the link between the attainment of ESR and budgetary decision-making on numerous occasions. In its General Comment No.5, the Committee stated in the context of discussing the obligations imposed by Article 4 CRC, that ‘no State can tell whether it is fulfilling children’s [ESCR] “to the maximum extent of ... available resources”, as it is required to do under Article 4, unless it can identify the proportion of national and other budgets allocated to the social sector and, within that, to children, both directly and indirectly.’⁷⁹ Furthermore, states are required to carry out ‘a continuous process of child impact assessment (predicting the impact of any proposed law, policy or budgetary allocation which affects children and the enjoyment of their rights) and child impact evaluation (evaluating the actual impact of implementation)’ is required.⁸⁰ States parties are required to identify ministries and departments dealing with children and to make sure that other ministries are also able to demonstrate how their budget and programmes are consistent with the realisation of children’s ESR.⁸¹ According to the Committee, the obligation to ‘fulfil’ children’s economic, social and cultural rights, ‘requires States parties to introduce the necessary legislative, administrative, judicial, *budgetary*, promotional and other measures aimed at the full enjoyment of [those rights]’ in terms of Article 4.⁸²

The Committee’s 2010 State Reporting Guidelines ask for information on allocation of resources during the reporting period for social services in relation to total expenditures for social security, health services, education, childhood development, child protection and child protection measures.⁸³ States are also requested to provide data on whether the budget allocated for the implementation of the Convention ‘is clearly identified and can be monitored as it relates to the comprehensive national strategy and corresponding plan for children’.⁸⁴ Reflecting this growing focus on the issue of resources, over the last number of years, the Committee has included a discrete section on ‘allocation of resources’ in its Concluding Observations.

The Committee has highlighted that it needs to know what steps are taken ‘at all levels of Government to ensure that economic and social planning and decision-making and budgetary decisions are made with the best interests of children as a primary consideration’.⁸⁵ This budget-conscious approach to Convention interpretation and monitoring is echoed in the Committee’s General Comments,⁸⁶ as well as its Guidelines on Periodic State Reports in which it requests State Parties to provide information including ‘whether the budget allocated for the implementation of the Convention and its Optional Protocols is clearly identified and can be monitored as it relates to

⁷⁹ ComRC General Comment No 5, para. 51.

⁸⁰ ComRC General Comment No.5, para. 45. The Committee made this observation when discussing the state’s duty to ensure both that the best interests of the child are a primary consideration in all actions concerning children in terms of Article 3(1) CRC, and that the Convention is respected in legislation and policy development and delivery at all levels of government.

⁸¹ ComRC Day of General Discussion, para. 30(c).

⁸² See, e.g., ComRC, General Comment No.17, para. 54; ComRC General Comment No.16, para. 29,

⁸³ ComRC ‘State Reporting Guidelines’, UN Doc. CRC/C/58/Rev.2, 23 November 2010.

⁸⁴ Ibid, para. 19(d).

⁸⁵ ComRC General Comment No.5, para. 51.

⁸⁶ Although the issue of resources is addressed in a considerable number of General Comments, budgets are dealt with in some detail in ComRC General Comment No.9 on the rights of children with disabilities, UN Doc. CRC/C/GC/9 (2007), para 20; ComRC General comment No. 13 on the right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13 (2011), paras. 40-42, 71-72 and 74-75; and ComRC General Comment No.17, para. 57(d).

the comprehensive national strategy and corresponding plan for children.⁸⁷ Budgetary data in state reports should 'indicate the resources available and the proportion allocated to children, disaggregated by sectors'.⁸⁸ Furthermore, reports should indicate clearly the proportion of allocation and expenditure on children, in relation to other priorities of the government, 'including, but not limited to, military allocation and expenditure'.⁸⁹ States parties should 'make children a priority in the budgetary allocations as a means to ensure the highest return of the limited available resources; and make investment in children visible in the State budget through detailed compilation of resources allocated to them'.⁹⁰ The Committee has gone so far as to suggest that all States should consider legislating a specific proportion of the public expenditure to be allocated to children⁹¹ – something that is currently only a feature of a very small number of constitutional systems.⁹²

The Committee's focus on budgetary issues forms a discrete element of its 2013 General Comment No.15. Here the Committee set out a series of obligations imposed on states with regard to budget allocation and spending,⁹³ focussing specifically on law, and policymaking in the health context.⁹⁴ States were urged to 'continually assess the impact of macro-economic policy decisions on children's right to health, particularly children in vulnerable situations, prevent any decisions that may compromise children's rights, and to apply the best interests principle when making such decisions'.⁹⁵

A key issue in terms of the current post-financial and economic crises context, is the Committee's statement that states parties are required to demonstrate that 'children, including in particular marginalised and disadvantaged groups of children, are protected from the adverse effects of economic policies or financial downturns'.⁹⁶ The Committee has also stated that states commitment to 'progressive fulfilment' of the child's right to health should be prioritised 'even in the context of political or economic crisis or emergency situations'.⁹⁷ Furthermore, state emphasis on allocations

⁸⁷ UN Doc, CRC/C/58/Rev.2 (2010), para. 19(d).

⁸⁸ ComRC Day of General Discussion, para. 34(c).

⁸⁹ *ibid.*

⁹⁰ *ibid.*, para. 30(a).

⁹¹ *ibid.*, para. 23.

⁹² For an example of such a measure, the Transitional Provisions of the Ecuadorean Constitution 2008 obliges the state to assign public resources from the General Budget in a progressive manner for the initial basic and secondary education (Disposiciones Transitorias, point 18), stipulating an annual increase of at least 0.5 per cent of the GDP until a minimum of 6 per cent is reached (*ibid.*). See also Article 212 of the Brazilian Constitution which requires that: 'the Union shall apply, annually, never less than eighteen percent, and the states, the Federal District, and the municipalities, at least twenty-five percent of the tax revenues, including those resulting from transfers, in the maintenance and development of education.' Article 164 of the Constitution of Taiwan states that 'expenditures of educational programs, scientific studies and cultural service shall not be, in respect of the Central Government, not less than 15 per cent of the total national budget; in respect of each province, not less than 25 percent of the total provincial budget; and in respect of each municipality or hsien, less than 35 percent of the total municipal or hsien budget. Educational and cultural foundations established in accordance with law shall, together with their property, be protected'. Admittedly 'education' is not limited to children but children are the main beneficiaries of such.

⁹³ ComRC General Comment No.15, paras. 104-107.

⁹⁴ See *ibid.*, para. 106.

⁹⁵ *ibid.*, para. 105.

⁹⁶ ComRC General Comment No.5, para. 51.

⁹⁷ General Comment No.15, para. 74,

aimed at economic growth should not be made at the sacrifice of social sector expenditure;⁹⁸ again this is a crucial point given the ‘austerity’ measures (including those of a budgetary nature) that have been adopted by a wide range of states parties to the CRC following the crises.⁹⁹

Notably, the Committee has moved beyond simply discussing the importance of budget decision-making vis-à-vis child ESR realisation generally to considering budget analysis methodology specifically. In the recommendations emerging from its Day of General Discussion on Resources for the Rights of the Child in 2007 – at which there was considerable discussion of child rights-based budget analysis methodology – it urged states to ‘consider using rights-based budget monitoring and analysis, as well as child impact assessments on how investments in any sector may serve “the best interests of the child”’.¹⁰⁰ It also argued that the ‘accurate systematization of [budgetary] data and indicators and an effective analysis of the budget are particularly important requirements for the monitoring of efforts towards the realisation of economic, social and cultural rights for children.’¹⁰¹ Further, the Committee emphasised the importance of transparent and participatory budgeting processes.¹⁰²

Positively, the Committee has progressed beyond simply issuing generic statements directing states to ‘increase budget allocations for children’ or ‘prioritise budgetary allocation for children’,¹⁰³ to setting out a procedural steps that states should take in order to give effect to children’s budgets,¹⁰⁴ and critiquing states failure to do so.¹⁰⁵ However, it has thus far not engaged with evaluating the compliance of specific outcomes of budgetary decisions with ESR obligations under the CRC. This is perhaps unsurprising given that the Committee does not generally adopt a ‘violations’ approach in its Concluding Observations in the sense of concluding explicitly that a specific act or omission of a State Party constitutes a violation of the Convention.¹⁰⁶ Instead, it prefers to ‘express concern’ about particular factual situations in which ESR are not being satisfied and to make recommendations.¹⁰⁷ However, although this might explain the Committee’s reluctance to evaluate discrete budget decisions in terms of their compliance with ESR, that reluctance is also symptomatic of the Committee’s broader failure to make the ‘conceptual link’ between ESR under the CRC and specific

⁹⁸ ComRC Day of General Discussion, para. 31.

⁹⁹ See, e.g., I. Ortiz, J. Chai & M. Cummins, *Austerity Measures Threaten Children and Poor Households: Recent Evidence in Public Expenditures from 128 Developing Countries* (New York: UNICEF, 2011)

¹⁰⁰ ComRC Day of General Discussion, para 30(b). In its General Comment No.16, the Committee stated that states should adopt child rights-based impact assessments in relation to ‘business-related policy, legislation, regulations, *budget*, or other administrative decisions which affect children and the enjoyment of their rights’ (para. 78).

¹⁰¹ *ibid*, para. 33.

¹⁰² *ibid*, para. 34(a).

¹⁰³ See, e.g., Pakistan, CRC/C/15/Add.2/7 (2003); Nepal, CRC/C/15/ADD/261 (2005).

¹⁰⁴ See, e.g., Bangladesh, CRC/C/BGD/CO/4 (2009). For an example of a ‘half-way house’ between these approaches on the Committee’s part, see Sri Lanka, CRC/C/15/Add/228 (2004).

¹⁰⁵ For some recent examples, see Albania, CRC/C/ALB/CO/2-4 (2012); Canada, CRC/C/CAN/CO/3-4 (2013); and United Kingdom, CRC/C/COK/CO/1 (2012).

¹⁰⁶ For an outline of a ‘violations’ approach of monitoring ESR, see A. Chapman, ‘A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights’ (1996) 18(1) *Human Rights Quarterly* 23.

¹⁰⁷ I am grateful to Noam Peleg for his insight on this point. (In conversation, November 2012). For an example of the Committee expressing ‘concern’ at what it termed ‘extensive budget cuts’, see Iceland, CRC/C/ISL/CO/3-4 (2012), para. 18-10

economic/budget decisions in its work. The challenge posed to monitoring methodologies by this omission is demonstrated in the discussion of child ESR-based budget analysis below.

5. Child rights-based budget analysis

Child rights-based budget analysis is the analysis of budgetary decisions using a framework premised on substantive child rights protections set out in international or national human rights instruments (e.g., in human rights treaties, constitutions or domestic legislation).¹⁰⁸ Ultimately all such analysis seeks to determine the impact of budgetary decisions on the implementation and enjoyment of children's rights. Child rights-based budget analysis work has thus far focused predominantly on ESR, rather than their civil and political rights counterparts.¹⁰⁹ This situation is attributable both to the particularly resource dependent nature of ESR and the fact that the implementation of ESR will frequently entail the allocation and expenditure of additional resources by governments above existing budgetary distributions.

Child ESR-based budget analysis may either be static or dynamic: 'static analysis evaluates a given budget by itself. Dynamic analysis compares the evolution of budgets over time, looking at variations in allocations and spending over different periods'.¹¹⁰ Dynamic analysis is particularly important when practitioners are seeking to evaluate the extent to which states are giving effect to their obligations progressively to realise children's ESR to the maximum extent of available resources, in terms of Article 4 CRC discussed below.

Such work will also vary in terms of the 'budget' being analysed. Budgetary allocations, expenditure, revenue and international and domestic macro-economic policy all have implications for the enjoyment of children's ESR. Child ESR-based budget analysis may thus focus on a range of different budgetary aspects. Most budget analysis practitioners (including those who focus on children's rights) have focused on the first two budgetary issues, however.¹¹¹ This 'bias' in ESR-based budget analysis work is demonstrated by a study carried out by the Queen's University Belfast (QUB) Budget Analysis Project of a range of key case studies and guidance on ESR-based budget analysis.¹¹² The

¹⁰⁸ For examples of child rights-budget analysis, see International Budget Project's resource page on 'Children and Youths: <http://internationalbudget.org/budget-analysis/sectors-issues-demographic/children-youths/>. For further examples, see, P. Shastri and E. Ganguly Thukral, *Budget for Children Analysis: A Beginner's Guide* (Save the Children: Kathmandu, 2010). See also E. Ganguly Thukral (ed), *Every Right for Every Child: Governance and Accountability* (London, Routledge, 2011).

¹⁰⁹ See, e.g., the work of Imali Ye Mwana, IDASA (previously Child Budget Unit) such as S. Cassiem and J. Streak, *Budgeting for Child Socio-economic Rights: Government Obligations and the Child's Right to Social Security and Education* (Cape Town: IDASA, 2001) and J. Streak, *Monitoring Government Budgets to Advance Child Rights* (Cape Town: IDASA, 2003) http://www.idasa.org/our_products/resources/output/monitoring_government_budgets_2/. Other groups, such as the Indian-based HAQ Centre for Child Rights, which produces analyses of the impact of national and state budgets, from a child rights perspective, also address civil and political rights-focussed child rights-based budget analysis in the context of child protection and juvenile justice.

¹¹⁰ OHCHR, *Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights* (8 June 2009), UN Doc. E/2009/90, 14.

¹¹¹ For an example of a recently developed methodology designed to evaluate macroeconomic policies from an ESR perspective (albeit not a child-specific one), see R. Balakrishnan, D. Elson & R. Patel, *Rethinking Macroeconomic Strategies from a Human Rights Perspective (Why MES with Human Rights II)* (New York: Marymount Manhattan College/ US Human Rights Network 2009).

¹¹² For more on the project, see www.qub.ac.uk/schools/SchoolofLaw/Research/HumanRightsCentre/ResearchProjects/BudgetAnalysis/.

study's authors found that practitioners examined numerous dimensions of budgets: 'All documents refer to allocation of resources and past expenditure is discussed by 13 out of the 14 documents. Budget outcomes (the impact that the budget has on the enjoyment of ESR) are considered in 12. Budget outputs (the goods and services produced by the budget) are identified in nine reports, while budget revenue streams were cited in eight. Only four papers discuss the macroeconomics of the budget.'¹¹³ There is also variety within child ESR-based budget analysis work in terms of the 'kind' of budget being considered, with actors focusing on national, sub-national or local government level budgets.¹¹⁴

While child ESR-based budget analysis efforts will differ in terms of the rights framework used, this chapter will focus on the CRC. That instrument is used widely in budget analysis work; in its review of case studies and guidance, the QUB Budget Analysis Project identified that 9 out of 14 of the leading ESR-based budget analysis documents used the CRC as a point of reference.¹¹⁵ This is unsurprising given the high levels of ratification of that instrument, the relatively limited number of constitutional frameworks that include detailed child ESR provisions, and the fact that the CRC forms part of the constitutional hierarchy of a number of different countries in which ESR-based budget analysis is practised. Where practitioners employ the CRC as their key analytical framework for the purpose of child ESR-based budget analysis, they make frequent use of the statements of the Committee on the Rights of the Child to support their approach and argumentation.¹¹⁶

There are two ways in which the Committee's failure to outline a comprehensive coherent framework for ESR and to link that framework to budgetary decisions impacts on budget analysis. As suggested at the end of the previous section, the first is from a methodological perspective: how can practitioners evaluate budgetary compliance – or indeed monitor compliance of state actions or omissions in any way – with ESR standards, if such standards are unclear and incomplete? This lack of clarity also has implications from an advocacy perspective. If there is doubt about the substantive content of ESR obligations under the CRC, how can advocates convince governments that they are in violation of their ESR obligations and hold them in account for such? Ambiguities and gaps in the CRC ESR framework have contributed to the frequent failure of child rights-based budget analysis practitioners to relate specific budget decisions to particular ESR obligations, as well as a tendency on the part of practitioners to ask 'broad questions' about budget decisions rather than 'hooking' those questions on to CRC language/obligations.¹¹⁷ Thus, the lack of clarity around ESR obligations under the CRC has resulted in a weakening of the connection between budget analysis work and

¹¹³ QUB Analysis Project, *Budget Analysis and Economic and Social Rights: A Review of Selected Case Studies and Guidance* (QUB: Belfast, 2010), 6.

¹¹⁴ See, e.g., the work of IDASA, which has produced 'Budgetbriefs' analysing both national and provincial budgets from a child ESR perspective.

¹¹⁵ QUB Analysis Project above n. 113, 5.

¹¹⁶ See, e.g., Shastri & Ganguly above n. 108.

¹¹⁷ See, e.g., the Ireland-based Children's Rights Alliance's 'Analysis of Budget 2013 and its Impact on Children' (Dublin: CRA, 2012) which highlights the impact of budgetary decisions on the realization of a range of CRC rights and does mention some ESR obligations but does not engage with these in any depth. See also D. Budlender and P. Proudlock, 'Child-centered Analysis of Government's Budgets 2010-2012' (Cape Town: Children's Institute, University of Cape Town, 2010) which provides an excellent overview of budgetary allocations on children, does not go beyond specifying which constitutional rights are impacted upon by particular budgetary decisions.

those legal obligations, thereby weakening the force of the conclusions of budget analysis practitioners.

The focus in this paper is on budget analysis methodology and, indeed, the Committee's historic discomfort with assessing the outcomes of budgetary decision-making through linking them to the language of ESR obligations means that budget analysis practitioners are effectively faced with a 'double whammy' in terms of their work. However, the Committee's inadequate approach to the ESR under the CRC applies to a wide range of methodologies focussing on monitoring children's ESR; specifically, any of those that use the CRC as an analytical framework for their work. The issue of clarity of standards hampers the ability of the advocates both to use the CRC ESR as standards for monitoring effectively and to hold government to account for ESR violations. Admittedly, the Committee is certainly not alone in terms of its discomfort to link budgetary decisions and their impacts with specific ESR obligations; the ComESCR has been criticised on the same grounds.¹¹⁸ However, the shortcomings on the part of one human rights treaty-monitoring body do not justify that of another – albeit that they may contribute to explaining such.

6. What should the Committee be doing?

Thus far, the paper has focussed on the shortcomings in the Committee's approach to ESR under the CRC. In this section, I will argue that the Committee needs to interpret the CRC on that instrument's own merits, rather than simply 'copy and pasting' the approach of other supervisory bodies. This is particularly important given the observations made above with regard to the particular position of children as ESR-holders. As highlighted earlier, the Committee has made an effort to bring a child rights focus to bear with regard to some of the ESR obligations that it has adopted from the ComESCR – albeit inconsistently and only to a limited extent. This has largely taken the form of simply tagging on references to children or child-related issues to the standards set out by the ComESCR,¹¹⁹ rather than a proper conceptualisation of how exactly these obligations should be construed from a child rights-centric perspective. There are clearly advantages in terms of the Committee making use of that framework; doing so means that it can build on the work of the acknowledged ESR experts in the UN treaty-monitoring ComESCR, thereby strengthening the legitimacy and authoritativeness of its own statements. My argument is not that the Committee should 'reinvent the wheel' unnecessarily. Rather I want to focus on how its current framework could/should be adapted in light of the Committee's mandate.

The Committee has not engaged with a number of key questions that have been raised by commentators or in the context of comparative or regional jurisprudence dealing with children's constitutional ESR. For instance, one might ask whether the Committee on the Rights of the Child should be more assertive in interpreting the CRC as according immediately enforceable entitlements than the ComESCR is with regard to ICESCR. Judicial and quasi-judicial bodies such as the European

¹¹⁸ See, e.g., A. Nolan, "Budget Analysis and Economic and Social Rights" in E. Riedel et al (eds.), *Contemporary Issues in the Realisation of Economic, Social and Cultural Rights* (Oxford: Oxford University Press, forthcoming). For a discussion of the ComESCR's reluctance to engage with macroeconomic policy issues more generally, see M. Dowell-Jones, *Contextualising The International Covenant On Economic, Social And Cultural Rights: Assessing The Economic Deficit* (Leiden: Martinus Nijhoff, 2004).

¹¹⁹ See, e.g., the language of ComRC General Comment No.5, para. 8, discussed above in the context of discussions of Article 4.

Committee of Social Rights and national courts have concluded, amongst other things, that children have direct entitlements to the satisfaction of their ESR¹²⁰ and that children should be prioritised in the overall realisation of rights.¹²¹ Such decision-makers have also been prepared to find that children's ESR have been violated but those of adults have not, in situations in which both groups have access to the same goods or services.¹²² These decisions have been premised (whether expressly or implicitly) on the particular position of children in society and in relation to ESR enjoyment.¹²³ Practice has been varied: there is no uniform (or even dominant) 'rule' or approach emerging from the jurisprudence.¹²⁴ But what is clear is that bodies are engaging with such questions in the context of dealing with children's ESR. It is therefore deeply disappointing that the Committee has neither engaged properly with these questions nor in any meaningful way with the implications that children as ESR-holders should have for such.

Another area in which the CRC might be expected to be more expansive than the ComESCR in terms of outlining ESR obligations is with regard to the minimum core obligation. Given children's particular vulnerability to violations of their ESR and the relatively severe impact that such violations may have on them vis-à-vis adults, one might argue that the delineation of a more extensive core obligation than that set out by ComESCR is justified on the basis that children's needs are more acute. This might involve stating that the minimum core of children's rights goes beyond the provision of 'essential foodstuffs, equal access to primary health care, basic shelter and housing, social security or social assistance coverage, family protection, and basic education'.¹²⁵ Of course, if the Committee was to take this approach, they would have to address head-on the ambiguities that exist with regard to the minimum core as outlined by the ComESCR.¹²⁶ This seems unlikely given the Committee's failure to critically engage with (and sometimes even apply correctly) the ComESCR's approach. With regard to state non-compliance with the minimum core obligation, the ComESCR has stated that 'in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority,

¹²⁰ See, e.g., Constitutional Court of Colombia, Tutela Judgment, T-200/93 (holding that the right to health held by children, as opposed to that of other people was established in the constitution as fundamental' and hence immediately enforceable). See also Constitutional Court of Colombia, Unification Judgment, SU-225/98 (iterating that the ESR of the child set out in Article 44 of the Colombian Constitution have an essential content of immediate application).

¹²¹ See, e.g. Constitutional Court of Colombia, Tutela Judgment, T-760/08 (Court ordered the legislatively established contributory and subsidised benefits regimes to be unified. This was to be done in the first case for children and youth, while, with regard to adults, it was to be done progressively taking into account sustainable funding).

¹²² See, e.g., European Committee of Social Rights, Complaint No. 14/2003, *International Federation of Human Rights Leagues (FIDH) v. France*, 8 September 2004 (finding that children's health rights were violated while those of adults were not even though both groups had similar access to healthcare).

¹²³ For discussion of these cases from a child ESR perspective, see Nolan above, n. 4 and 'The Child's Right to Health and the Courts' in J. Harrington and M. Stuttaford (eds), *Global Health and Human Rights: Legal and Philosophical Perspectives* (London: Routledge, 2010) 135.

¹²⁴ See, e.g., the contrasting approach of the South African and Colombian Constitutional Courts on the question of whether children's constitutional ESR give rise to immediately enforceable entitlements on the part of right-holders.

¹²⁵ ComRC Day of General Discussion, para. 48; ComESCR General Comment C No.3, para. 10.

¹²⁶ See Young, above, n. 77.

those minimum obligations'.¹²⁷ It is disappointing that the ComRC has not sought to suggest that the minimum core of children's rights requires that children should be accorded priority in states efforts to meet the minimum core of the rights of everyone.

Following on from the point made above, should the ComRC interpret ESR under CRC as imposing a higher burden of proof on States parties with regard to the extent to which retrogressive measures with regard to child ESR are permissible, than is the case under ICESCR? In his May 2012 letter to States Parties 'in relation to the protection of Covenant rights in the context of the economic and financial crisis',¹²⁸ the Chairperson of ComESCR outlined the requirements that 'any proposed policy change or adjustment' in response to the crises has to meet. This includes the requirement that the measure must not be discriminatory and must comprise all possible measures, including tax measures, to support social transfers and mitigate inequalities that can grow in times of crisis and to ensure that the rights of disadvantaged and marginalised individuals and groups are not disproportionately affected'.¹²⁹ It is clear from this and other statements that the ComESCR is concerned about the particular position of vulnerable groups, when it comes to retrogressive measures. Children are clearly contemplated – but only as one of many groups to be taken into account, not as that body's main focus. In its General Comment No. 17 on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts, the Committee highlighted that: '[n]o regressive measures in relation to the right to play, recreation, rest, leisure or participation in cultural or artistic activities are permitted. If any such deliberate measure was taken, the State would need to prove that it had undertaken careful consideration of all alternatives, including giving due weight to children's expressed views on the issue, and that the decision was justified bearing in mind all other rights in the Convention'.¹³⁰ These are the same conditions imposed by the ComESCR in its General Comments,¹³¹ together with the added requirement that children's expressed views on

¹²⁷ ComESCR General Comment No.3, para. 10.

¹²⁸ Committee on Economic, Social and Cultural Rights, 'Letter from CESCR Chairperson to States Parties in the context of the economic and financial crisis', CESCR/48th/SP/MAB/SW, 16 May 2012, <http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf>.

¹²⁹ Ibid.

¹³⁰ ComRC General Comment No.17, para. 55. The right to rest, leisure and play is a cultural right and hence subject to the same umbrella obligation as ESR in terms of Article 4. As such, we can extrapolate from the Committee's consideration of the obligations imposed by that right.

¹³¹ In its General Comment No.3 on the nature of States parties obligations, the ComESCR states that 'any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'. (ComESCR General Comment No.3, para. 9). This language is echoed in a number of other General Comments (General Comment No.21 on Right of everyone to take part in cultural life, UN Doc. E/C.12/GC/21 (2009), para 65; General Comment No. 19 on the right to social security, UN Doc. E/C.12/GC/19 (2008), para. 42; General Comment No. 18 on the right to work UN Doc., E/C.12/GC/18 (2005), para. 21; General Comment No. 17 on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author, UN Doc. E/C.12/GC/17 (2006), para. 27; General Comment No.15 on the right to water (Arts. 11 and 12), UN Doc. E/C.12/2002/11 (2003), para. 19; General Comment No.14 on The right to the highest attainable standard of health (Art. 12), UN Doc. E/C.12/2000/4 (2000), para. 32; and General Comment No.13 on the right to education (Art. 13), UN Doc. E/C.12/1999/10 (1999), para. 45.). Some of these statements also set out the requirement to ensure 'there has been the most careful consideration of all alternatives'. (General Comment No. 19, para. 42; General Comment No. 18, para. 21; General Comment No. 17, para. 27; General Comment No.15, para. 19; General Comment No.14, para. 32; and General Comment No.13, para. 45). A number of other General Comments have highlighted that the adoption of any

the issue should be considered. It is positive that there is reference made to children's participation rights here. However, it is striking that there is no reference to children's best interests and the need to ensure their rights to life, survival and development despite the fact that these are 'general principles' of the Convention and may be implicated by backward steps in terms of the right in question (and, indeed, all economic, social and cultural rights under the Convention).¹³² One could argue that the status of these elements of the CRC as 'general principles' means that they should implicitly be read into the construal of rights in all situations anyway – including in situations of retrogression. However, this is belied by the express reference to only one general principle: Article 12. Given the particularly severe impact on children of violations of their ESR when compared with adults, should there not be a significantly greater burden on states to justify retrogressive measures that affect their rights? In its General Comment No.15, the Committee states that 'Irrespective of resources, States have the obligation to not take any retrogressive steps that could hamper the enjoyment of children's right to health.'¹³³ One might hope that this signals a new, stricter approach on the part of the Committee in relation to retrogressive measures but it is too early to tell.

There is one final area that one might expect the ComRC to go beyond the ComESCR. This is in the area of age discrimination in the context of ESR. While age discrimination is not expressly prohibited under either the CRC or ICESCR, it could clearly be contemplated under 'other status' in Articles 2(2) and 2 of those instruments respectively. The ComESCR has stated that 'age is a prohibited ground of discrimination in several contexts' including 'in relation to young persons, unequal access by adolescents to sexual and reproductive health information and services amounts to discrimination.'¹³⁴ It is clear, however, both from this General Comment and other statements of the ComESCR,¹³⁵ that the ComESCR is primarily concerned with age discrimination on the basis of 'older age'.¹³⁶ Given growing concerns about the disproportionate impact of the global financial and economic crises and the responses thereto on younger people, including children,¹³⁷ it is highly desirable that the ComRC should take a strong line on discrimination against children relative to older persons on the basis of age, particularly with regard to access to social benefits, housing, work rights protections and social services. This is particularly important given the observation above with

retrogressive measures incompatible with the 'core obligations' under the Covenant would be impermissible. (See ComESCR General Comment No.15, para. 42; ComESCR General Comment No.14, para. 48).

¹³² While no mention is made of non-discrimination either, the fact that this is an immediate obligation means that retrogressive measures that are discriminatory would be in violation of the Convention anyway.

¹³³ ComRC General Comment No.15, para. 72.

¹³⁴ ComESCR General Comment No 20 non-discrimination in economic, social and cultural rights, UN Doc E/C.12/GC/20 (2009), para. 29.

¹³⁵ See, e.g., ComESCR General Comment No.6 on the economic, social and cultural rights of older persons, 13th Session (1995).

¹³⁶ Indeed, the ComESCR has gone so far as to say: 'the Committee on Economic, Social and Cultural Rights is of the view that States parties to the Covenant are obligated to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons. The Committee's own role in this regard is rendered all the more important by the fact that, unlike the case of other population groups such as women and children, no comprehensive international convention yet exists in relation to the rights of older persons and no binding supervisory arrangements attach to the various sets of United Nations principles in this area.' (ComESCR General Comment No.6, para. 13).

¹³⁷ See, e.g., Report of the Independent Expert on the question of human rights and extreme poverty, Ms. Maria Magdalena Sepúlveda Carmona on the human rights based approach to recovery from the global economic and financial crises, with a focus on those living in poverty, UN Doc.A/HRC/17/34 (2011), para. 23, which states that children have suffered devastating and disproportionate effects of the global economic and financial crises.

regard to children's democratic unenfranchisement and their limited ability to exercise indirect influence over democratic decision-making processes that determine laws and policies relating to their ESR and those of other, voting groups. As yet, though, youth-based discrimination has not been addressed by the Committee, which has focussed primarily on discrimination between specific groups of children in its General Comments¹³⁸ – an approach that is unsurprising given the wording of Article 2.

These are some key ways in which the Committee might build on or adapt the ComESCR framework from a child rights-perspective. It is undoubtedly to be welcomed that the Committee has finally issued a General Comment specifically focussed on an ESR – health – in which it has sought to apply the ComESCR framework in the CRC context. However, it still remains for the Committee to engage in a comprehensive child-specific characterisation of the ESR obligations under the CRC.

7. A final word: the challenge and opportunity offered by CRC-OP3

This article has bemoaned the shortcomings in the ESR framework outlined by the ComRC from a child rights-perspective. It has highlighted the challenges that this poses in terms of the Committee furnishing effective guidance both to states in their implementation efforts and to advocates seeking to hold states to account for non-compliance with such rights. I have argued that this is a particular issue in the budgetary context given the Committee's failure to link the ESR obligations that it has delineated with particular budgetary decisions in a meaningful way. There is, however, both new scope and a potential vehicle for improvement on the part of the Committee.

The coming into force of the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure provides another opportunity for the Committee to develop its child ESR framework.¹³⁹ Crucially, in applying CRC standards to specific concrete situations, the Committee will be required to provide views on whether or not there has been a violation of the Convention.

Given the current global economic context and evidence that children and poor households are amongst those most impacted by austerity measures,¹⁴⁰ complaints with regard to budgetary decisions seem highly likely to be brought before the Committee to consider. If it is to satisfy its mandate in addressing such complaints, the Committee will have to make the 'conceptual link' between ESR under the CRC and specific economic/budget decisions in its work.

Article 10(4) of the Optional Protocol states that when examining violation of economic, social and cultural rights,

the Committee shall consider the reasonableness of the steps taken by the State party in accordance with Article 4 of the Convention. 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 economic, social and cultural rights in the Convention.

¹³⁸ See, e.g., ComRC General Comment No.5, para. 12.

¹³⁹ As of 19 March 2013, there were 35 signatories and 17 parties to the Optional Protocol. Ten ratifications are required before the Optional Protocol comes into force.

¹⁴⁰ Ortiz, I., J. Chai and M. Cummins, *Austerity Measures Threaten Children and Poor Households: Recent Evidence in Public Expenditures from 128 Developing Countries* (New York: UNICEF, 2011), 21.

This provision is based on Article 8(4) of the Optional Protocol to ICESCR providing for a Communications Procedure – a sub-article that was included as a response to efforts on the part of a number of states to introduce a ‘margin of appreciation’ for states with regard to rights under that Covenant which was met with strong NGO resistance. Debate exists as to whether ‘reasonableness’ will be interpreted as giving broad ‘margin of appreciation’ to states with regard to implementing ESCR (or not) or if it simply incorporates a standard of review for rights compliance for South African constitutional jurisprudence which would impose a considerably heavier burden on states.¹⁴¹ Given that the OP-ICESCR is due to come into force in the summer of 2013, the Committee will undoubtedly have somewhere to turn for inspiration by the time it is required to construe Article 10(4).

The fact remains, however, that the Committee will not be able to elide over whether or not the state act or omission complained of is ‘reasonable’ in terms of Article 10(4) for the purposes of CRC ESR compliance. Nor will it ultimately be able legitimately to avoid engaging with ESR obligations in a meaningful, situation-specific way. As such, the Optional Protocol will present the Committee with an excellent opportunity to address the shortcomings in its current approach to ESR and budgetary issues that pose obstacles to both those actors who have responsibility for implementing ESR and those who seek monitor such implementation.

¹⁴¹ For a consideration of the different ways in which Article 8(4) might be interpreted, see C. Mahon, ‘Progress at the Front: The Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’ (2008) 8 *Human Rights Law Review* 617; B. Porter, ‘The Reasonableness of Article 8(4): Adjudicating Claims from the Margins’ (2009) 27(1) *Nordic Journal of Human Rights* 39.