

Justiciability of Economic, Social, and Cultural Rights: Entitlements or Empty Promises

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Introduction

One of the most daunting challenges facing the international human rights community continues to be the need to give practical effect to economic, social, and cultural rights. Civil and political rights are often considered the core of international human rights law, and for this reason have been called the “first generation” of human rights. They make up the majority of the rights mentioned in the 1948 Universal Declaration on Human Rights and are the sole consideration of the 1967 International Covenant on Civil and Political Rights (ICCPR). On the other hand, economic, social, and cultural rights, although also found in the Universal Declaration as well as in the 1967 International Covenant on Economic, Social, and Cultural Rights (ICESCR), have been known as “second generation rights,” apparently because states do not undertake to give immediate effect to all of the rights recognized therein.²

During the Cold War, Western governments championed civil and political rights. Communist governments focused on economic and social rights as a counterweight to their lack of civil and political rights.³ The division persists; today the Cubans and the Chinese make the same arguments. Cuban-sponsored resolutions on economic and social rights at the Commission on Human Rights and the General Assembly, with broad support from developing countries, routinely call for resource transfers, debt relief, an end to making aid conditional on human rights performance, termination of structural adjustment efforts imposed by donors and financial institutions, and the recognition of new human rights—such as the right to safe drinking water and sanitation, at the 2002 session of the Commission.⁴

Despite the collapse of the Soviet Union in 1989, economic, social, and cultural rights have gained increased significance within the international community because of the support of Europe and developing countries. The 1993 Vienna World Conference on Human Rights stressed that human rights and fundamental freedoms—including economic and social rights—are not only “universal, indivisible and interdependent and interrelated,” but also that “democracy, development, and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”⁵ Western governments subsequently sponsored texts at the Commission on Human Rights calling for the establishment of special rapporteurs on the right to education (Portugal in 1998) and housing as a component of the right to an adequate

standard of living (Germany in 2000), and for independent experts on extreme poverty (France in 1998), and on the justiciability of economic, social, and cultural rights (Portugal in 2001).⁶

From a normative standpoint, the current key issue in the debate is whether economic, social, and cultural rights should be placed on an equal footing with civil and political rights in terms of their justiciability. The Vienna World Conference on Human Rights encouraged the Commission on Human Rights, in consultation with the Committee on Economic, Social, and Cultural Rights, the elected body created by the UN Economic and Social Council (ECOSOC). This body was created to oversee compliance by states with the ICESCR and to examine a proposal for establishing an individual complaints mechanism to the ICESCR on the justiciability of economic, social, and cultural rights.⁷ In 1996, the committee forwarded to the commission a draft optional protocol on the matter.⁸ This led to an April 2002 call by the commission for the establishment of an open-ended working group of the commission to consider drafting an optional protocol to the ICESCR for the justiciability of such rights.⁹ The commission’s decision will be acted upon by ECOSOC later this month (July 2002).

The justiciability of economic, social, and cultural rights has been strongly supported by several European states that have ratified the Additional Protocol to the European Charter Providing a System of Collective Complaints, which entered into force on 1 July 1998.¹⁰ Additionally, Cuba and other developing countries sponsored a related resolution at the 1999 session of the commission regarding “impunity of perpetrators of violations of economic, social, and cultural rights.”¹¹ Cuban texts at the commission have also cited “with interest” a study by a special rapporteur of the UN Sub-Commission on Human Rights that would characterize violations of economic, social, and cultural rights as international crimes subject to the principles of universal jurisdiction.¹² Given the challenge faced by the international community on economic matters, the need for a clear approach to the implementation of economic, social, and cultural rights, particularly with regard to the question of justiciability, is imperative.

Legal Nature Of Obligations

In providing a draft protocol to the commission in 1996, the Committee on Economic, Social, and Cultural Rights asserted that “if the principle of the indivisibility, interdependence and interrelatedness of the two sets of rights is to

be upheld in the work of the United Nations, it is essential that a complaints procedure is established." The committee pointed to the fact that under the first optional protocol to the ICCPR, the Human Rights Committee was entitled to receive and consider communications from individuals subject to the jurisdiction of a state party who claims to be a victim of a violation by that state of any of the rights set forth in the covenant.¹³

From a legal standpoint, however, there are important differences between the obligations that states' parties assume when ratifying the two covenants. The civil and political rights contained in the ICCPR must be guaranteed directly through appropriate legal prohibitions. Article 2(1) of the ICCPR stipulates that each state party undertakes "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy." Article 2(2) further mandates that states' parties "adopt such other legislative measures as may be necessary to give effect to the rights" guaranteed in the ICCPR whenever such provisions do not exist in its domestic law.

The rights in the ICESCR, however, are not the counterparts of obligations to be performed by states in full and at once. Rather, they are goals to be achieved progressively. As set forth in Article 2(1) of the ICESCR, each state party "undertakes" to "take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized . . . by all appropriate means." Moreover, whereas the ICCPR states that "everyone has the right" to each fundamental freedom, the ICESCR is formulated in terms of "States Parties recognize the right of everyone" to each economic goal.

The precise obligations of states under the ICESCR are unclear. Without legal clarity concerning the core obligations that state parties have undertaken with respect to the ICESCR, it will be difficult for an individual complaint procedure to function in a credible and efficient way.

In advocating adoption of its optional protocol, the committee has tried to clarify the nature of the legal obligations assumed by states under the ICESCR. It has issued general comments taking the position that food, housing, and health constitute separate justiciable rights. The Committee's General Comments Nos. 12 (right to food) and 14 (right to health) pronounce that states' parties to the ICESCR are obligated to "fulfill (provide)" the right to food and health whenever an individual or group is unable to realize the right "by means at their disposal." Both comments further declare that "[a]ll victims of such violations are entitled to adequate reparation" and that they should "have access to effective judicial or other appropriate remedies at both the national and international levels."¹⁴ The committee has also emphasized its view that "the right to adequate housing is a justiciable and enforceable right."¹⁵

Nonetheless, neither the Universal Declaration nor the ICESCR create separate justiciable rights to food or housing, but rather create a right to an adequate standard of living. Universal Declaration Article 25 provides that "*everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services*" (emphasis added).

Similarly, ICESCR Article 11(1) provides that:

States' parties recognize the *right of everyone to an adequate standard of living* for himself and his family including adequate food, clothing, and housing and to *the continuous improvement of living conditions*. States' parties will take appropriate steps to ensure the realization of this right¹⁶ (emphasis added).

Thus, Universal Declaration Article 25 and ICESCR Article 11(1) proclaim a right to an adequate standard of living, components of which include access to food and housing. States parties to the ICESCR respect or recognize the right to an adequate standard of living and to continuous improvement of living conditions by not imposing arbitrary or discriminatory limitations on the ability of individuals to pursue its fulfillment—it in essence becomes a negative rather than a positive right.¹⁷

From a practical standpoint, it makes little sense to speak of a separate legally enforceable right to food, housing, or medical care when more than one-fifth of the world's population live on less than \$1 a day, and when some 825 million people worldwide do not have enough food to meet their basic nutritional needs today. The solution to the food, housing, and health problems lies in a combination of actions, such as the adoption of national policies for managing natural resources better and expanding trade between surplus and deficit countries, rather than the application of legal sanctions. Alleviating extreme poverty and hunger in any country depends on sustainable and broad-based economic growth and income generation over the long term.¹⁸

Recent texts adopted by the international community have recognized this distinction. With respect to food security, the agreed text for the upcoming World Summit on Sustainable Development, as approved in Bali, Indonesia, this past month calls for states to:

Achieve the Millennium Declaration target to halve by the year 2015, the proportion of the world's people who suffer from hunger and *realize the right to a standard of living adequate for the health and well-being of themselves and their families, including food*, including by promoting food security and fighting hunger in combination with measures which address poverty, consistent with the outcome of the World Food Summit and, *for States Parties, with their obligations under Article 11 of the Covenant on Economic, Social and Cultural Rights*.¹⁹

Similarly, the annual German text at the Commission on Human Rights on “adequate housing as a component of the right to an adequate standard of living,” is based directly upon the provisions of Universal Declaration Article 25 and ICESCR Article 11. The 2002 Commission resolution requests that the special rapporteur give particular emphasis to “practical solutions” and “best practices” in order to develop a legal framework for providing access to adequate housing.²⁰ The General Assembly, in its 2001 Declaration on Cities and Other Human Settlements in the New Millennium, “welcomed” the decisions by the commission concerning housing; the assembly then urged the special rapporteur, as part of his mandate “on adequate housing as a component of the right to an adequate standard of living,” to “develop a regular dialogue and discuss possible areas of collaboration” with governments and other relevant actors. States also reaffirmed their commitment to strengthen and safeguard an enabling environment where individuals can achieve access to food and housing.²¹

Economic Policies

The proposal of the committee also raises practical concerns from an economic policy standpoint. Since different systems of government have different approaches to resource allocation and management of economies, it would be difficult (if not impossible) to develop a common universal standard that would be acceptable to all governments. Geography, history, culture, tradition, and demographic considerations vary country by country. Different democratic processes will necessarily result in different views. Are these issues best decided by a committee of experts or are they best left to individual states?

In addition, as a practical matter, it is unclear how governments with a federal system, such as the United States, would guarantee and enforce economic, social, and cultural rights, because these issues are often matters of state and local law. The question of guaranteeing and enforcing economic, social, and cultural rights is more easily dealt with in a “unitary” state with plenary authority over all issues related to economic, social, and cultural rights.²²

Financing

Yet another important question is whether the protocol should also include an *interstate complaints mechanism* like that contained in the ICCPR, which would enable one state party to charge another with a violation of the treaty.²³ The Committee on Economic Social and Cultural Rights decided not to include an interstate complaints mechanism in its draft proposal, because “governments have consistently been wary of what has been referred to as ‘a Pandora’s Box,’ which all parties prefer to keep shut.”²⁴ Some developing countries, however, have stated that they would also want to consider inclusion of an interstate complaints mechanism to monitor

compliance with state parties’ obligations to provide international assistance and cooperation. They cite the obligations under ICESCR such as Article 11, which calls for states to “ensure an equitable distribution of world food supplies in relation to need.”²⁵

The role of international cooperation and assistance in the realization of economic, social, and cultural rights has been extremely controversial at the commission and elsewhere. Developing countries take the position that foreign debt, structural adjustment, and even globalization work against human rights. They claim that the realization of economic, social, and cultural rights can only be achieved by collective action on the part of the state, civil society, and the international community. Western countries tend to emphasize that economic growth can best take place when human rights are respected. These differences have continued to produce sharp north/south splits at the commission in a number of texts relating to economic, social, and cultural rights.

The commission’s independent expert on the right to development has proposed adoption of a development compact that would consolidate these competing positions in a way consistent with the adoption of an interstate complaints mechanism. Under his proposed compact, the right to development would be seen as a “process” of development. Developing countries would agree to ensure that economic, social, and cultural rights (the rights to food, education, and the highest attainable standard of health) “are set up as claims or entitlements of right-holders which duty-bearers are expected to protect and promote respecting human rights standards based on equity and justice.” The developed countries would in turn “ensure that all discriminatory policies and obstacles to free trade and finance are removed and the additional cost of implementing these rights is properly shared.”²⁶

It is extremely unlikely, however, that the major donor countries will accept legally binding obligations to provide development assistance, because their parliaments and congresses must approve the amount of any development assistance. Even the Commission on Human Rights, at its 2001 session, “recogniz[ed] that any development compact would be of a voluntary nature for all parties involved and that its content would be defined on a case-by-case basis.”²⁷ Moreover, the March 2002 UN Conference on Financing for Development in Monterrey dealt with the issue as an exhortation:

We urge developed countries that have not done so to make concrete efforts toward the target of 0.7 percent of gross national product (GNP) as ODA to developing countries and 0.15 to 0.20 percent of GNP of developed countries to least developed countries, as reconfirmed at the Third United Nations Conference on Least Developed Countries, and we encourage developing countries to build on the progress achieved in ensuring that ODA is used effectively to help achieve development goals and targets.

Conclusion: An Alternate Approach

The legal prescription for achieving economic goals that has universal support, and the only realistic chance of success, is contained in the UN Charter. The preamble to the charter emphasizes the determination of the United Nations “to promote social progress and better standards of life in larger freedom,” and “to employ international machinery for the promotion of the economic and social advancement of all peoples.” Article 1(3) of the charter identifies one purpose of the UN: “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.” Chapter IX of the charter elaborates the basic obligations of the UN and member states for achieving international economic and social cooperation. Article 55 of Chapter IX provides that “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote” the following:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health and related problems; and international cultural and educational cooperation; and,
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

While the world has changed since the drafting of the charter, its prescription for “social progress and better standards of life in larger freedom” through creation of an enabling political and economic environment, not through state entitlements or interstate transfers, continues to be the best way to promote “the economic and social advance of all peoples.”

Notes

1. The views expressed herein are solely the views of the author and not the Department of State.
2. See Richard Lillich and Hurst Hannum, *International Human Rights*, explaining that while “most commentary uses ‘second generation’ language to describe economic, social and cultural rights . . . it does not connote second-class status,” 1995, pp. 194–95.
3. The United States during the Reagan-Bush years frequently argued that economic, social, and cultural rights were not true human rights. See Alston *U.S. Ratification of the Covenant on Economic, Social, and Cultural Rights: the Need for an Entirely New Strategy*, 84 *Am. J. Intl. L.* 365, 1990.
4. See statement by the Cuban Minister of Foreign Affairs, Felipe Perez Roque, 30 March 2000, (on file with author). “[W]hy is it that the commission approves twice as many resolutions on civil and political rights, as on economic, social, and cultural rights?” he asks. “It is in the interest of developed countries that the commission concern itself only with civil and political rights. Because rights to development, to life, to food . . . are not priorities for anybody other than us—the poor and underdeveloped countries.” At the 2002 ses-

sion of the commission, Cuba introduced five resolutions on the subject including structural adjustments and foreign debt, CHR Res. 2002/29, 22 April 2002, adopted by a vote of 29-15-9, right of peoples to peace, CHR Res. 2002/71, 25 April 2002, adopted by a vote of 33-15-5; promotion of a democratic and equitable international order, CHR Res. 2002/72, 25 April 2002, adopted by a vote of 32-15-6, international solidarity, CHR Res. 2002/73, 25 April 2002, adopted by a vote of 36-15, and the right to food, CHR Res. 2002/29, 25 April 2002. Cuba was also responsible for the adoption of two commission decisions on the realization of safe drinking water and sanitation, CHR Dec. 2002/105, 22 April 2002, adopted by a vote of 37-1-15, and on the social forum, CHR Dec. 2002/106, 22 April 2002, adopted by a vote of 35-3-15. The resolutions and decisions of the commission are available online at <http://www.unhchr.ch>.

5. United Nations Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF. 157/24, Part I, paras. 5 and 8, 13 October 1993. The declaration is available online at <http://www.un.org>.

6. See CHR Res. 1998/33, 17 April 1998, CHR Res. 2000/9, 17 April 2000, CHR Res. 1998/25, 17 April 1998, and CHR Res. 2001/30, 20 April 2001, respectively. At the 2001 session, the commission rejected by a vote of 44-2(U.S.)-7, a U.S. proposal that would have had the effect of deferring establishment of the independent expert on justiciability until more states had provided comments on whether economic, social, and cultural rights are best implemented by an adjudicative process.

7. Vienna Declaration and Programme of Action, *supra* note 4, Part II, para. 75.

8. For the Report of the Committee on the draft optional protocol, see UN Doc. E/CN.4/1997/105 (Annex), 1997.

9. CHR Res. 2002/24, 22 April 2002. For the report of the independent expert (Hatem Kotrane) on justiciability of economic, social and cultural rights see UN Doc. E/CN.4/2002/57, 2002.

10. See comments by Finland, UN Doc. E/CN.4/1999/112, at 2-3, 1999, Germany, E/CN.4/2000/49 at 5, 2000, and Portugal, E/CN.4/2001/62 at 4-7, 2001. Other EU countries have questioned the need for a protocol. See comments by Sweden, UN Doc. E/CN.4/2001/62/Add.1, at 2-3, 2001.

11. CHR Res. 1999/58, 28 April 1999, adopted by a vote of 21-9-22.

12. See CHR Res. 2000/10, 17 April 2000, on the right to food, adopted by a vote of 49-1-2. The final report and an updated study by the special rapporteur (Mr. El Hadji Guisse) on the question of the impunity of perpetrators of human rights violations (economic, social, and cultural rights) are contained in UN Doc. E/CN.4/Sub.2/1997/8, 1997 and UN Doc. E/CN.4.2000/48 and Add.1, 2000, respectively.

13. Report of the Committee, *supra* note 7.

14. The Right to Adequate Food (Art. 11), General Comment No. 12, UN Doc. E/C.12/1999/11, Annex V, paras. 15, 32, 1999; The Right to the Highest Attainable Standard of Health (Art. 12), General Comment No. 14, UN Doc. E/C.12/2000/21, Annex, IV, paras. 37, 59, 2000.

15. See Statement by the Committee on Economic, Social, and Cultural Rights to the 25th Special Session of the General Assembly, 11 May 2001, (on file with author).

16. ICESCR Article 11(2), unlike Universal Declaration Article 25, further requires that states parties “recogniz[e] the fundamental right of everyone to be free from hunger.” The negotiating history of Article 11(2) indicates that the impetus for recognizing a “fundamental right to be free from hunger” came from the Director-General of the FAO at that time, who felt that some mention of this particular right was necessary in the ICESCR because it was not contained in the Universal Declaration. The FAO Director-General’s views were favorably received, and eventually a text on freedom from hunger was adopted.

17. This would seemingly entail not levying discriminatory taxation on any group even if the aim were redistributive, since the rich are entitled to the right to continuous improvement of living

conditions as anyone else.

18. See C. Ford Runge and Benjamin Senauer, "A Removable Feast," *Foreign Affairs*, May–June 2000 at 39; T.R. Reid, "Feeding the Planet," *National Geographic*, October 1998, at 56.

19. The Declaration of the World Food Summit: adopted in Rome, Italy, on 13 June 2002 also reaffirms "the right of everyone to have access to safe and nutritious food." The declaration, however, also calls upon states to elaborate "voluntary guidelines to support Member States' efforts to achieve the progressive realization of the right to adequate food in the context of national food security." The U.S. took a reservation to the latter provision stating that "the issue of adequate food can only be realized in the context of the right to a standard of living adequate for health and well being, as set forth in the Universal Declaration of Human Rights, which includes the opportunity to secure food, clothing, housing, medical care and necessary social services." Both the draft plan of implementation for the WSSD and the declaration of the WFS can be found online at www.un.org. But see the annual Cuban text on the right to food in the Commission on Human Rights, *supra* note 3, which endorses the Committee's General Comment No. 12 as containing the authoritative definition of the right to food. The United States has traditionally voted against this text.

20. CHR Res. 21, 22 April 2002.

21. Declaration on Cities and Other Human Settlements in the New Millennium, adopted by the 25th Special Session of the General Assembly, 8 June 2001, para. 8, 29. The declaration is available online at <http://www.un.org>. Unfortunately, the commission's rapporteur on housing in his reports has ignored the terms of his mandate and urged that states instead recognize a separate right to housing. See UN Docs.E/CN.4/2001/51 and E/CN.4/2002/59. The rapporteur also asserted that the United States is in violation of a "legal obligation" to implement "the right to housing as a legally binding right" pursuant to Article 5 of the Convention on the Elimination of all Forms of Racial Discrimination. Roman Rollnick, *Housing is a Human Right*, Q & A: *Miloon Kothari*, CONFERENCE DAILY NEWS, 8 June 2001, at 5, (emphasis added). Racial Discrimination Convention Article 5 does list specific economic, social, and cultural rights, including the "right to housing" which U.S. law does not recognize. States are not required by Article 5, however, to ensure observance of each of the rights listed therein, but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided by the domestic law. See Committee on the Convention on the Elimination of all Forms of Racial Discrimination, General Recommendation XX on Article 5, 1996, reprinted in UN Doc. HRI/GEN/1/Rev. 5, para. 1 ("Article 5 of the Convention, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights"); Senate Committee on Foreign Relations, Report on Convention on the Elimination of All Forms of Racial Discrimination, S. EXEC. REP. NO. 103–29, at 28, 1994.

22. See "The Politics of Human Rights," *ECONOMIST*, 18 August 2001, at 9.

23. See ICCPR Articles 41–42.

24. Report, *supra* note 7 at 7.

25. See Report on Workshop on the justiciability of economic, social, and cultural rights, UN Doc. E/CN.4/2001/62/Add.2, at para. 18, 2001. See also comments submitted by the American Association of Jurists arguing that "excluding [an interstate complaints procedure] without valid reasons is counter to the approach taken in the International Covenant on Civil and Political Rights (articles 41 et seq.), the Convention on the Elimination of All Forms of Racial Discrimination (articles 11 et seq.) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 21)." UN Doc E/CN.4/1998/84, at 10, paras. 3–7, (1998).

26. Third report of the independent expert on the right to development, UN Doc. E/CN.4/2001/WG.18/2, paras. 21, 46, respectively (emphasis added).

27. CHR Res. 2001/9 operative paragraphs 4 and 9, 18 April 2002, adopted by a vote of 48-2(U.S.)-3.