

TEN YEARS AFTER THE VIENNA WORLD CONFERENCE ON HUMAN RIGHTS

PRESENTATION FOR PANEL ON EVENING OF THURSDAY 16 OCTOBER 2003

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This presentation has three objectives:

First, I would like to reflect briefly on the progress made by economic, social and cultural rights (ESCR) since the Vienna World Conference on Human Rights in 1993.

Second, I aim to discuss some of the work undertaken by the UN Committee on Economic, Social and Cultural Rights (CESCR) in the last three or four years.

Third, I make a few remarks about how international human rights can be used as an international shield.

My treatment of these three topics is introductory. I am sure there are others in this room who can supplement – and critique – what I have to say. I hope they will in the discussion afterwards.

I. PROGRESS SINCE VIENNA?

As is well-known, for many years ESCR were the poor relations in the family of international human rights. Civil and political rights were privileged, ESCR were neglected and marginal. Of course, participants at Vienna were aware of this unequal treatment, hence the compromise formula in the Declaration and Plan of Action:

The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.¹

Are ESCR as marginal today as they were in 1993? I do not think so – at least not at the international level. Within the UN, ESCR receive more attention now than ever before. To give just one example: before Vienna, the UN Commission on Human Rights had not established one Special Rapporteur on ESCR. We now have four: on education, housing, food and health.

There is also some evidence that ESCR are attracting more attention at the regional level than before. Again, to give just one example: the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints entered into force in 1998 and a number of collective complaints have now been adjudicated upon by the European Committee of Social Rights.

Also, NGOs and scholars are giving ESCR more attention now than in 1993. Both Amnesty International and Human Rights Watch have recently extended their mandates to include some measure of ESCR. Perhaps more important, increasing

¹ Para 5.

numbers of grassroots civil society organisations, especially in the south, seem to be embracing economic, social and cultural rights issues, even if they do not always use the rights discourse which we are employing in this conference. As for academia, I have no doubt that there is now more scholarly literature on international ESCR than hitherto.

However, although ESCR seem to me to be attracting more international, regional, non-governmental and academic attention now than in 1993, they still do not receive as much attention as civil and political rights. ESCR remain in deficit – but the deficit is less than it used to be.

What about the national level? Are ESCR gaining more recognition at the national, as well as the international and regional levels? Here I am less sanguine. As it considers states' reports, the UN Committee on Economic, Social and Cultural Rights finds relatively slight recognition of ESCR in either national legislation or the domestic courts. There are exceptions, as in Norway, which has recently incorporated the International Covenant on Economic, Social and Cultural Rights (ICESCR) into domestic law, and South Africa and Finland which have constitutionalised ESCR and made them justiciable. But, on the whole, ESCR, as express legal entitlements, are often marginal in the great majority of domestic legal systems. There is a paradox here that I return to in the Conclusion.

II. THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: SOME RECENT DEVELOPMENTS.

Since 1993, CESCR has adopted eleven General Comments (GCs). General Comments are not legally binding but, as Matthew Craven has remarked, they carry “considerable legal weight” in relation to the issues confronting the Committee.² In the absence of a complaints procedure, General Comments provide one of the few opportunities available to the Committee to interpret the provisions of the Covenant.

CESCR has recently accelerated its adoption of GCs on specific ESCRs so as to help states, and other actors, struggling with the normative imprecision of ESCR. Thus, in 1999 the Committee adopted a GC on the right to food and two on the right to education. In 2000, it adopted its GC on the right to health and last year a GC on the right to water. In this period, the Committee also finalised a number of important Statements (eg one on poverty and another on intellectual property) but for present purposes I will focus on its General Comments.

May I emphasise that what these General Comments are trying to do is complex and controversial. They are trying to outline the normative content of complicated ESCR, as well as the obligations deriving from these norms. They are also trying to identify ways by which these norms and obligations can be monitored by states, civil society and others. Moreover, they are trying to do all this in a way that is meaningful to rich and poor states alike; in other words, they have to speak to the realities of Canada and Chad. Further, as is well-known, the national legal tradition of ESCR is not as rich as the national legal tradition regarding civil and political rights, and thus it provides fewer precedents to help international work on ESCR. In summary, the challenge is to

² Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995), 91.

identify the contours and content of specific international ESCR, and also to establish the conceptual tools by which this can be done. By any standards, this is a difficult and ambitious undertaking.

It is not appropriate here to subject the Committee's recent specific GCs to a detailed analysis. Instead, I would like to highlight briefly four jurisprudential features of these GCs that may be of some interest.

First, the Committee's recent GCs – on food, education, health and water – adopt the multi-layered approach to human rights obligations. Thus, GC 14 says that the right to health imposes three types or levels of obligation: the obligations to respect, protect and fulfil (see, for example, para 33-37 and 50-52). Deriving from the work of Asbjorn Eide and Henry Shue, this analysis is important because it confirms that some obligations (the obligations to respect) in relation to ESCR do not require state action and are not resource dependent. Just as state officials have an obligation not to torture, they also have an obligation not to demolish so-called 'slums' at 5.00am without notice. Both obligations are a prohibition on state action and neither obligation depends upon resource availability. While this multi-layered approach to human rights obligations is found in the South African Constitution, CESCR's GC on the right to food, adopted in 1999, was the first time that it had been used by a UN human rights treaty-body. The Committee's subsequent General Comments on the rights to education, health and water followed suit. In my view, the multi-layered approach provides a useful analytical tool for the better promotion and protection of ESCR.

Second, the Committee's recent GCs on food, education, health and water also develop the controversial concept of "core obligations" which was first used by the Committee in 1990.³ The Committee takes the view that there are "core obligations" that apply to all states, no matter what their stage of economic development. In other words, these core obligations apply equally to both Canada and Chad. To take one example of a core obligation from GC 14 on the right to health, all states must "ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable and marginalized groups" (para 43(1)). To take another example, all states must "adopt and implement a national public health strategy and plan of action ... addressing the health concerns of the whole population" (para 43(6)). While the concept of "core obligations" certainly remains controversial, it now enjoys a firm place in the Committee's jurisprudence.

Third, the Committee's recent GCs provide examples of violations of the rights to food, education, health and water, as recommended by the ICJ's Bangalore Plan of Action in 1995. It should be said that the Maastricht Guidelines on Violations of ESCRs (1997) has contributed to the Committee's approach to ESCR violations.⁴

Fourth, the Committee's two most recent GCs, on the right to health and the right to water, signal how the Committee thinks indicators and benchmarks can and should be used in relation to ESCR (eg GC 14 paras 57-58). Naturally, the Committee looks primarily at how states can use indicators and benchmarks. But the simple method outlined by the Committee in GC No.14 can be adopted and adapted by NGOs,

³ General Comment No. 3.

⁴ Both instruments can be found in *Economic, Social and Cultural Rights: A Compilation of Essential Documents*, ICJ, 1997.

national human rights institutions and other actors. Although much more work is needed in this field, the Committee signals in GCs 14 and 15 what it believes is the way forward in relation to indicators, benchmarks and ESCR.

These, then, are four features of the Committee's recent GCs: the multi-layered obligations analysis; core obligations; violations; and indicators and benchmarks. There are others that I do not have time to mention. All are controversial. More work is needed on all of them. But the Committee has placed these tools on the table for others to use and refine, if they wish, and according to their needs.

For my part, as Special Rapporteur on the right to health, I am trying to contribute to the development of these tools. For example, in my interim report to the UN General Assembly, submitted just a few days ago, I devote some pages to the issue of right to health indicators and benchmarks.

III. USING HUMAN RIGHTS AS AN INTERNATIONAL SHIELD⁵

Ratification of the International Covenant on Economic, Social and Cultural Rights -- and other human rights treaties -- imposes onerous obligations on states: it requires states to ensure that health care, primary education and so on, is available to all. Discussion about the Covenant usually focuses on what a state must do, and not do, in order to conform to its treaty obligations. Thus, a state must build primary schools and introduce immunisation programmes; and it must neither demolish homes without notice, nor ban trade unions. In short, the Covenant imposes multiple obligations on states parties.

There is, however, another aspect to the Covenant that is often overlooked. If they wish, relevant state parties, such as Least Developed Countries (LDCs), may argue that it is impermissible for any international or other policy to push the most vulnerable members of their societies below the basic international minimum threshold represented by the Covenant's provisions.⁶ In other words, a state may reasonably ask and expect others not to act in such a way that places it in breach of the binding international legal obligations that it owes individuals and groups in its jurisdiction.

Put in this way, the Covenant takes on a new, additional role. It is no longer just a source of onerous obligations in relation to which a state is periodically held to account in Geneva. It has become a device that signals which international and other policies impacting upon the poor in a particular state party are legitimate and which are not. In this way, the Covenant has become a shield that state parties may use to protect their poor from international policies that would otherwise cause avoidable hardship to vulnerable individuals and groups. This, then, is the idea that has begun to inform some human rights initiatives in recent years: the Covenant as an international shield for the poor.

The conception of the Covenant as an international shield for the poor enables developing countries to say to more powerful states and international organisations:

⁵ This section draws upon Paul Hunt, *Using Rights as a Shield*, NZ Human Rights Law and Practice, 6, 2001, page 111.

⁶ See the Statement on Poverty and ICESCR, in CESCR's Annual Report for 2001 (E/2002/22 and E/C.12/2001/17), Annex VII, paras 15-18.

'We accept that our current economic arrangements are not sustainable. We know we have to reform our economy. We need your economic advice and financial assistance to make the necessary reforms. But these reforms must be both constructed and implemented in a way which is in conformity with our binding international obligations under the Covenant - especially our human rights obligations to our most vulnerable groups and individuals.' The state might continue: 'As a law-abiding international citizen, we are sure you would not encourage us to breach our binding international human rights obligations which we owe to all individuals in our jurisdiction.'

Crucially, if the Covenant is used in this protective way, it does not obstruct rational, measured economic reform. Re-structuring may still occur. But it does mean that the reforms have to be formulated and implemented in ways that minimise avoidable suffering, especially among vulnerable groups. In this way, the Covenant can contribute to the long-term sustainability of economic reform.

Of course, the conception of the Covenant as an international shield raises important and difficult issues. Some are normative: what, precisely, is the international minimum threshold implicit in the Covenant? Some concern causation: how do you identify which policies are responsible for pushing the poor below the international minimum threshold? These are serious issues demanding serious attention.

Some have expressed concern that the conception of the Covenant as an international shield for the poor lets states parties off the hook. The concern is that some states will use this line of argument as an excuse for their own failure to adopt appropriate national policies and programmes. In this context, it is important to underscore the dual role of the Covenant. The Covenant places onerous obligations on states. States may not resile from these obligations. But, in addition, the Covenant can also be used by states as an international shield to protect their poor. These two roles are not mutually exclusive. They co-exist. Both are important.

In recent years, CESCR has begun to ask states from the economic south whether or not, in their dealings with international financial institutions (IFIs), like the World Bank and IMF, they raise their binding legal obligations under the Covenant. In other words, the Committee has begun to ask whether or not southern states conceive of the Covenant as a shield in the way I have outlined.

One state was very candid. It said it did not mention the Covenant in its negotiations with IFIs. Why not? Because the state's negotiators with IFIs did not know about the Covenant. Foreign Affairs knew about the Covenant. Maybe the Ministry of Justice knew about Covenant. But neither Foreign Affairs nor Justice negotiated with the World Bank and IMF. Who negotiated with these IFIs? Treasury. But Treasury had not heard of the Covenant.

This line of enquiry has generated a number of CESCR concluding observations in relation to a number of states. The following concluding observation is typical:

The Committee strongly recommends that Egypt's obligations under the Covenant should be taken into account in all aspects of its negotiations with international financial institutions, such as IMF, the World Bank and WTO, to

ensure that economic, social and cultural rights, particularly of the most vulnerable groups, are not undermined.⁷

Effectively, the same recommendation has been adopted in relation to other states, including Jordan, Morocco, Syria, Ukraine and Nepal.⁸

A parallel line of questioning by the Committee is also emerging. It is not directed to states from the economic south, but to the richer states of the economic north. To take one example, Germany attended before CESCR in 2001 and its delegation was asked what steps Germany takes to ensure that, when its representative participates in the World Bank, he or she takes into account the international human rights obligations of Germany, as well as the international human rights obligations of the recipient state in question. The Committee's Concluding Observations on Germany include the following recommendation:

The Committee encourages the State party, as a member of international financial institutions, in particular the International Monetary Fund and the World Bank, to do all it can to ensure that the policies and decisions of those organizations are in conformity with the obligations of States parties to the Covenant, in particular the obligations contained in articles 2 (1), 11, 15, 22 and 23 concerning international assistance and cooperation.⁹

You will find similar recommendations in the Concluding Observations of Japan, Italy and others. When Germany next attends before the Committee, I anticipate it will be asked what it has done to ensure conformity with this recommendation. Perhaps more importantly, civil society in Germany can use the recommendation, if it wishes, to campaign for enhanced German international cooperation in relation to developing states.

May I emphasise that the line of Committee questioning I have mentioned is not about conditionality. It is about whether or not rich states may impose on poor states financial arrangements which breach the ESCR of the poor. It is about the consistent and coherent application of international human rights law across national and international policy-making processes.

Just as the Covenant can be used to tackle unfair inequalities within a state, so it can help to address – on a very modest scale - the grossly uneven distribution of power between the economic north and the economic south.

IV. CONCLUSION: ESCR LAW AND PRACTICE AT THE NATIONAL LEVEL

Towards the beginning of this paper, I remarked that ESCR receive scant legal recognition in many jurisdictions. But there is a paradox here. Although very few domestic jurisdictions give adequate legal recognition to ESCR, in fact most jurisdictions have numerous laws and institutional arrangements that provide protection for at least some components of many ESCR. Numerous jurisdictions, for

⁷ E/C.12/2000/21 para. 170.

⁸ Respectively, E/C.12/2000/21 para. 247 (Jordan) and para. 549 (Morocco), E/C.12/1/Add.63 para. 29 (Syria), E/C.12/1/Add.65 para. 20 (Ukraine), E/C.12/1/Add.66 para. 38 (Nepal).

⁹ E/C.12/1/Add.68, para 31.

example, have housing tribunals, employment courts, and social security appeals procedures. Some have Health Ombudsmen and food safety standards. All of these may contribute to elements of the rights to housing, health, food and so on. I am not suggesting that these existing arrangements are adequate – on the contrary, invariably they are not. But, importantly, they belie the tired assertion that ESCR are inherently non-justiciable.

So my final comment is to emphasise how useful it would be if studies were prepared of national law and practice regarding ESCR. Apart from repudiating the argument that ESCR are inherently not amenable to legal definition and adjudication, such national studies would enable human rights advocates to identify good practices from which other jurisdictions might learn.

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