

Rights in Anti-Poverty and Housing Strategies: Making the Connection*

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A. Introduction

Since the adoption of the *Universal Declaration of Human Rights (UDHR)* in 1948, poverty and homelessness, and the adverse health consequences that flow from them, have been understood not only as issues of economic and social deprivation but also as matters of basic human rights. In recent years, calls for a “rights-based” approach to addressing poverty and homelessness have become commonplace, particularly within the UN human rights system.¹ Since the mid-1990s UN human rights bodies have urged Canadian governments to adopt and implement strategies to address the crisis of increasing poverty and homelessness within a human rights framework, based on the recognition of the right to an adequate standard of living and the right to adequate housing as guaranteed in international human rights law ratified by Canada.² These recommendations have been echoed by Senate and House of Commons committees, a wide range of civil society organizations, and many human rights, legal, and policy experts.³

What is meant by a rights-based approach, however, is not always clear. Is the point of affirming housing and freedom from poverty as fundamental rights in the context of housing and anti-poverty strategies simply to create a moral imperative on governments to act to improve housing and income support programs? Does a rights-based strategy rely on accepting these rights as justiciable and allocating a central role to courts? Does it affect the design and content of housing and anti-poverty strategies or merely describe their goal?

In this chapter, calls for rights-based approaches to housing and anti-poverty strategies will be situated within the context of new understandings of

* This paper has been developed from the author’s contribution to a longer paper which was jointly written with Martha Jackman. The author gratefully acknowledges the University of Ottawa Institute for Population Health, the Social Sciences and Humanities Research Council Community University Research Alliance (SSHRC-CURA) program and the Law Foundation of Ontario for their support.

¹ These are described in Section B, below.

² See Section D, below.

³ Martha Jackman & Bruce Porter, *International Human Rights, Health and Strategies to Address Homelessness and Poverty in Ontario: Making the Connection*, Exchange Working Paper Series, PHIRN, 3(3): 2012 at 40-46, online: RRASP/PHIRN www.rrasp-phirn.

social rights that have emerged internationally. In earlier years, socio-economic rights such as the right to housing and an adequate standard of living were relegated to a “second generation” of human rights, conceptualized as worthy goals or future aspirations of government policy rather than as enforceable rights. Socio-economic rights are now generally understood within the UN system as equal in status to civil and political rights not just in conceptual terms (as being equally important), but equal in terms of human rights practice. They are understood to be claimable by rights-holders and subject to effective remedies. They are also seen as a site for a revitalized human rights practice, centred on rights claimants and parallel to more traditional civil and political human rights practice. This sea change in the understanding of human rights as a unified framework for human rights practice has occurred gradually over the course of a generation, but it was firmly entrenched at an institutional level when, on 10 December 2008, the UN General Assembly adopted the *Optional Protocol to the ICESCR* and on 5 May, 2013 when the *Optional Protocol* came into force.⁴ The *Optional Protocol* permits the Committee on Economic, Social and Cultural Rights (CESCR) to adjudicate petitions alleging violations of *ICESCR* rights in the same manner as petitions have been considered in relation to civil and political rights for forty years. This institutional accomplishment was appropriately heralded by Louise Arbour, then UN High Commissioner on Human Rights, as “human rights made whole.”⁵

If governments are to be held accountable for failures to meet their obligations with respect to economic and social rights, institutional mechanisms must be in place to enable rights holders to claim their rights. Conceiving of socio-economic rights primarily in relation to governments and their commitments rather than in relation to rights holders and their claims—as rights without claimants—reinforced patterns of exclusion of the most powerless and marginalized groups that human rights are supposed to

⁴ The Protocol entered into force three months after the tenth ratification, see *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, GA res. 63/117, (entered into force 5 May 2013) at art 18(1) [*Optional Protocol*]. For updates on signatures and ratifications, see United Nations Treaty Collection, online: [Treaties.un.org](http://treaties.un.org) <http://treaties.un.org>. The Government of Canada has indicated that it does not intend to ratify the *Optional Protocol*, see United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada, Addendum, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UNHRCOR, 11th Sess, UN Doc A/HRC/11/17/Add.1, (2009) at paras 9 & 11 [Response to UPR].

⁵ Louise Arbour, “Human Rights Made Whole”, *Project Syndicate* (26 June 2008), online: Project Syndicate www.project-syndicate.org.

remedy.⁶ The new unified approach, by contrast, recognizes that all human rights must be subject to the rule of law and the overarching principle that individuals must have access to effective remedies if their rights are violated.

The modern conception of social rights opens up possibilities for a new understanding of the interplay between human rights and socio-economic policy. Social rights claims are now seen as transformative in nature, as tools for challenging structural disadvantage, social exclusion and political powerlessness, and for addressing poverty and homelessness as denials not only of basic needs, but also of equal citizenship, dignity and rights. While rights claims in the more traditional civil and political rights framework tend to focus on remedies that can be immediately granted by courts, establishing operational rules for government programs subject to immediate enforceability, the new paradigm of social rights brings broader strategic aspects of policy and program development that are not subject to immediate remedies into the field of human rights practice. It thus demands a reconceptualization of claims, adjudication and remedy so as to implement strategies to address structural causes of poverty and homelessness, creating the foundations for a more principled and strategic approach to rights-based policy development.

The interplay between human rights and future-oriented plans and strategies to implement and realize rights within a reasonable period of time has thus become a critical issue in the emerging field of social rights practice, arising in both legal and social policy domains. In the legal sphere, with the adjudication of more complex structural social rights claims, advocates and judges are called upon to devise new approaches to judicial remedies and enforcement. Here, the challenges relate to developing effective programmatic remedies that extend into the future: to ensure the development and implementation of necessary legislation, programs and strategies within a reasonable period of time; to facilitate meaningful participation of rights claimants in the design and implementation of programs; to guarantee

⁴ Philip Alston, "No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant" in Asbjørn Eide & Jan Helgesen, eds, *The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address. Essays in Honour of Torkel Opsahl* (Oslo: Norwegian University Press, 1991) 79; Bruce Porter, "The Right to be Heard: The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: What's at Stake?" (2005) 11:3 Hum Rts Trib 1; Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality and Citizenship" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 77 [Porter, "Claiming"].

ongoing accountability of governments; and to monitor outcomes against projected timelines and appropriate indicators.⁷

Beyond the judicial sphere, and extending into the social policy domain, the new understanding of social rights has also inspired the emergence of innovative programmatic approaches to addressing poverty and homelessness in a rights-based framework, drawing on some of the same principles that have been developed in the legal context. The new conception of social rights obliges governments to facilitate the design of strategies and programs to realize rights within identified time-frames and with measurable goals and targets; to recognize the central role that must be played by rights claimants; and to strengthen governmental accountability through complaints procedures, monitoring, and evaluation. Claimable rights are not restricted to justiciability in the narrow sense. Governments are obliged to take appropriate measures to realize rights over time and to consider how their programs and strategies can incorporate mechanisms to ensure ongoing accountability to rights-holders.

B. The International ‘Common Understanding’ of Rights-Based Approaches

The UN Population Fund (UNFPA) describes the conceptual shift to a “rights-based” approach within UN agencies as follows:

Before 1997, most UN development agencies pursued a ‘basic needs’ approach: they identified basic requirements of beneficiaries and either supported initiatives to improve service delivery or advocated for their fulfilment.

UNFPA and its UN partners now work to fulfil the rights of people, rather than the needs of beneficiaries. There is a critical distinction: a need not fulfilled leads to dissatisfaction. In contrast, a right that is not respected leads to a violation, and its redress or reparation can be legally and legitimately claimed

.... A rights-based approach strives to secure the freedom, well-being and dignity of all people everywhere, within the framework of essential standards and principles, duties and

⁷ See for example John Squires, Malcolm Langford & Bret Thiele, eds, *The Road to Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Sydney: Australian Human Rights Centre, 2005); see also papers prepared for the “Project on Enforcement of ESCR Judgments” (International Symposium, Bogota, Colombia, 6-7 May 2010), online: ESCR-Net www.escr-net.org.

obligations. The rights-based approach supports mechanisms to ensure that entitlements are attained and safeguarded.⁸

During the 1990s the Committee on Economic, Social and Cultural Rights (CESCR) had wrestled, in the context of periodic reviews of state parties to the Covenant, with growing poverty and widening inequality in both developed and developing countries. The Committee identified a critical need for a better understanding of the role of human rights in poverty reduction strategies and, in 2001, asked the UN Office of the High Commissioner for Human Rights (OHCHR) to develop guidelines for the integration of human rights into poverty reduction strategies. In response to this request, Mary Robinson, the UN High Commissioner, asked three experts—professors Paul Hunt, Manfred Nowak, and Siddiq Osmani—to consult with national officials, civil society and international development agencies and to prepare draft guidelines.⁹ This resulted in the OHCHR’s publication in 2002 of the *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*.¹⁰ A ‘common understanding of a rights-based approach’ outlined in *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies (Common Understanding)*¹¹ was then adopted by UN development agencies in 2003. Four key ingredients of rights-based programming were identified in the *Common Understanding*:

- Identifying the central human rights claims of rights-holders and the corresponding duties of “duty-bearers,” and identifying the structural causes of the non-realization of rights.
- Assessing the capacity of rights-holders to claim their rights and of duty-bearers to fulfill their obligations, and develop strategies to build these capacities.
- Monitoring and evaluating both outcomes and processes, guided by human rights standards and principles.

⁸ United Nations Population Fund, *The Human Rights-Based Approach*, online: United Nations Population Fund www.unfpa.org.

⁹ United Nations Office of the High Commissioner for Human Rights, *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies* (Geneva: OHCHR, 2002) at preface.

¹⁰ *Ibid.*

¹¹ United Nations Development Group, *The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among the UN Agencies* (2003), online: HRBA Portal <http://hrbaportal.org> [United Nations, *Common Understanding*].

- Ensuring that programming is informed by the recommendations of international human rights bodies and mechanisms.¹²

The *Common Understanding* affirmed that “the application of ‘good programming practices’ does not by itself constitute a human rights-based approach, and requires additional elements.”¹³ It called for a dynamic interdependence of social policy, human rights principles and legal entitlements. It also required that strategies and programs ensure meaningful engagement with, and participation of, those living in poverty as rights-claimants, with access to effective remedies.¹⁴ Rights-based programming, the UN agencies affirmed, recognizes stakeholders as “key actors” and participation as both a means and a goal—empowering marginalized and disadvantaged groups, promoting local initiatives, adopting measureable goals and targets, developing “strategic partnerships” and supporting “accountability to all stakeholders.”¹⁵ The *Common Understanding* emphasized that rights-based strategies and programs should also:

- Monitor and assess budgetary allocations.
- Build awareness of rights among rights-holders.
- Ensure effective participation by stakeholders in the design, implementation, monitoring and evaluation of programs.
- Develop appropriate indicators and data collection disaggregated by gender and other characteristics.
- Integrate international, national, sub-national and local initiatives and strategies.
- Address critical emerging issues, such as migration, urbanization and demographic changes.
- Integrate equality and non-discrimination principles into strategies.
- Address forms of social exclusion affecting those living in poverty.
- Integrate recommendations of UN treaty bodies and the UN Human Rights Council (HRC).¹⁶

¹² *Ibid.*

¹³ *Ibid* at 3.

¹⁴ *Ibid* at 2.

¹⁵ *Ibid* at 3.

¹⁶ *Ibid* at 2.

The 2006 publication: *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies (Guidelines)*¹⁷ affirmed that “the adoption of a poverty reduction strategy is not just desirable but obligatory for States which have ratified international human rights instruments.”¹⁸ The *Guidelines* explain the human rights approach as follows:

The human rights approach offers an explicit normative framework—that of international human rights. Underpinned by universally recognized moral values and reinforced by legal obligations, international human rights provide a compelling normative framework for the formulation of national and international policies, including poverty reduction strategies.¹⁹

The *Guidelines* recommend that poverty reduction strategies include four categories of accountability mechanisms: judicial, quasi-judicial, administrative, and political²⁰ and that “[t]hose responsible for formulating and implementing the poverty reduction strategy receive basic human rights training so that they are familiar with the State's human rights commitments and their implications.”²¹ The *Guidelines* recommend that civil society organizations and other rights-holders should also have a role in monitoring poverty and housing strategies to ensure that governments are held to account for failures (or successes) and to best identify areas that may need increased attention and resources.²² No singular mechanism should be relied upon for effective accountability and remedies, however. As the WHO and the OHCHR’s joint report on health and poverty reduction puts it:

Some processes of accountability are specific to human rights, for example inquiries by national human rights institutions and reporting to the UN human rights treaty-monitoring bodies. Others are general, including administrative systems for monitoring service provision, fair elections, a free press, parliamentary commissions and civil society monitoring. The principle of accountability requires

¹⁷ United Nations Office of the High Commissioner for Human Rights, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, UN Doc HR/PUB/06/12 (Geneva: OHCHR, 2006) [OHCHR, *Guidelines*].

¹⁸ *Ibid* at para 19.

¹⁹ *Ibid* at para 16.

²⁰ *Ibid* at para 77.

²¹ *Ibid* at para 40.

²² *Ibid* at paras 75 & 86.

that PRS [Poverty Reduction Strategy] processes of design, implementation and monitoring should be transparent and decision makers should answer for policy process and choices. In order to achieve this, the PRS should build on, and strengthen links to, those institutions and processes that enable people who are excluded to hold policymakers to account.²³

The shift from needs-based to rights-based approaches is linked to a fundamental reconceptualization of poverty and homelessness. No longer considered solely in terms of economic deprivation, poverty and homelessness are now seen as deprivations of rights and capacity—symptomatic of failures not just of social and economic programs and policies, but also of legal and administrative regimes, justice systems, human rights institutions and other participatory mechanisms through which governments can be held accountable to human rights and rights-holders can become active citizens. Among other sources, the new approach has drawn inspiration from the work of Nobel Prize winning economist Amartya Sen. In his early ground-breaking research, Sen showed that poverty and famine were not generally caused by a scarcity of goods or discrete failures of programs but rather involved broader “entitlement system failures” that arose in large part from a devaluing of the basic rights claims of the most vulnerable members of society.²⁴ This led to Sen’s later understanding of poverty as a deprivation of capabilities that is tied, but not reducible to, low income levels.²⁵ Eliminating poverty and homelessness is now seen not only as attending to unmet economic needs, but also as re-valuing the rights claims of those living in poverty, empowering them as rights-holders, identifying the entitlement system failures that lie behind poverty, hunger, and homelessness, challenging systemic barriers to equality that confront marginalized and disadvantaged groups, redressing failures of governmental accountability towards them, and remedying the forms of discrimination and social exclusion they experience.

Designing and implementing such rights-based strategies requires considering what specific rights need to be protected, where and how they are to be claimed, what institutional competency is available for hearing and adjudicating them, what remedies ought to be available, how outcomes are to

²³ United Nations Office of the High Commissioner for Human Rights & World Health Organization, *Human Rights, Health and Poverty Reduction Strategies*, UN Doc HR/PUB/08/0 (Geneva: OHCHR, WHO, 2008) at 8 [OHCHR & WHO].

²⁴ Amartya Sen, “Property and Hunger” (1988) 4:1 *Economics and Philosophy* 57 reprinted in Wesley Cragg & Christine Koggel, eds, *Contemporary Moral Issues* (Toronto: McGraw-Hill Ryerson, 2004) 402.

²⁵ See Amartya Sen, *Inequality Reexamined* (New York: Russell Sage Foundation, 1992); Amartya Sen *Development as Freedom* (New York: Anchor Books, 2000).

be evaluated and monitored, and what corrective mechanisms will be in place where desired outcomes are not forthcoming. The role of courts, human rights institutions, civil society and local organizations must be assessed in the context of designing and implementing programs and legislation, so as to ensure that program beneficiaries are made rights claimants with access to participatory processes through which claims can be collaboratively given voice, provided with hearings and made subject to effective and responsive remedies.

C. International Human Rights Norms Relevant to Anti-Poverty and Housing Strategies in Canada

1) The Right to Effective Remedies for Rights Violations

Despite the fact that international human rights are not directly enforceable by in Canada except through domestic law, they still provide the normative framework for the rights-based approach that has emerged internationally. International human rights are an important source of both substantive and procedural rights protections for those who are living in poverty or who are denied adequate housing in Canada. As noted by the Senate Subcommittee on Cities in its seminal report, *In from the Margins: A Call to Action on Poverty, Housing and Homelessness*, international human rights are a persuasive source for the interpretation of the *Charter* and other domestic law and may be given effect by being incorporated into domestic legislation.²⁶ Moreover, remedies for international human rights violations may be sought through periodic review procedures before UN treaty bodies; at the Universal Periodic Review before the UN Human Rights Council; through optional complaints procedures before human rights treaty bodies; or by way of fact finding missions and recommendations from “mandate holders” such as the UN Special Rapporteur on Adequate Housing. While governments in Canada have paid far too little attention to these procedures and the remedial recommendations that have emerged from them, those affected by poverty and homelessness in Canada have increasingly turned to them for both the normative framework for anti-poverty and housing programs and for access to procedures through which claims that are not being heard by Canadian courts can receive a fair hearing.

International procedures cannot, however, suffice in themselves. An overriding obligation under international law, and one implicit in the principle of the rule of law, is to provide effective domestic remedies for violations of human rights. This obligation applies equally to economic and social rights as

²⁶ Senate, Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology (Chair: Honourable Art Eggleton, PC), *In from the Margins: A Call to Action on Poverty, Housing and Homelessness* (December 2009) at 69-72, online: Parliament of Canada www.parl.gc.ca [Senate, *In from the Margins*].

to civil and political rights.²⁷ While emphasizing the important role that courts must play, the CESCR has acknowledged the need for some flexibility as to how effective remedies are provided. Where judicial remedies are not available, alternative, effective remedies for violations of the right to adequate housing and an adequate standard of living must be implemented, outside of courts.²⁸ For example, human rights commissions have broad authority to review legislation; to hold inquiries; and to develop policy statements, and thus can play an important remedial role. Many other administrative bodies involved in housing or income assistance could likewise provide new venues through which rights claimants can obtain a hearing and secure effective remedies.

Access to judicial review is critical, but equally important to a rights-based approach is the implementation of other accessible, affordable and timely procedures to ensure effective remedies without always relying on courts. The new rights-based approaches call for a more thorough integration of law and policy, framed by the notion of social rights as claimable. Judicial and quasi-judicial mechanisms should thus be integrated with effective informal and administrative procedures for claiming and enforcing social rights under legislated housing and poverty reduction strategies.

There are multiple *fora* in which rights to housing and an adequate standard of living can be claimed, defined, and applied, and many ways in which rights can and should affect policies and programs, short of court orders. The Supreme Court of Canada has yet to decide to what degree programs to remedy poverty or homelessness are constitutionally mandated, but it has affirmed that such measures are constitutionally “encouraged” by *Charter* values.²⁹ Chief Justice McLachlin has observed that the *Charter* does not belong to the courts but “to the people.”³⁰ Rights-based strategies for the elimination of poverty and homelessness may serve as one way to reclaim rights, and to provide access to new types of adjudication and remedies which are too often denied within the judicial system as it currently operates.

²⁷ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, UNCESCROR, 19th Sess, UN Doc E/C.12/1998/24, (1998) [*General Comment 9*].

²⁸ *Ibid.*

²⁹ *Schachter v Canada*, [1992] 2 SCR 679.

³⁰ *Cooper v Canada (Human Rights Commission)*, [1996] 3 SCR 854 at para 70, McLachlin J (as she then was), dissenting.

2) Progressive Realization' and the Obligation to Implement Strategies

Under both domestic and international law, key components of economic and social rights are subject to “progressive realization.” Obligations are assessed relative to the available resources and to the stage of development of institutions and programs within the State party.³¹ Article 2(1) of the *ICESCR* requires the government of a State party “to take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”³²

Where violations of the right to housing or to an adequate standard of living result from a denial of an immediate, minimal entitlement that is within the government’s means to provide, the remedy is straightforward: the government must immediately provide the benefit. The progressive realization standard creates additional future-oriented obligations to fulfill the right to adequate income or housing within a reasonable time and, at the same time, to address broader structural patterns of disadvantage and exclusion which take time to remedy. The rights can only be fulfilled in the future, but the requirement to design and implement appropriate strategies through legislation and programs is an immediate obligation. The CESCR has consistently emphasized, from its first General Comment on, that even if the full implementation of *Covenant* rights cannot be achieved immediately there is still an overriding obligation to develop “clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant.”³³ There is a specific obligation “to work out and adopt a detailed plan of action for the progressive implementation” of each of the rights contained in the Covenant.³⁴ In *General Comment No. 3, on the nature of States parties obligations* the CESCR noted that while *Covenant* rights are subject to progressive realization, there are two overriding obligations which are of immediate effect: the obligation to ensure non-

³¹ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976, accession by Canada 19 May 1976) at art 2 [*ICESCR*].

³² *Ibid.*

³³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 1: Report by States Parties*, UNCESCROR, 3d Sess, UN Doc E/1989/22, (1989) at para 4.

³⁴ *Ibid.*

discrimination and the obligation “to take steps.”³⁵ The steps taken “should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”³⁶ “Moreover, the obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.”³⁷

Legislative measures are almost always desirable and in some cases indispensable. The CESCR notes that a critical concern is whether legislative measures “create any right of action on behalf of individuals or groups who feel that their rights are not being fully realized.”³⁸ In *General Comment No. 4* on the right to adequate housing³⁹ the CESCR noted that the *ICESCR* “clearly requires that each State party take whatever steps are necessary” for fulfilling the right to adequate to housing and that this “will almost invariably require the adoption of a national housing strategy.”⁴⁰ Legal remedies must be available to groups facing evictions, inadequate housing conditions, or discrimination in access to housing.⁴¹ The CESCR has affirmed similar obligations in other General Comments such as those relating to the right to

³⁵ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant)*, UNCESCROR, 5th Sess, UN Doc E/1991/23, (1990) [*General Comment 3*].

³⁶ *Ibid* at para 2.

³⁷ *Ibid* at para 11.

³⁸ *Ibid* at para 6.

³⁹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 4: The Right to Adequate Housing (art 11(1) of the Covenant)*, UNCESCROR, 6th Sess, UN Doc E/1992/23, (1991) [*General Comment 4*].

⁴⁰ *Ibid* at para 12.

⁴¹ *Ibid* at para 17.

adequate food,⁴² the right to social security,⁴³ the right to work,⁴⁴ the right to health⁴⁵ and the right to water⁴⁶ calling on States to create targeted national strategies based on human rights principles to ensure that each of these rights is fulfilled.

3) The Reasonableness Standard

The standard to be applied in assessing whether strategies or programs comply with the “progressive realization” standard under Article 2(1) of the *ICESCR* was the object of intense debate during the drafting of the optional complaints procedure to the *ICESCR*. Skeptical States, such as Canada, the United States and Australia, argued that the *Optional Protocol* should prescribe a deferential standard of review, encouraging the CESCR to apply a “broad margin of discretion” or to require a finding of “unreasonableness” before a finding of a violation could be made.⁴⁷ Other States argued that such a deferential standard would defeat the very purpose of the *Optional Protocol*, by undermining any meaningful accountability of States in relation to the

⁴² United Nations Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food (art 11)*, UNCESCROR, 20th Sess, UN Doc E/C.12/1999/5, (1999) at paras 4 & 21 [*General Comment 12*].

⁴³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 19: The Right to Social Security (art 9)*, UNCESCROR, 39th Sess, UN Doc E/C.12/GC/19, (2007) at paras 41, 48 & 67 [*General Comment 19*].

⁴⁴ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 18: The Right to Work (art 6)*, UNCESCROR, 35th Sess, UN Doc E/C.12/GC/18, (2006) at para 31 [*General Comment 18*].

⁴⁵ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health (art 12)*, UNCESCROR, 22d Sess, UN Doc E/C.12/2000/4, (2000) at para 43(f) [*General Comment 14*].

⁴⁶ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water (arts. 11 and 12)* E/C.12/2002/11 (2002) at paras 28 & 31 [*General Comment 15*].

⁴⁷ United Nations Committee on Economic, Social and Cultural Rights, *Report of the Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights on its Third Session*, UN Commission on Human Rights, 62d Sess, UN Doc E/CN.4/2006/47, (2006) at para 92.

ICESCR's key substantive programmatic obligations.⁴⁸ In the end, proposals for a deferential standard of review were not accepted and references to a margin of discretion were omitted. The final text of the *Optional Protocol* prescribes a standard of "reasonableness" in assessing steps taken to achieve progressive realization of *ICESCR* rights, requiring compliance with the substantive guarantees in Part II of the *ICESCR* while recognizing there may be a variety of ways for governments to achieve the results necessary for compliance:

[w]hen 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.⁴⁹

The specific wording used in the *Optional Protocol* was taken from a paragraph of the now famous *Grootboom*⁵⁰ decision on the right to adequate housing in South Africa, in which the South African Constitutional Court first developed its reasonableness standard for review of compliance with the justiciable economic and social rights in the South African Constitution.⁵¹ In adopting this formulation, the Open Ended Working Group mandated to draft the *Optional Protocol* was also guided by a statement prepared by the CESCR: *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, in which the Committee suggested for the first time that, in evaluating compliance with article 2(1) of the *ICESCR*, it would assess the "reasonableness" of steps

⁴⁸ See Bruce Porter, "The Reasonableness Of Article 8(4) – Adjudicating Claims From The Margins" (2009) 27:1 Nordic Journal of Human Rights 39 [Porter, "Reasonableness"]; Brian Griffey, "The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights" (2011) 11 HRL Rev 275 at 290 (Porter and Griffey provide descriptions of the debates on the reasonableness standard).

⁴⁹ *Optional Protocol*, above note 4.

⁵⁰ *Government of the Republic of South Africa v Grootboom*, [2000] ZACC 19 (SAFLII) (S Afr Const Ct).

⁵¹ Porter, "Reasonableness", above note 48.

taken.⁵² In its statement, the CESCR identified a number of possible factors to be considered in determining whether steps taken by a State party meet the reasonableness standard, including:

- The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights.
- Whether discretion was exercised in a non-discriminatory and non-arbitrary manner.
- Whether resource allocation is in accordance with international human rights standards.
- Whether the State party adopts the option that least restricts *Covenant* rights.
- Whether the steps were taken within a reasonable timeframe.
- Whether the precarious situation of disadvantaged and marginalized individuals or groups has been addressed.
- Whether policies have prioritized grave situations or situations of risk.
- Whether decision-making is transparent and participatory.⁵³

Beyond the CESCR's commentary on the reasonableness standard under the *Optional Protocol*, there is extensive jurisprudence in CESCR's General Comments and in its Concluding Observations on Periodic Reviews of State parties that provides further clarification as to the requirements of policies and strategies for compliance with article 2(1) of the *ICESCR*. Comprehensive and purposive legislative measures are almost always required,⁵⁴ and strategies must be informed by an equality framework, prioritizing the needs of disadvantaged groups and ensuring protection from

⁵² United Nations Committee on Economic, Social and Cultural Rights, *An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant*, UNCESCROR, 38th Sess, UN Doc E/C.12/2007/1, (2007) [CESCR, "Maximum Available Resources"]; Malcolm Langford, "Closing The Gap? – An Introduction To The Optional Protocol To The International Covenant On Economic, Social And Cultural Rights" (2009) 27:1 Nordic Journal of Human Rights 2.

⁵³ *Ibid.*

⁵⁴ *General Comment 3*, above note 35.

discrimination.⁵⁵ Strategies must specifically address issues of systemic discrimination and the barriers faced by individuals who have suffered historic discrimination or prejudice and should include “efforts to overcome negative stereotyped images.”⁵⁶ They should rely on effective “coordination between the national ministries, regional and local authorities.”⁵⁷ Human rights institutions may scrutinize existing laws, identify appropriate goals and benchmarks, provide research, monitor compliance, examine complaints of alleged infringements and disseminate educational materials.⁵⁸

The CESCR has emphasized that monitoring and redress should also include assessment of budgetary measures.⁵⁹ The reasonableness of budgetary allotment can be assessed based on information about the

⁵⁵ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 20: Non-discrimination in Economic, Social and Cultural Rights (art 2 para 2)*, UNCESCROR, 42d Sess, UN Doc E/C.12/GC/20, (2009) at para 9 [*General Comment 20*]. See also: UN Commission on Human Rights, *Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, UN Doc E/CN.4/1987/17, (1987) at para 39: “Special measures taken for the sole purpose of securing adequate advancement of certain groups or individuals requiring such protection as may be necessary in order to ensure to such groups or individuals equal enjoyment of economic, social and cultural rights shall not be deemed discrimination.”

⁵⁶ *Ibid* at para 41.

⁵⁷ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water (art 11 & 12)*, UNCESCROR, 29th Sess, UN Doc E/C.12/2002/1, (2002) at para 51 [*General Comment 15*].

⁵⁸ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 10: The Role of National Human Rights Institutions in the Protection of Economic, Social and Cultural Rights*, UNCESCROR, 19th Sess, UN Doc E/C.12/1998/25, (1998) at para 3.

⁵⁹ *General Comment 3*, above note 35 at para 11.

percentage of the budget allocated to specific rights under the *Covenant* and may be compared to that of other states with similar levels of development.⁶⁰

As Brian Griffey notes “questions remain as to how the ‘reasonableness’ test will be applied, but the answer must be consistent with *ICESCR* obligations and the object and purpose of the *Optional Protocol*.”⁶¹ Reasonable strategies will be based on a commitment to ensuring access to adequate housing and freedom from poverty as fundamental human rights that can be effectively claimed and enforced.

As Sandra Liebenberg and Geo Quinot have argued in relation to the reasonableness standard in South African jurisprudence, the requirement of ‘reasonableness’ itself demands a rights-conscious strategy, commensurate with the special status of “rights” in comparison to other legitimate policy objectives:

It is not enough that the objectives which the State sets itself fall within the broad range of what are regarded as ‘legitimate’ State objectives. These objectives must be consistent with the normative purposes of the rights. This implies a rights-conscious social policy, planning and budgeting process. It is noteworthy in this context that one of the core obligations identified by the UN Committee on Economic, Social and Cultural Rights in relation to the rights protected in the International Covenant on Economic, Social and Cultural Rights (1966) is the adoption of a national strategy and plan of action aimed at the realisation of the relevant rights. Such a national plan must be participatory and transparent and set clear goals as well as indicators and benchmarks by which progress can

⁶⁰ Manisuli Ssenyonjo, “Reflections on State Obligations with Respect to Economic, Social and Cultural Rights in International Human Rights Law” (2011) 15:6 Int’l JHR 969 at 980-81. See for example United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of Congo*, UNCESCROR, 43d Sess, UN Doc E/C.12/COD/CO/4, (2009) at para 16, where the Committee found that the State’s decreased allocation of resources to social sector development combined with increased levels of military spending resulted in a violation of its Covenant obligations; Brian Griffey, “The ‘Reasonableness’ Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights” (2011) 11 HRL Rev 275 at 290 [Griffey, “The Reasonableness Test”] at 290.

⁶¹ Griffey, “The Reasonableness Test” *ibid* at 304.

be monitored. Particular attention must be given in the plan to vulnerable or marginalised groups.⁶²

An important avenue for the integration of international human rights norms into housing and anti-poverty strategy in Canada, as in South Africa, will be through the development of domestic standards of reasonableness under both administrative and constitutional law.⁶³ Reasonable decision-making in domestic law in Canada, as was affirmed by the Supreme Court of Canada in *Baker*, requires conformity with both international human rights values and with the *Charter*.⁶⁴ In *Eldridge*, the Supreme Court found that the duty to take reasonable positive measures to accommodate disability is a component of section 1 of the *Charter*.⁶⁵ In the recent decision of *Doré v Barreau du Québec*,⁶⁶ the Court departed from some of its earlier jurisprudence⁶⁷ by proposing that, in cases where administrative decision-making under statutory authority is alleged to have been exercised in a manner that is contrary to the *Charter*, judicial review of such decisions may be conducted under a “robust” administrative law test of reasonableness, nurtured by the *Charter*, which can provide essentially the same level of protection of *Charter* rights as does a section 1 analysis.⁶⁸ In its more recent decision in the *Insite* case (*PHS Community Services Society*)⁶⁹, the Supreme Court found that where decisions impact on the rights to life and security of the person, discretion must be exercised also in conformity with principles of

⁶² Geo Quinot & Sandra Liebenberg, “Narrowing the Band: Reasonableness Review in Administrative Justice and Socio-Economic Rights Jurisprudence in South Africa” (Paper delivered at the Law and Poverty Colloquium, Stellenbosch University, South Africa, 29-31 May 2011), [unpublished, on file with authors].

⁶³ United Nations Committee on Economic, Social and Cultural Rights, *General Comment 1: Report by States Parties*, UNCESCROR, 3d Sess, UN Doc E/1989/22, (1989).

⁶⁴ *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 at paras 69-71.

⁶⁵ *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR. 624, at para 79.

⁶⁶ *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*].

⁶⁷ *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.

⁶⁸ *Doré*, above note 66 at para 29. For a discussion of the implications of the evolving jurisprudence on reasonableness in administrative law, see Lorne Sossin & Andrea Hill, Chapter 8.

⁶⁹ *Canada (AG) v PHS Community Services Society*, 2011 SCC 44.

fundamental justice. Principles of fundamental justice must include international human rights norms.⁷⁰ Drawing on this jurisprudence, there is ample room to apply both domestic and international standards of reasonableness as a legal requirement of strategies and programs to address poverty and homelessness.

D. Recommendations of International Human Rights Bodies for Housing and Anti-Poverty Strategies in Canada

Concerns among international human rights bodies about the growing crisis of poverty and homelessness in Canada, one of the most affluent countries to have ratified the ICESCR, have reached unprecedented levels in recent years. The centerpiece of the CESCR's recommendations with respect to poverty and homelessness in Canada has been a strategy for the reduction of homelessness and poverty that integrates economic, social and cultural rights.⁷¹ The CESCR has emphasized that a strategy in Canada should include "measurable goals and timetables, consultation and collaboration with affected communities, complaints procedures, and transparent accountability mechanisms, in keeping with Covenant standards."⁷² The CESCR has referred Canada to its statement, *Poverty and the International Covenant on Economic, Social and Cultural Rights*, which is aimed at "encouraging the integration of human rights into poverty eradication policies by outlining how human rights generally, and the *ICESCR* in particular, can empower the poor and enhance anti-poverty strategies."⁷³ The CESCR has emphasized that "anti-poverty policies are more likely to be effective, sustainable, inclusive,

⁷⁰ *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3.

⁷¹ United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 19th Sess, UN Doc E/C.12/1/Add.31, (1998) at para 46 [*Concluding Observations* 1998]. See also United Nations Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UNCESCROR, 36th Sess, UN Doc E/C.12/CAN/CO/4 & E/C.12/CAN/CO/5, (2006) at para 60 [*Concluding Observations* 2006].

⁷² *Concluding Observations* 1998, *ibid* at para 62.

⁷³ United Nations Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UNCESCROR, 25th Sess, UN Doc E/C.12/2001/1, (2001) at para 3 [*Poverty and the ICESCR*].

equitable and meaningful to those living in poverty if they are based upon international human rights.”⁷⁴

The CESCR’s recommendations were reinforced during the 2007 visit to Canada of the UN Special Rapporteur on adequate housing, Miloon Kothari. A key recommendation in Kothari’s Mission Report on Canada was for “a comprehensive and coordinated national housing policy based on indivisibility of human rights and the protection of the most vulnerable.”⁷⁵ Kothari reiterated the recommendations of the CESCR that the strategy should include measurable goals and timetables, complaints procedures, and transparent accountability mechanisms.⁷⁶ He recommended that federal and provincial governments work in close collaboration and coordination and “commit stable and long-term funding to a comprehensive national housing strategy.”⁷⁷ The Special Rapporteur also strongly advocated for the improvement of legal remedies for poverty and homelessness, recommending that the “right to adequate housing be recognized in federal and provincial legislation as an inherent part of the Canadian legal system.”⁷⁸

The UN Human Rights Council’s two reviews of Canada under the new *Universal Periodic Review (UPR)* procedure have also highlighted the need for anti-poverty and housing strategies based on human rights. Prior to Canada’s appearance for its *UPR* before the UN Human Rights Council in 2009, an NGO Steering Committee coordinated six meetings in cities across the country with over 200 civil society and Aboriginal organizations as well as representatives from the federal and provincial governments. Drawing on these meetings, a briefing document outlining major human rights concerns was prepared and provided to members of the Human Rights Council in informal meetings in Geneva in the days leading up to Canada’s review.⁷⁹ The Briefing Document highlighted poverty and homelessness as the issues of greatest concern to all NGOs, Aboriginal communities and stakeholders, and

⁷⁴ *Ibid* at para 13.

⁷⁵ United Nations Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Miloon Kothari - Addendum - Mission to Canada (9 to 22 October 2007)*, UNHRCOR, 10th Sess, UN Doc A/HRC/10/7/Add.3, (2009) at para 90 [*SR Mission to Canada*].

⁷⁶ *Ibid* at para 90.

⁷⁷ *Ibid* at para 92.

⁷⁸ *Ibid* at para 88.

⁷⁹ *The Universal Periodic Review of Canada: February 2009: An Overview of a Select Number Canadian NGO Concerns and Recommendations* (31 January 2009), online: Social Rights CURA www.socialrightscura.ca.

strongly recommended the development of human rights-based strategies to address both.⁸⁰

Recommendations considered under the *UPR* come from other States participating in the *UPR* process, and may be either formally accepted or rejected by the State under review. Among the recommendations in Canada's 2009 UPR were that Canada develop "a national strategy to eliminate poverty" and "consider taking on board the recommendation of the Special Rapporteur on adequate housing, specifically to extend and enhance the national homelessness programme."⁸¹ Further to this, it was recommended that Canada "intensify the efforts already undertaken to better ensure the right to adequate housing, especially for vulnerable groups and low-income families."⁸²

The recommendation to adopt a national strategy to address poverty was not accepted by Canada in its response to the 2009 UPR. The federal government expressed support for the provincial strategies but refused to commit to implementing the recommended federal plan.⁸³ Canada did, however, partially accept a recommendation to "integrate economic social and cultural rights in its poverty reduction strategies in a way that can benefit the most vulnerable groups in society."⁸⁴ Recommendations for strategies to address homelessness and poverty were made again in Canada's 2013 UPR, supplemented by further recommendations for strategies to ensure food security and the rights to water and sanitation.⁸⁵ Canada again refused to accept any of the recommended strategies to reduce and eliminate hunger, poverty or homelessness and thus continues to resist sustained and growing

⁸⁰ *Ibid.*

⁸¹ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, UN Human Rights Council OR, 11th Sess, UN Doc A/HRC/11/17, (2009) at paras 45, 72 & 75 [2009 UPR Canada].

⁸² *Ibid* at para 72.

⁸³ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada, Addendum, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UNHRCOR, 11th Sess, UN Doc A/HRC/11/17/Add.1, (2009) at paras 9, 11 & 27 [Response to 2009 UPR].

⁸⁴ 2009 UPR Canada, above note 81 at para 45; Response to 2009 UPR, above note 83 at para 26.

⁸⁵ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, UNHRCOR, UN Doc A/HRC/24/11 (2013).

pressure from UN human rights bodies to address these crises within a human rights framework.⁸⁶

E. Calls for National Rights-Based Housing and Anti-Poverty Strategies in Canada

In 2008, the Subcommittee on Cities of the Standing Senate Committee on Social Affairs, Science and Technology, held a national consultation on housing and homelessness, soliciting feedback from numerous experts and civil society representatives. In its report, *In from the Margins: A Call To Action On Poverty, Housing and Homelessness*, the Subcommittee noted that:

Whether the subject was poverty, housing or homelessness, many witnesses described the problems in terms of rights denied. Pointing to both domestic human rights legislation and international commitments made by Canada to United Nations declarations and conventions, these witnesses identified the failure of governments to live up to these obligations, and the importance of providing access for individuals to hold governments accountable and to claim rights in appropriate courts and tribunals.⁸⁷

The Subcommittee's report went on to cite then UN High Commissioner on Human Rights Louise Arbour's statement that poverty "describes a complex of interrelated and mutually reinforcing deprivations, which impact on people's ability to claim and access their civil, cultural, economic, political and social rights. In a fundamental way, therefore, the denial of human rights forms part of the very definition of what it is to be poor."⁸⁸

The Senate Subcommittee called for a national housing and homelessness strategy to complement similar initiatives being launched at the provincial/territorial level.⁸⁹ In support of a rights-based approach, the report identified three main sources of legal rights relevant to poverty and homelessness: i) international law that has been ratified by Canada, ii) the *Canadian Charter of Rights and Freedoms*, and iii) provincial and federal

⁸⁶ United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada, Addendum, Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State under Review*, UNHRCOR, 24th Sess, UN Doc A/HRC/24/11/Add.1 (2013) at para 30.

⁸⁷ Senate, *In from the Margins*, above note 26 at 15.

⁸⁸ *Ibid* at 71.

⁸⁹ *Ibid* at 104.

human rights legislation.⁹⁰ The Subcommittee recommended measures to enhance the ability of people living in poverty to claim their rights, including legal representation in “law reform cases with respect to their human rights.”⁹¹ In order to strengthen the status of international human rights law in relation to the treatment of poverty and homelessness in Canada, the Subcommittee recommended that the federal government “explicitly cite international obligations ratified by Canada in any new federal legislation or legislative amendments relevant to poverty, housing and homelessness.”⁹²

In 2010, following up on the recommendations by the Senate Subcommittee, the House of Commons Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities (HUMA Committee) held hearings and issued a report on a federal poverty reduction plan.⁹³ The Committee reported that:

The Committee was told that we also need a shift in perspective if we are to significantly reduce poverty in Canada. Poverty reduction measures must not be seen only as charity work or only be guided by moral principles, but must be set within a human rights framework, specifically the recognition that governments have a duty to enforce socio-economic and civil rights. Adopting a human rights framework also limits the stigmatization of people living in poverty. The Committee fully endorses such a framework in this report.⁹⁴

The HUMA Committee referred to the development of a new human rights paradigm for poverty reduction at the international level, quoting from a 2004 publication of the Office of the High Commissioner for Human Rights which led to the adoption of the 2006 OHCHR *Guidelines*:

The recognition that the way poor people are forced to live often violates their human rights—or that promoting human rights could alleviate poverty—was a long time in coming. Now a human rights approach to poverty

⁹⁰ *Ibid* at 69-72.

⁹¹ *Ibid* at 16.

⁹² *Ibid*.

⁹³ House of Commons, Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, (Chair: Candice Hoepfner), *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (November 2010), online: Parliament of Canada <http://www.parl.gc.ca> [HUMA Committee].

⁹⁴ *Ibid* at 2.

reduction is increasingly being recognized internationally and is gradually being implemented.⁹⁵

The HUMA Committee noted the importance of Canada's international obligations, both under the *UDHR* and in ratified human rights treaties, to ensure an adequate standard of living, including adequate housing.⁹⁶ It recommended the federal government "endorse the *United Nations Declaration on the Rights of Indigenous Peoples* and implement the standards set out in this document."⁹⁷ The Committee also emphasized the importance of ensuring that measures to reduce poverty among people with disabilities are linked to human rights protections, including the recently ratified *Convention on the Rights of Persons with Disabilities* (CRPD).⁹⁸

The central recommendation of the HUMA Committee was for a rights-based federal action plan for the reduction of poverty. In the Committee's view:

This action plan should incorporate a human rights framework and provide for consultations with the provincial and territorial governments, Aboriginal governments and organizations, the public and private sector, and people living in poverty, as needed, to ensure an improvement in lives of impoverished people.⁹⁹

An important initiative to incorporate international human rights within federal legislation along the lines suggested by the HUMA Committee was found in Bill C-304, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*.¹⁰⁰ Originally introduced as a Private Member's Bill by New Democratic Party (NDP) MP Libby Davies and receiving widespread support from civil society organizations across

⁹⁵ *Ibid* at 92 citing United Nations Office of the High Commissioner for Human Rights, *Human Rights and Poverty Reduction: A Conceptual Framework*, UN Doc HR/PUB/04/1 (Geneva: OHCHR, 2004) [OHCHR, *Conceptual*] at iii.

⁹⁶ HUMA Committee, above note 93 at 53.

⁹⁷ *Ibid* at 164.

⁹⁸ *Ibid* at 134.

⁹⁹ *Ibid* at 96.

¹⁰⁰ Bill C-304, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 3d Sess, 40th Parl, 2011 (Committee report presented in House of Commons 21 March 2011) [Bill C-304].

Canada,¹⁰¹ the bill was substantially amended after second reading to include a more robust human rights framework, in line with recommendations from UN treaty bodies.

The amendments to Bill C-304 required the implementation of “a national housing strategy designed to respect, protect, promote and fulfil the right to adequate housing as guaranteed under international human rights treaties ratified by Canada.”¹⁰² The Bill called for the national housing strategy to include:

- Targets and timelines for the elimination of homelessness.
- An independent process for bringing, reviewing and reporting on complaints about possible violations of the right to adequate housing.
- A process for reviewing and following-up on any concerns or recommendations from UN human rights bodies with respect to the right to adequate housing.
- A focus on the needs of those who are homeless, groups facing discrimination, people with disabilities and Aboriginal communities.
- A key role for civil society organizations, including those representing groups in need of housing and Aboriginal communities, in designing the delivery, monitoring and evaluation of programs required to implement the right to adequate housing.

¹⁰¹ Rob Rainer, “The Right to Housing: The Red Tent Campaign and Bill C-304” *Canada Without Poverty Advocacy Network* (14 July 2010), online: Social Policy in Ontario <http://spon.ca>.

¹⁰² Bill C-304, above note 100 at s 3(1).

- A provision recognizing Quebec's unique commitment to the rights in the *ICESCR*.¹⁰³

A 2010 report of the Standing Committee on Foreign Affairs and International Development noted that Bill C-304 “directly responds to concerns repeatedly raised by UN treaty bodies.”¹⁰⁴ The bill received significant support from communities across Canada and had the support of the majority of members of parliament but did not come to a vote at third reading before the dissolution of parliament.¹⁰⁵ Bill C-304 was reintroduced as a private member’s bill (C-400) in the subsequent Parliament under a

¹⁰³ *Ibid* at s 3.1 (the provision reads: “Le Québec peut, ayant adhéré au *Pacte international relatif aux droits économiques, sociaux et culturels*, utiliser les avantages découlant de la présente loi dans le cadre de ses propres choix, de ses propres programmes et de sa propre stratégie en matière d'habitation sur son territoire.” This provision was incorrectly translated in the English version of Bill C-304 to read: “Quebec may, as a party to the *International Covenant on Economic, Social and Cultural Rights*, participate in the benefits of this Act with respect to its own choices, its own programs and its own approach related to housing on its territory” [emphasis added]. Quebec has set a unique standard for provincial adherence to international human rights treaties that could be a model for other provinces. Quebec has formally “ratified” key treaties and committed itself to compliance in areas of its jurisdiction. On April 21, 1976, by Order-in-Council (1438-76), Quebec “ratified” the *ICESCR*, signed it and transmitted a signed copy of the treaty to the Federal Government. The Order-in-Council reads as follows: “ Que le gouvernement du Québec ratifie le *Pacte international relatif aux droits économiques, sociaux et culturels*, le *Pacte international relatif aux droits civils et politiques*, le *Protocole facultative se rapportant au Pacte international relatif aux droits civils et politiques*; Que le texte officiel des modalités et du mécanisme de participation des provinces à la mise en oeuvre de ces instruments internationaux soit signé par le ministre des Affaires intergouvernementales et par le ministre de la Justice; Que le ministre des Affaires intergouvernementales soit chargé de transmettre aux autorités fédérales cette ratification et le texte signé de l’entente; Que cette ratification et cette entente entrent en vigueur à partir du moment où elles auront été communiqués au gouvernement fédéral.”). See online: Social Rights CURA www.socialrightscura.ca (for full text).

¹⁰⁴ House of Commons, Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development, (Chair: Scott Reid), *Canada’s Universal Periodic Review and Beyond – Upholding Canada’s International Reputation as a Global Leader in the Field of Human Rights* (November 2010), online: Parliament of Canada <http://www.parl.gc.ca> [House of Commons, *Universal*] at 16.

¹⁰⁵ Bill C-304, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 3d Sess, 40th Parl, 2011 (Committee report presented in House of Commons 21 March 2011).

Conservative majority.¹⁰⁶ Despite widespread support from civil society organizations, the Bill was defeated on February 27, though all four opposition parties and two independent members supported it.¹⁰⁷ The extent of support Bill C-304 and Bill C-400 received across the country, within and beyond the housing and anti-poverty communities, demonstrates the strength of civil society and public commitment to its underlying rights-based approach.

F. Conclusion: Emerging Sites for Rights Practice in Canada

Groups advocating for people living in poverty and without adequate housing in Canada have increasingly turned to international human rights for a framework through which to identify and challenge conditions of inequality and socio-economic exclusion. The National Anti-Poverty Organization and the Charter Committee on Poverty Issues prompted reform of UN treaty body procedures in the early 1990s when they requested and were granted permission to appear before the CESCR in the context of Canada's 1993 periodic review. Until then, stakeholders had no formal voice in the periodic review process before any UN human rights body.¹⁰⁸ Since that time, Canadian NGOs have shown a singular commitment to making the international treaty monitoring processes work more effectively as a framework for domestic human rights practice. Reviews of Canada before human rights bodies are well known within the UN system for the extensive involvement of NGOs, both in terms of the numbers of groups and coalitions engaging with the process and the depth and range of their oral and written submissions. Canadian NGOs have consistently pressed for reform of domestic procedures to ensure more effective follow-up to, and implementation of, treaty body concerns and recommendations and for more effective domestic remedies to violations of social rights.¹⁰⁹

NGO recommendations for improved domestic implementation have been taken up by and endorsed by parliamentary bodies charged with reviewing the implementation of international human rights. The Senate

¹⁰⁶ Bill C-400, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 1st Sess, 42st Parl, 2012 (First Reading 16 February 2012).

¹⁰⁷ Bill C-400, *An Act to ensure secure, adequate, accessible and affordable housing for Canadians*, 1st Sess, 42st Parl, 2012. (First reading 16 February 2012, bill defeated, 27 February 2013). Vote No. 619
41st Parliament, 1st Session, Sitting No. 215, Wednesday, February 27, 2013.

¹⁰⁸ Bruce Porter, "Using Human Rights Treaty Monitoring Bodies in Domestic Social And Economic Rights Advocacy: Notes From Canada" (1999) 2:1 *Economic and Social Rights Review* 2.

¹⁰⁹ Shelagh Day, "Minding the Gap: Human Rights Commitments and Compliance" in Young, Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) at 201; Porter, "Claiming", above note 4.

Committee on Human Rights conducted a review of implementation of Canada's international human rights obligations in 2001, recommending, among other things, the appointment of a human rights ambassador, regular federal/provincial/territorial meetings on human rights, and amendments to the *Canadian Human Rights Act* to include international human rights.¹¹⁰ As the Senate Committee eloquently stated:

The disjuncture between Canada's international human rights commitments and its domestic law cannot be allowed to go unaddressed. Nor is it fair or proper to sit back and hope that the courts will rescue Canada from the inconsistencies in its approach to its international human rights obligations. A new approach must be found. Otherwise, the continued failure of the government in Canada to systematically address the domestic legal implications of international human rights treaties it has voluntarily ratified could leave this country open to charges of hypocrisy and the potential to diminish Canada's moral authority as a leading voice for human rights in the international arena.¹¹¹

The Senate Committee has followed up with reports on Canada's engagement with the process, urging the adoption of "a process that will ensure open and transparent, timely, and substantive engagement with civil society, aboriginal organizations, parliaments, and the Canadian public with respect to implementation of Canada's human rights obligations."¹¹² The House of Commons Standing Committee on Foreign Affairs and International Development has similarly expressed concern about the lack of consultation with civil society, transparency and political leadership in implementing international human rights obligations, recommending serious reform of existing federal/provincial/territorial mechanisms for implementation and timely, constructive responses to UN concerns and recommendations.¹¹³

While provincial governments have taken important steps in engaging with civil society and stakeholders in the design and implementation of

¹¹⁰ Senate Human Rights Committee, *Promises to Keep: Implementation of Canada's International Human Rights Obligations*. (December, 2001), online: Parliament of Canada www.parl.gc.ca.

¹¹¹ *Ibid.*

¹¹² Standing Senate Committee On Human Rights, *Canada's Universal Periodic Review Before The United Nations Human Rights Council. Second Report* (May, 2009) online: Parliament of Canada www.parl.gc.ca.

¹¹³ House Of Commons Canada, Subcommittee On International Human Rights, *Canada's Universal Periodic Review And Beyond—Upholding Canada's International Reputation As A Global Leader In The Field Of Human Rights: Report Of The Standing Committee On Foreign Affairs And International Development* (November, 2010), online: Parliament of Canada www.parl.gc.ca.

housing and anti-poverty strategies, the strategies to date have remained largely within the older paradigm of social rights as moral aspirations. They have failed to engage in any significant way with the notion of social rights as claimable rights, or with the need for revitalized human rights institutions and rights claiming mechanisms as has been promoted within the UN system.¹¹⁴

The model of rights-based approaches to poverty and homelessness that has evolved within international human rights is highly relevant to the ongoing crisis of poverty and homelessness in Canada and to the design of effective policies, programs and strategies to address it. Sen's early insight about famine and hunger in the development contexts applies *a fortiori* to homelessness and poverty in Canada. Economic deprivation amidst affluence in Canada must be understood as a socially constructed systemic failure of law, policy and decision-making, deriving from the fundamental devaluing of the rights claims of those who have been stigmatized and pushed to the margins of society. It is not simply a problem of unmet needs. This is not to excuse governments from the obligation to reverse cuts to housing and social assistance programs or to ignore the myriad of ways in which programs are failing to meet the needs of those who are most disadvantaged. Rather, it is to situate social program cuts and budgetary decisions within the broader context of the devaluing of the rights and equal dignity and citizenship of those living in poverty and homelessness. Vitriolic attacks and stigmatization of the groups whose needs have been neglected are part of the social context for unmet needs within government programs. Marie-Eve Sylvestre, in her affidavit in support of a *Charter* challenge to governments' inaction on homelessness, notes that: "As programmatic responses that addressed the causes of homelessness such as social housing, investment in health care or employment policies, have been reduced or eliminated, governments have adopted unprecedented measures based on the "stigma" of homelessness as a perceived "moral" failure and designed to make homeless people disappear from the public sphere."¹¹⁵ It is no accident that historically unprecedented social program cuts in Canada have been accompanied by withdrawal of funding and support for any rights-based advocacy on behalf of the groups most affected. The attack on programs and the attack on rights are inextricably linked.¹¹⁶

What will rights-based strategies look like in Canada? They will require a re-visioning of housing and anti-poverty strategies around the normative framework of social rights as claimable rights that has emerged internationally. Goals and timelines for the reduction and elimination of

¹¹⁴ For a review of provincial strategies, see Martha Jackman & Bruce Porter, "International Human Rights and Strategies to Address Homelessness and Poverty in Canada: Making the Connection", online: Social Rights CURA www.socialrightscura.ca.

¹¹⁵ Marie-Eve Sylvestre, "Affidavit for *Tanudjaja v Canada*" (Ont Sup Ct File no CV-10-403688) (2011) [Sylvestre, "Affidavit for *Tanudjaja*"].

¹¹⁶ Porter, "Claiming", above note 4.

homelessness will not simply be targets for governments but will also be articulated as entitlements to reasonable decision-making consistent with the obligation of progressive realization and emerging standards of reasonableness internationally as well as with the more robust standards of administrative law reasonableness that has been affirmed by the Supreme Court of Canada, infused with Charter and international human rights values. Human rights norms will be written into a range of programs and legislation so as to inform the mandate and guide the decisions of statutory bodies and decision-makers which have previously operated outside of any human rights framework. Courts will be required to engage more constructively with positive obligations of governments to implement transformative strategies consistent with the progressive and substantive nature of social rights and to require rights-based housing and anti-poverty strategies as remedies to Charter and other claims. The institutional mandate of human rights commissions, landlord and tenant, social benefits, labour and many other administrative bodies will be reconceived in light human rights norms and values. All of these changes will begin to ensure that the myriad of entitlement system failures that lie behind poverty and homelessness amidst affluence are brought within a human rights lens and made subject to effective remedies.

Creating a more robust human rights framework for housing and anti-poverty strategies in Canada does not ‘judicialize’ social policy or make policy and programming more litigious. Quite the contrary. Current practices of criminalizing and stigmatizing those who are homeless or living in poverty based on false stereotype and prejudice is an aggressive “judicialization” of homelessness and poverty that been proven to be fiscally as well as morally irresponsible.¹¹⁷ A rights-based approach redefines the relationship between justice and socio-economic marginalization in a manner which challenges systemic discrimination rather than reinforcing it.

Homelessness and poverty among those with mental health challenges and other disabilities is related to factors beyond scarcity of housing or employment. It calls for a multidimensional solution, including challenging discrimination and stigmatization, and deconstructing how certain groups are socially constructed as ‘needy’ by exclusionary and discriminatory policies. Clearly, the immediate need for adequate and affordable housing and improved incomes among these groups must be addressed, but the systemic factors and exclusionary systems which create the needs must also be challenged. Exclusionary policies based on income, in both the private and not-for-profit housing markets, have resulted in single mothers on social assistance having no choice but to move into the most over-priced apartments, paying significantly higher monthly rent for inadequate apartments than those with higher incomes who are able to secure more affordable and desirable

¹¹⁷ Sylvestre, “Affidavit for *Tanudjaja*”, supra note 116.

apartments because they are considered more desirable tenants.¹¹⁸ A rights-based approach to housing and anti-poverty strategies provides the mechanism through which a transformative social rights practice can address and solve structural causes of economic deprivation such as these, while at the same time ensuring that governments' policies and budgetary allocations meet human rights standards of reasonableness.

Recognizing adequate housing and an adequate standard of living as claimable rights in Canada will rely, to some extent, on judicial and quasi-judicial hearings and remedies from courts, administrative tribunals and on new commitments from institutions such as human rights commissions and tribunals. Emanating from improved legal remedies, however, will be an enhanced community understanding of fundamental rights. This in turn will create new opportunities for rights-holders to be heard without the need for formal procedures. Rights-based housing and anti-poverty strategies offer the opportunity to implement, through local initiatives and strategies, the fundamental rights that have been affirmed and clarified at the international level, drawing from a movement that has become global in scope, but which is based on empowering rights holders to affirm and claim rights locally.

Until human rights, including the right to adequate housing and an adequate standard of living, are incorporated into housing and anti-poverty strategies as claimable rights, such strategies will remain, at best, governmental commitments to improved programs. Certainly governmental commitments to eliminate poverty and homelessness through improved programs are critical to any housing and anti-poverty strategy. However, addressing a fundamental human rights crisis must also include human rights as part of the solution, and enlist the critical knowledge base and capacity of rights-holders to identify systemic problems and devise solutions. Revaluing the rights of those who have been affected by the programmatic failures in the area of housing and income security in Canada remains a critical aspect of any strategic solution.

Provincial/territorial accountability is also critical to rights such as the right to adequate housing and the right to an adequate standard of living. Housing and anti-poverty strategies present an ideal opportunity to develop new forms of accountability through municipal/provincial joint strategies with clear goals and timetables for eliminating poverty and homelessness, and providing for effective monitoring, complaints procedures, hearings and remedies. Institutions such as provincial human rights commissions, Law Reform Commissions and Ombudsmen could play important roles in making international human rights norms meaningful and relevant to rights-holders.

Louise Arbour and Fannie Lafontaine have affirmed that: "Canada has much to gain and nothing to lose in opening up to international tools for

¹¹⁸ Human Rights, Access and Equity: CERA's recommendations for the Homelessness Action Task Force (November, 1998) online: Equality Rights www.equalityrights.org.

solving its domestic troubles.”¹¹⁹ It is time that governments in Canada responded to the chorus of recommendations, from the UN to community organizations and grassroots movements, to take Canada’s international human rights obligations seriously, and incorporate them into housing and anti-poverty strategies. Rights-based strategies for the elimination of poverty and homelessness may serve as the next critical frontier through which to reclaim human rights that have been too long ignored.¹²⁰

¹¹⁹ Louise Arbour & Fannie Lafontaine, “Beyond Self-Congratulations: The *Charter* at 25 in an International Perspective” (2007) 45:2 Osgoode Hall LJ 239 at 257.