

Consideration of Merits Under the OP-ICESCR: Reasonableness Review under 8(4) and the Maximum of Available Resources Standard

Notes for Discussion at the Workshop on Strategic Litigation under the OP-ICESCR

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Introduction: The two readings of reasonableness

Those of us who participated in the drafting of the OP-ICESCR will well remember the predicament we faced in the last day of discussions, around the wording of article 8(4) and the reasonableness standard. After eloquent submissions from a number of states, including Portugal and Finland the day before, well supported by the NGO Coalition, the Chairperson had removed from the draft any reference to “margin of discretion” or “margin of appreciation” as well deleting a bracketed proposal to replace “reasonableness” with “unreasonableness”. The session on the last day, however, began with a demonstration of very effective lobbying by Canada, backed up by the U.S. and a number of other states unsupportive of the Optional Protocol (OP), in which about twenty states spoke at the outset to insist that a reference to “margin of discretion” or “margin of appreciation” must be reinserted if they were to support the referral of the draft to the Human Rights Council. It was clear that some kind of compromise language would be necessary to save the protocol.

We huddled together in our corner of the meeting room to try to come up with a strategy. Lillian Chenwi pulled up the *Grootboom* decision. We pulled out the section from paragraph 41 of *Grootboom*, which stated:

“The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness.”

This was a statement we could all agree with. We floated the idea that the Committee would recognize that the state may choose from a “a range of measures” that would satisfy the obligations of the Covenant. Enough states were satisfied with this last minute proposal that the Chairperson was able to get support for compromise wording based on this, and the rest is history. The Optional Protocol now states, in 8(4) that “the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.”

History, however, is open to interpretation. While we believe that this change in wording was extremely significant, there will still be a lot of debate about what exactly it means. The reasonableness standard in *Grootboom* has been read in different ways. It has been read by some as a strong affirmation of substantive rights that require positive measures well beyond, but including, concrete core entitlements. It has been read by others as a relatively weak form of justiciability that substitutes a “good governance” standard of review” for a requirement of “rights compliance”, leaving claimants with “a right to a reasonable housing policy” rather than a right to adequate housing. Even those favourable to the reasonableness standard in South Africa have expressed growing concern that it has focused the adjudication of ESC rights inappropriately on the rationale for state decision-making rather than on the content of rights, and has been used as a basis for denying concrete, entitlement based remedies to claimants. These two “readings” of *Grootboom* and the reasonableness standard in South Africa can be used to strategize how best to approach reasonableness review under 8(4) of the OP-ICESCR, giving us guidance as to what approach to dissuade the CESCR from adopting, and what to encourage.

We propose to focus of our chapter, therefore, on the importance for strategic litigation to

- i) ensure that the CESCR does **not** adopt a narrow understanding of reasonableness as a deferential, rationality standard of review to be accorded claims engaging states’ decisions’ regarding positive measures or resource allocation
- ii) avoid presenting any dichotomy between reasonableness review and minimum core obligations, arguing instead that reasonable policies often require universal minimal entitlements; and
- iii) discourage a disproportionate focus on the state’s rationale for its decisions rather than developing the substantive content of the rights of petitioners

8(4) mandates an approach to reasonableness review which gives the Committee the full authority and responsibility to consider the content of the rights in the Covenant. Policies and decisions should be reviewed for both procedural and substantive compliance with the rights, purposes and values of the ICESCR, in the context of available resources and the needs and rights of others.

What to Avoid: Reasonableness Review as Deference to one Party in the Determination of Compliance

The narrow approach to reasonableness review that we must try to avoid under the OP-ICESCR has arisen from a predominantly negative rights approach under civil and political rights jurisprudence and from traditional administrative law approaches to rationality review. In these contexts, reasonableness review has taken as its starting point the relationship between the reviewing body and the original decision-maker - or the relationship of international human rights bodies to the domestic decision-making apparatus of states parties. It has been seen as a way of ensuring that **unreasonable** decisions

are struck down while otherwise providing a basis for courts or reviewing bodies to leave intact decisions made by decision-makers closer to the issue at hand, having the advantage of direct evidence or oral hearings, or with particular competence in the area of law at issue.

Concerns about limits to the competence of the CDESCR to review complex issues of domestic law and policy will certainly arise under the OP-ICESCR, and the CDESCR may decide in certain contexts to defer to domestic decision-makers in areas in which they have superior expertise or knowledge. For example, if a domestic court held meeting acceptable standards of fairness, and determined that government action depriving petitioners of access to medical care resulted violations of the right to life, the CDESCR might decide in a exercise some deference to the domestic court rather than to considering the evidence anew and reaching a contrary conclusion.

But the issues of when to defer to domestic courts or other decision-making bodies is not what article 8(4) is about. Section 8(4) is about the consideration of the merits of complaints in relation to the steps taken by the responding State Party. It gives direction to the Committee as to how to determine questions of **compliance** with article 2(1) in relation to substantive rights in the ICESCR and the measures adopted by States. Importantly, it does **not** give direction to the Committee to defer to the decisions of the State Party on the question of compliance with article 2(1) of the ICESCR. That is the job of the Committee, and it must exercise its authority impartially.

Concerns about Blanket Deference or Margins Accorded to States Parties in Resource Allocation

We propose to argue that the narrow understanding of reasonableness as a deferential rationality standard of review of decisions must be clearly distinguished from reasonableness review under article 8(4).¹ Our concern, of course, is that that notions of blanket deference to be accorded resource allocation decision, and the doctrine of "margins" of appreciation or discretion to be accorded states in these areas has been the basis for

- dismissing ESC rights claims without seriously examining them;
- providing inadequate remedies that fail to ensure basic entitlements; and
- focusing adjudication of ESC rights on the rationale put forward by the state (often post-facto) rather than on the rights and values that are the fundamental purposes of the ICESCR .

The experience of practitioners and claimants is that notions of blanket deference to resource allocation, margin of discretion or margin of appreciation are too often used to undermine rigorous or

¹ The SA Constitutional Court in *Khosa & Mahlauli v Minister of Social Development* clearly distinguishing rationality review from reasonableness review in socio-economic rights

fair adjudication of substantive ESC rights claims. The application of blanket deference to resource allocation decision is based on the false assumption that decisions in relation to resource allocation or program design are inherently less suspect, more democratic, or more central to state “sovereignty” than decisions made by states to directly interfere with civil and political rights. Such an underlying bias would seriously compromise the integrity of ESC rights adjudication. If we are not consistent in resisting the idea that deference to state decision-making should be disproportionately accorded in relation to substantive claims involving resource allocation, we may find that a misapplication of “reasonableness review” simply imports into the adjudication of ESC rights claims all of the prejudices and misconceptions that were behind their exclusion from adjudication in the first place.

The Line in the Sand: Determining Whether Measures Taken Are Reasonable and Comply with the Covenant is the Exclusive Role of the Committee, not of the Respondent State Party

The line we need to draw in the sand is that assessing what is in compliance with the rights in the Covenant is the role of Committee. The CESCR must not defer to the State Party in determining the very the issue of compliance or violation raised by the petitioner. While that principle sounds obvious to any fair adjudication, it is often not the case in practice. A misapplication of reasonableness review can easily be used to justify deference to the State Party not only on the question of how to design or implement particular programs or positive measures necessary to compliance - i.e., on the specific remedial measures to be employed – but **on the very legal issue in dispute** – i.e. what constitutes reasonable measures in compliance with article 2(1) and the substantive rights in the Covenant.

So, for example, a state challenged for violating the right to adequate housing by a petitioner deprived of necessary housing subsidy may argue that it has determined that its particular allocation of the budget toward housing subsidies is reasonable in light of competing needs. The State may argue that it, not the Committee, is best placed to assess competing needs and to decide what is reasonable. The Committee might then defer to the state's resource allocation decisions unless there is compelling evidence that the decision was “unreasonable”. It would have thus deferred to the State Party on the very question being adjudicated - whether the resource allocation decisions that deprived the petitioner of housing were in compliance with the Covenant. That kind of deference is inconsistent with the duty of fairness. It is the Committee, not the State Party, that has the competence and legitimate authority to consider what is reasonable in relation to compliance with the ICESCR. The State may have its own definition or understanding of reasonable policy, but understanding is not entitled to deference from the Committee. The State must be required to present any evidence necessary along with its rationale, and it is up to the Committee to adjudicate the issue of compliance.

The Drafting History of Article 8(4) – What was Rejected and What was Affirmed

Fortunately, the traditional, deferential standard of reasonableness review is **not** what we got in 8(4). It

was rejected when the Working Group firmly rejected proposals to replace the positive standard of "reasonableness" with a negative standard of "unreasonableness" and deleted references to "margin of discretion" or "margin of appreciation." When the reference to margin of appreciation in the penultimate draft of the OP was deleted, it was replaced it with a phrase from the *Grootboom* decision, affirming the principle that the state may choose from a range of policy options **when a number of different options would achieve compliance**. This is entirely different from granting the state a margin in relation to compliance itself, or deferring to its decisions in relation to the determination of what meets the reasonableness standard under 8(4). In short, article 8(4) preserves the fundamental fairness and integrity of adjudication under the OP-ICESCR by establishing that the Committee, not the state party, determines what is reasonable and therefore in compliance with the Covenant.

Under the OP, reasonableness review means determining whether the state has met the standard of reasonableness in the measures or steps taken - in resource allocation and program design - in order to ensure **the petitioners' rights**. The analysis must be framed by and fully grounded in the context of the petitioner's circumstances, the content of the right and the broader values and purposes of the ICESCR. It will start from the perspective and experience of the claimant, consider what the right means in that context and only subsequently consider the the justification for the state's conduct or omissions in considering whether they meet the standard of reasonableness. Reasonableness under 8(4) should thus be interpreted as the standard of decision-making that is required for full compliance with the ICESCR, both procedurally and substantively, with respect to the content of the petitioners' rights and the use of the maximum of available resources. It will be developed on a case by case basis, with reference not only to measurable indicators but also the broader purposes and values of the ICESCR.

Reasonableness Review and Universal Entitlements

Reasonableness review is contextual and it applies general values and principles to the assessment of the content of rights in particular circumstances. In that sense, it cannot be reduced to universal quantifiable requirements, to be applied to every case. It goes well beyond what has been described as "minimum core obligations".

On the other hand, any suggestion that the reasonableness standard does not require, in many cases, minimal entitlements or concrete remedies for petitioners is simply wrong. We should avoid, in our strategic litigation, becoming mired in a false dichotomy between minimum core content and reasonableness review as well as any suggestion that the concrete entitlements required by the reasonableness standard will always be minimal requirements of survival, when in fact, the state can afford more.

It is absurd to imagine that the right to reasonable decision-making does not imply a right to particular entitlements, both in relation to the overall design of programs and budgeting and with respect to the remedy to be provided particular claimants when rights have been violated. Thus, we should vigorously dissuade the CESCR from any notion that the justiciable components of the rights in the Covenant are the minimum core obligations associated with them, while at the same time, ensuring that the

Committee recognizes that in many contexts, ‘basic entitlements designed to vindicate the complaints’ life, dignity, equality and autonomy interests. will be required in order for a state to meet the test of reasonableness under article 8(4).

What will Reasonableness Review Look Like?

As noted, reasonableness review will start by elucidating the content of the right claimed in the context and circumstances of the petitioner’s lived experience. How does the claimant group experience the alleged violation? How may it be experienced differently because of sex or disability or cultural factors? Our strategies must be to ground our approach in the real lives of those whom we represent and bring the evidence necessary for the Committee to consider the claim of individual petitioners in relation to broader systemic patterns of injustice. The values of individual dignity, equality and security of the purpose that are at stake for the claimants need to be fully elucidated. We must also reveal the democratic legitimacy of ESC rights claims in order to combat tendencies to defer to state decision-making as if they are inherently democratic. Was the claimant group consulted and were their interests fully considered in the design of the policy or decisions? What unique needs might the petitioners have that were not considered, and what are the consequences of the violation that the CESCR might not appreciate? It will be critical in this aspect of our litigation strategies that we allow the claimants to find their voice and fully articulate what is at stake for them. In this way, socio-economic rights adjudication can help catalyse and deepen participatory and deliberative democracy.

The Committee must then consider the broader picture, which the State has the onus to present, but which claimants and supporting amicus should also engage to ensure a balanced picture. Individual petitioners may indeed face serious deprivations as a result of reasonable decisions to allocate resources to others, or to limit entitlements in one area in order to provide for them elsewhere. States may present evidence that they considered the needs of the petitioners, assessed the cost, and determined that to expend the resources necessary would compromise its ability to meet other needs or fulfill other rights. It may show that it was dealing with more urgent needs of other groups whose situation was more desperate. These considerations may indeed be consistent with the broader rights and values of the ICESCR. In general, our strategies should not assume that the interests of compliance with the ICESCR will always be forwarded by upholding claims by petitioners. Reasonableness review defends the interests of those who may have been able to bring forward claims. Our strategies must therefore ensure the full participation of other stakeholders through effective amicus interventions, as well as new roles for national human rights institutions, to give the Committee the evidence it needs to judge whether measures are reasonable in light of the primacy of human rights for all – not just for particular petitioners.

The reasonableness “defense”, therefore, should not be interpreted as a defense for the government but rather as a defense of a broader consideration of all the rights and interests at stake.. It provides for a dialectic between an individual rights claim and the consideration of other needs and interests, to

ensure consistency with broader values and purposes of the Covenant in the context of limited resources. In most cases, it will be advanced by states as a defense against an alleged violation. But it may also be used by amicus and other stakeholders to ensure that in considering the particular interests of an individual petitioner, their rights and interests are not overlooked.

The Burden of Proof

The onus of establishing the violation of the substantive right is on the petitioner. That violation should be established not only in reference to relevant measures of adequacy or indicators of compliance, but also on the basis of contextual factors affecting the content of the right in the particular circumstances of the case. The OP provides a new opportunity for claimants to assist the Committee in elaborating on the content of rights, properly informed by the voice and understanding of those affected.

The onus then shifts to the respondent to explain the basis for its policies or decisions. It is the State Party that is best placed to provide relevant evidence as to competing demands on and limits to available resources, on why it was necessary to limit the fulfillment of a petitioner's right in order to fulfill other rights and obligations. This shift of the burden of proof to the respondent in reasonableness review is consistent with procedures in relation to the duty to reasonable accommodate disability.

The claimant and amicus must, however, be permitted to challenge or refine or, in the case of amicus, perhaps even support the state's interpretation of competing needs and its notion of what is reasonable.

Standards of Reasonable Policies and Decisions

While the standards of reasonable decision-making should be developed in the context of individual cases, we already have some guidance from domestic and regional jurisprudence, as well as from commentary by the CESCR itself, as to what constitutes reasonable policies and decisions in compliance with the ICESCR. Compliance must be both procedural and substantive.

Procedural compliance with the reasonableness standard will include, for example:

- meaningful engagement with stakeholders in both the design and implementation of programs, including in budgeting and resource allocation;
- participatory rights and effective remedies for rights-holders, including affirmative measures for marginalized groups, built into program design and legislation as well as measures to ensure that more powerful interest groups do not adversely affect fair decision-making;
- meaningful goals and timetables with independent monitoring, review and complaints mechanisms to ensure progress in fulfilling rights.

Substantive compliance with the 8(4) reasonableness standard has been summarized by “the four a’s” – availability; accessibility; acceptability; and adaptability.

Reasonable measures will include, for example:

- plans that are deliberate, concrete and targeted towards the fulfillment of ESC rights;
- provision for those in the most desperate or precarious circumstances;
- universal access to basic levels of entitlements;
- protection of equality, non-discrimination, dignity, autonomy and other human rights in program design and implementation;
- addressing both long term and short term needs;
- meeting the unique needs of diverse groups and interests, including women, people with disabilities, indigenous;
- prevention of any deliberately retrogressive measures;
- firm commitments to longer term goals;
- cost effective and transparent allocation and expenditure of financial resources;
- elimination of corruption in programs and budgeting.

Such “checklists” for the assessment of reasonable policies, however, must not be allowed to substitute for the consideration of the content of the petitioner’s rights. Compliance with the ICESCR is not merely a matter of measures or averages or statistics. The question the Committee must determine in an allegation of a violation of a right to housing is not whether the State’s housing and budget policies in general meet the requirements of a checklist for reasonableness. Rather, the question is whether the State took reasonable steps to ensure **the petitioner’s right to adequate housing**. In most cases, the latter question will be a considerably more manageable inquiry for the Committee, and one which preserves the value added of an individual complaints procedure in ensuring that the content of rights is elaborated in reference to the rights holders, not just in reference to broadly applied measures or indicators.

Reasonableness and Remedy

While remedies under the OP-ICESCR will be covered in a separate chapter, we will conclude our chapter by a consideration of the value of the reasonableness standard under 8(4) in the development of effective remedies. Article 8(4) establishes that where there is a range of policies that may achieve compliance with the ICESCR, it is up to the State, not the Committee, to choose among these.

In many cases, where structural or systemic remedies are required, the CDESCR will leave it up to the state to develop and implement the necessary programs or policies to remedy a violation. Such remedies, however, must be in compliance with the Covenant, and therefore must also be in compliance with article 2(1) and the standard of reasonableness.

Procedural requirements of reasonableness will equally be applicable to remedies, ensuring effective participation of stakeholders in the design and implementation of programs, and accountability to firm goals and timetables, with independent monitoring and complaints procedures. Remedies will also be required to meet the substantive requirements of reasonableness, attending, for example, to those in most desperate need and ensuring basic minimal entitlements where appropriate. Rather than 'micromanaging' the implementation of remedies, the CDESCR will be able to focus on ensuring that remedies meet the requirements of reasonable measures, procedurally and substantively, and ensure that the implementation of remedies is consistent with those principles. Reasonableness review thus encourages and enhances the kinds of participatory, structural interdicts that have been developed in national jurisdictions to remedy systemic violations over time.