

**FIFTH ANNUAL MEETING OF THE ASIA-PACIFIC FORUM OF  
NATIONAL HUMAN RIGHTS INSTITUTIONS**

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I have been asked to say a few words about economic, social and cultural rights and recent developments concerning the UN Committee on Economic, Social and Cultural Rights (CESCR). As you may recall, CESCR consists of eighteen individuals sitting in their personal capacities. It monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which has now been ratified by more than 140 states. The Covenant is part of the International Bill of Rights.

My presentation falls into two parts. The first part is deliberately provocative. In both parts I sketch, for the purposes of discussion, some possible roles for national human rights institutions (NHRIs). Although CESCR's Rapporteur, today I am speaking in my personal capacity.

**I. COVENANT AS A SHIELD FOR STATE PARTIES**

ICESCR imposes binding obligations on all state parties. Under international law, a state has to implement these obligations in good faith. Discussion about the Covenant usually focuses on what a state has to do to conform to its treaty obligations. Before ratification, the state usually amends its domestic law so it is in conformity with the Covenant. After ratification, the state has an obligation to ensure new laws conform to the Covenant. Every five years the state is required to submit a periodic report to CESCR and to attend before the Committee. And so on. There is no question, ratification of the Covenant does impose onerous obligations on states.

But there is another aspect to the Covenant which is often overlooked. And it is this aspect which I would like to focus on in the first part of my presentation.

The point I want to emphasise is that the Covenant can also be used as a shield by states, especially those from the economic South. The Covenant is not only a source of onerous state obligations. It can also be used by the more vulnerable states to protect themselves from some of the policies and pressures of powerful global non-state actors.

International financial institutions (IFIs) - the World Bank, IMF, Asian Development Bank and so on - wield a lot of power. In some ways, they have more power than numerous southern states which are desperate for loans, credits and other financial assistance. Numerous states have introduced IFI-sponsored structural adjustment programmes (SAPs). In some cases, these SAPs have caused enormous hardship to the most vulnerable groups in society. Women have been disproportionately affected. Hospital clinics have been closed. Primary school fees have been introduced. Children's malnutrition has increased. Some SAPs have generated what, at first sight, appear to be widespread breaches of the Covenant.

Confronted with this type of scenario, it is open to a state to say to an IFI: '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.'

In this way, the function or role of the Covenant changes. It is no longer just a source of onerous obligations in relation to which a state is periodically held to account in Geneva. The Covenant has become a

shield. It has become a way of protecting a state from the worst excesses of ill-considered structural reform.

If used in this protective way the Covenant does not obstruct economic reforms. The re-structuring still occurs. But it does mean that the reforms are introduced in ways which minimise avoidable suffering, for instance by the introduction of safety nets for vulnerable groups - thereby contributing to the reform's longterm sustainability.

In comparison to the 1980s, international financial institutions today are much more sensitive to the needs of the poor. Today, the IFIs are much more aware of the importance of social cohesion and the role of economic safety nets. For some IFIs, poverty alleviation has become a crucial policy objective. Of course, more could be done, but this shift in direction deserves to be acknowledged and commended.

But this welcome change of direction does not make my point redundant. On the contrary, the increasing concern of IFIs with poverty alleviation, presents states from the south with new opportunities to use the Covenant in their dealings with the IFIs. The Covenant is more obviously relevant to the work of IFIs now, than ever before.

In the last 18 months, CESCRR has begun to ask states from the economic south whether or not, in their dealings with the IFIs, 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.

In May this year, 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.

A parallel line of questioning by the Committee is also beginning to emerge. It is not directed to states from the economic south, but to the

richer states of the economic north. In May this year, Italy - one of the G7 - was asked what steps it takes to ensure that, when its representative acts in the World Bank, he or she takes into account the international human rights obligations of Italy, as well as the international human rights obligations of the recipient state in question. To Italy's great credit, the question generated a useful and constructive discussion. May I emphasise that the question was not about conditionality. It was about whether or not rich states may impose on poor states financial arrangements which breach the ESCR of the poor.

I would like to suggest that these complex issues deserve careful consideration - in particular the point that, just as the Covenant can be used to tackle unfair inequalities within a state, so it can help to address the grossly uneven distribution of power between the economic north and the economic south.

In this context, here is a role for NHRIs, especially those from the economic south. They can educate their governments about human rights. They can show that the Covenant is not just a stick with which the state might be admonished by some remote UN human rights committee. NHRIs can show how the Treasury's negotiators can use the Covenant in negotiations with IFIs. They might offer human rights training for the Treasury's negotiators. They might do their government a great service by showing that the Covenant - and other international human rights treaties - can be used as a shield to protect the state's poorest citizens from the policies of powerful, global non-state actors.

## **II. WHAT DO ESCR MEAN AND HOW CAN THEY BE MONITORED?**

Those committed to ESCR face two very basic challenges. First, what do ESCR mean? What are the contours and content of ESCR? What does the right to housing and the right to health protection and the right to education actually mean? This is the great normative challenge.

Second, once we have some broadly agreed sense of what ESCR mean, how can we monitor them? The Covenant is quite clear that, whatever the normative content of the rights might be, a state party is entitled to realise them progressively and subject to resource availability (article 2(1)).

Unavoidably, the progressive element means that what might be expected of New Zealand this year will probably not be the same as what is expected of New Zealand in 2005. Unavoidably, the resource availability element means that what is expected of, say, Australia today is not the same as what is expected of India or the Philippines today - because Australia, India and the Philippines do not have the same resources available to them.

In short, under the Covenant, ESCR obligations have a variable dimension. This being so, how do you measure or monitor this variable dimension? How do you capture, as it were, a moving target?

These then are the two basic challenges confronting ESCR. The normative challenge: what do they mean? The monitoring challenge: in relation to a particular state, what is the appropriate obligation and how do you measure it?

The UN Committee on Economic, Social and Cultural Rights is responding to these difficult challenges in a number of ways. It is trying to provide tools or devices which others - states, NHRI, NGOs - can use to tackle these tough issues. Here, I very briefly mention three of these tools.

First, in the last 15 months, the Committee has agreed and published three General Comments which set out, in some detail, what we think the rights to food, education and health protection actually mean. These normative elaborations are not binding, but persuasive. They are shaped by the law and practice of numerous state parties, relevant international law, and the UN world conferences such as Jomtien, Vienna, Copenhagen, Beijing and Cairo.

Second, the Committee is trying to clarify what is the irreducible core content or minimum threshold for each right. A state cannot use progressive realisation and resource availability as escape hatches by which it avoids all obligations under the Covenant. A state cannot say that, because of resource constraints, boys will go to school five days a week, but girls will only go to school one day a week. States may not use resource constraints to excuse discrimination. The text of the Covenant

suggests that each right has a core content which is subject to neither progressive realisation nor resource availability. The Committee is trying to figure out what this core content is in relation to each right. This is an immensely difficult task. But we have made a start.

Third, the Committee is working on human rights indicators and benchmarks. If ESCR have a variable dimension, we need tools to measure this variability. So far, no one has come up with a way of doing this other than by using indicators and benchmarks. Let's say that in a state, primary school enrolments are 60% for boys and 30% for girls. There is your human right: the right to education. There is your indicator: school enrolment rates. There are your benchmarks: 60% for boys and 30% for girls. Critically, the benchmarks expose sex discrimination. So the state needs policies and programmes to tackle this discrimination. If, in five years time, the benchmarks remain the same, the state needs to be able to explain why it has failed to narrow the gap between boys and girls.

So, one of the Committee's jobs is to provide tools which others can adapt and use. Tools such as norms (ie General Comments) and indicators and benchmarks.

If a NHRI wishes, it can adapt and use these tools to suit its national context. Take the right to education. A NHRI might start with articles 13 and 14 of the Covenant which describe the right to education. It might then look at the Committee's General Comment on article 13 which sets out what the Committee understands the right to education to mean. It can then apply those understandings and insights to its national context. It might prepare its own national guidelines on the right to education - guidelines for teachers, students, institutions' governing councils, and government. It might identify nationally appropriate right to education indicators and benchmarks and use them to monitor progress over 5 or 10 years in selected geographical areas. In this way, the NHRI picks up tools fashioned at the international level, adapts them to its national context, and uses them to monitor the right to education at the national or local levels.

## **CONCLUSION**

In closing, I have time to only mention the absolutely crucial role that UN Specialised Agencies and programmes have in relation to the promotion and protection of human rights generally, and ESCR in particular. The bread and butter work of the ILO, WHO, FAO, UNESCO, UNICEF and UNDP has a major human rights component - whether it is the right to fair working conditions, the right to health protection, the right to cultural life, the right to food, children's rights, the right to an adequate standard of living, or sundry other rights.

Secretary-General Kofi Annan's reforms of 1997 characterised human rights as a cross-cutting issue extending across the UN. Since then, the UN Specialised Agencies and programmes have been devoting increasing attention to human rights. To take just one regional example, last year UNDP worked closely with the Solomon Islands in relation to its obligations under ICESCR. At the national level, there is a lot of scope for NHRIs to collaborate with UN agencies and programmes.

As some of you will know, a few weeks ago UNDP published a report called 'Human Development and Human Rights'. This is a path-breaking UN publication. It charts the mutually reinforcing relationship between development and rights. It signals the way forward. I commend it to you all.

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