Human Rights and Austerity in Ireland: response to CESR paper

Seminar on Austerity and Human Rights in Europe

The impact of European austerity policies on the realisation of economic, social and cultural rights

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Des Hogan[1]

CHECK AGAINST DELIVERY

Distinguished guests, ladies and gentlemen, I have been asked to provide a response to the Center for Economic and Social Rights (CESR) 2012 report on Ireland entitled, *Mauled by the Celtic Tiger: Human Rights in Ireland's Economic Meltdown*. In the short time afforded me I propose to address three central issues in that report: first, the challenge in specifying the precise economic and social rights obligations on States parties to core UN conventions, but subject to an economic crisis; second, the challenges which accompany privatisation and third the international obligations on inter-governmental organisations such as the International Monetary Fund, World Bank or European Central Bank. Having done so, I will conclude by reflecting on what role, if any, there is for National Human Rights Institutions (NHRIs) in responding to these challenges.

[1] Acting Chief Executive, Irish Human Rights Commission. The comments in this paper are those of the author and should not be taken to reflect those of the Irish Human Rights Commission.

In addressing these points I pick up on some of the major themes of the CESR report. It is useful to consider those themes. The Executive summary sets the tone of the report where it asserts:

"A poorly managed recession, followed by a series of austerity budgets characterized by retrogressive cuts to social spending and an aversion to tax increases have markedly undermined the rights to education, health, housing, work and an adequate standard of living… Vast numbers who lost their jobs as the construction industry collapsed are now being joined by service sector workers who have seen their positions fall victim to the continuing quagmire. All the while, the most vulnerable populations, such as women, children, Travellers, migrants, older persons and the disabled, are suffering the human rights impacts of the crisis disproportionately."

The report proceeds by describing how the National Recovery Plan 2011-2014 has sought to implement the 2010 Memorandum of Understanding between the State and the International Monetary Fund (IMF), the European Union (EU) and the European Central Bank (ECB) through a range of budgetary and fiscal austerity measures, not least 5 (now 6) regressive (as in the sense of cumulative cuts to social spending) budgets. It expresses concern that economic recovery plans and policies are made without any human rights impact assessment which could reform a recovery plan.

National legal framework

The report highlights a number of institutional challenges arising from the Irish legal framework and I quote:

"From the normative standpoint, three areas of concern arise from an assessment of the status of human rights in Ireland's national legal framework: (i) the failure to implement constitutional 'directive principles' in policy-making regarding economic, social and cultural rights, (ii) the non-incorporation of international legal standards in national legislation, and (iii) the resistance to making economic, social and cultural rights justiciable."[2]

Before advancing to the main thrust of my observations today I would make the following remarks to these points.

The question of whether, when faced with an economic crisis where one's national sovereignty is at risk if a State defaults, one should not prioritise cuts to spending as opposed to increases to tax is a vexed one which splits economists and social commentators alike. In Ireland, taxation policies from most political parties prioritise low basic income tax subvented by a range of indirect taxes such as Value Added Tax which apply to all regardless of income. These are democratic decisions made on the basis of political parties' pre-election manifestos. At the same time indirect taxes are rising in Ireland with each successive budget since 2008. Nor may it be an entirely straightforward exercise to compare Ireland with other European or non-European countries unless the additional impacts of private spending for social services is taken into account. If private spending on childcare, education, health and social services is necessary in the absence of universal State provision or support for those social spending areas (except where one has limited means), conclusions on taxation policies may need to be modified (this is not to suggest that higher taxes could not result in increased State

[2] Ibid, at p.6.

subvention for such social spending over time but as with all taxes, one does not inevitably follow the other).

Taxation is but one element however. I should also address the question of the place of social and economic rights in Irish law. Social and economic rights often get translated into Irish law through legislation: witness the Child Care Acts 2001-2011, the Health Acts 1947-2007, the Housing Acts 1966-2009 etc. Over and above legislation, some economic and social rights are already recognised under the fundamental rights provisions of Ireland's Constitution, Bunreacht na hÉireann, which was proclaimed by the People in 1937 and which of course predates and in many ways anticipates the Universal Declaration on Human Rights. Thus the rights to property (Article 43 and 40.3), education (Article 42), bodily integrity[3], privacy[4], identity[5], health in prison,[6] are recognised in addition to a wide range of civil and political rights protections. As noted in the CESR report, Article 45(1) of the Constitution goes further where it emphasises "a social order in which justice and charity shall inform all the institutions of the national life."[7] And although Article 45 makes clear that these directive principles are intended for the general guidance of the Oireachtas (Parliament) and "shall not be cognisable by any Court under any of the provisions of this Constitution", the courts have on occasion demonstrated their willingness to take the principles into account for example when identifying unenumerated rights under Article 40.3.1 of the Constitution such as recognising the right to work and earn one's livelihood as

[3] *Ryan v Attorney General* [1965] IR 294.
[4] *McGee v Ireland* [1974] IR 284.
[5] *O'T v B* [1998] 2 IR 321.
[6] *The State (Richardson) v The Governor of Mountjoy Prison* [1980] ILRM 82.
[7] Article 45 sets out general guidance for the Oireachtas in its *Directive Principles of Social Policy* stating, *inter alia*, in Article 45.4.1° "The State pledges itself to safeguard with especial care the economic interests of the weaker sections of the community, and, where necessary, to contribute to the support of the infirm, the widow, the orphan, and the aged."

constitutional rights.[8] Article 45 is thus more directed to the Parliament to take its principles into account. However where Parliament arguably does not do so the question of judicial review under the Constitution arises.

At the Constitutional level, the non-justiciability of Article 45 and the fact that the Irish Courts adhere to a strict Separation of Powers doctrine[9] mean that there is general judicial restraint in requiring the Executive to ensure social rights through for example taking special measures for children at risk[10] or in extending the primary school age for adults with disabilities.[11] Such judicial restraint is not of course uncommon in common law jurisdictions particularly where matters of policy arise and where the dispensation of scarce resources are at issue: witness the dilemma of the South African Constitutional Court in *Soobramoney v Minister for Health (Kwazulu-Natal)*[12]*,* where it held that a refusal to provide the Appellant with life-extending dialysis treatment did not violate his rights to life and health under the South African Constitution, citing resource-allocation grounds.[13]

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[8] *Tierney v Amalgamated Society of Woodworkers* [1959] IR 254 per Budd J.

[9] Here the Courts observe the separation of powers strictures prescribed under Articles 15 (Executive), 28 (Parliament) and 34 et al. (Courts) of the Constitution.

[10] *TD v Minister for Education* [2001] 4 IR 259 (Supreme Court) which reversed the trend identified in *DB v Minister for Justice* [1999] 1 IR 29 where Kelly J had held that the State had a positive duty to provide appropriate facilities to children at risk under Article 42.5 of the Constitution

[11] *Sinnott v Minister for Education*[2001] 2 IR 545. In *Tormey v Ireland* [1985] IR 289 the High Court had earlier affirmed its "full jurisdiction" to grant the reliefs of habeas corpus, certiorari, prohibition, mandamus, quo warranto, injunction or a declaratory action where a matter was justiciable; at 296-297.

[12] Soobramoney v Minister for Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) per Chaskalson P.

[13] See also House of Lords Judgment in *YL v Birmingham City Council & Ors* [2008] 1 AC 95 which limited the applicabilty of the Human Rights Act 1998 (and by defintion the ECHR) to a private care home in receipt of public funds.

The final factor identified in the CESR report is that of non-incorporation of international of human rights standards in Irish legislation.[14] Due to the provisions of Article 29 of the Constitution, the provisions of international conventions do not form a part of Irish law even where ratified by the State, until such time as an Act of the Oireachtas introduces the right through primary or secondary legislation or it is identified as a constitutional right by the courts.[15] The State has a choice of either permitting direct incorporation of the provisions of ratified conventions through amendment to the Constitution or of legislative transposition. Absent clear transposition of a ratified convention right, however, it is likely to continue to face adverse scrutiny by UN human rights committees.[16]

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[14] See IHRC report to UPR, March 2011, where it stated: "The lack of incorporation results in less protection and awareness of these rights. In particular, the lack of justiciable Economic, Social and Cultural rights in the Constitution and legislation means
that there are gaps in protection for these rights:; see
http://www.ihrc.ie/download/pdf/ihrc_report_to_un_universal_periodic_review_march_2011.pdf

[15] However, the courts have often held the reverse: *In Re O Laighleis* [1960] IR 93 Maguire CJ observed how "Clauses 1 and 3 of Article 29 of the Constitution clearly refer only to relations between states and confer no rights on individuals"; at 124. See also *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 13.

[16] See the most recent Committee on Economic, Social and Cultural Rights Concluding Observations on Ireland's second periodic report (2002) "The Committee notes with regret that, despite its previous recommendation in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation, and that the State party could not provide information on case law in which the Covenant and its rights were invoked before the courts"; CESCR 10-05-2002 E/C.12/1/Add.77; at para 12. The fact that it is now 11 years since the latest CESCR review of the State does not lend itself to proper supervisory oversight of the State. See also the 2008 Concluding Observations of the Human Rights Committee to the State's third periodic report under the International Covenant on Civil and Political Rights: "The Committee notes that, unlike the European Convention on Human Rights, the Covenant is not directly applicable in the State party. In this regard, it reiterates that a number of Covenant rights go beyond the scope of the provisions of the European Convention on Human Rights. (art. 2) The State party should ensure that all rights protected under the Covenant are given full effect in domestic law. The State party should provide the Committee with a detailed account of how each Covenant right is protected by legislative or constitutional provisions"; CCPR/C/IRL/CO/3 30 July 2008 at para 6. In fact, the Committee arguably overstated the applicability of the ECHR in Irish law. See also the 2011 Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination on the State's third and fourth periodic reports: "he Committee regrets that since the consideration of its previous report, the State party has made no efforts to incorporate the Convention into the domestic legal order, particularly in light of the fact that the State party has incorporated other international human rights instruments into domestic law. (art. 2)"; CERD /C/IRL/CO/3-4, at para 16. Surprisingly the 2011 Concluding Observations of the Committee against Torture did not address non-incorporation of international conventions.

Obligations on States subject to an economic crisis

The obligations on States under ICESCR to give effect to the rights therein including through progressive realisation of the rights in the Covenant and to guard against retrogression are arguably imprecise even during positive economic climates. Thus in 2002, the CESCR Committee noted "the favourable economic conditions prevailing in the State party and observes no insurmountable factors or difficulties preventing the State party from effectively implementing the Covenant."[17] It would not comment thus today. In fact, the rapidity of general economic regression in Ireland over the past few years and the prognosis for budgets over the coming years suggests that the economic freedom of the State to act in certain ways even if it were so minded, is extremely limited. So while the State's maximum available resources reduce, the obligation to ensure progression of rights, if not the prohibition of unjustified retrogression, can arguably be excused during this economic crisis.

But what do we mean of progressive realisation? There is little guidance afforded in the General Comments or Concluding Observations of CESCR as to whether States should, upon ratification, engage in a baseline analysis of how it ensures economic, social and cultural rights and if so how. Particular indicators or benchmarks or templates are seldom suggested. Nor is this something which States are called upon to do during examination of State reports, rather the Committee refers to national strategies and their indicators where they exist. But to a classical positivist lawyer much of this suggests relativity. How can we speak of universality in economic and social

[17] Ibid at para 11.

rights if the legal standard is a relative one? I believe we need to move to clear legal standards which are replicated in judicial and quasi-judicial national and regional systems for the protection of rights and I return to this in a moment.

To return to my point, there is no template for any such baseline analysis from which progression – or indeed retrogression – can be measured over time. Perhaps this is what is meant in the CESR report when it recommends a human rights impact assessment, possibly under the framework of a National Action Plan on Human Rights. Perhaps a commitment by States coming before the CESCR Committee to introduce human rights assessments could put teeth into what is meant by "deliberate, concrete and targeted" steps towards realisation of ESC rights. As realistically, a commitment by international financial institutions (IFIs)[18] to incorporate human rights impact assessments when negotiating structural adjustment lending programmes would drive this process forward. After all, such conditionalities on commitments to human rights and adherence to the values of the Charter of Fundamental Rights is evident in the EU's negotiations with accession States. Why should it not be an element the EU is itself bound to uphold?

Concerning non-retrogression, ICESCR's General Comments assert that retrogression should be guarded against and may only occur when all other avenues have been pursued. Thus in relation to the right to health under Article 12 of ICESCR, General Comment 14 suggests that there is a strong presumption that retrogressive measures taken "are not permissible", with

[18] IFIs such as the WB, the IMF and the WTO have the status of specialised agencies of the UN and as such are obliged to respect the provisions of the UN Charter.

the burden of proof resting with the State to show that such measures are warranted.[19]

And it is here that the core "non-derogable" right to freedom from discrimination as set out in ICESCR becomes relevant.[20] The traditional test of non-discrimination provides that where there is *de facto* or presumptive discrimination demonstrated by a complainant, the onus of proof shifts to the respondent (usually the State). This is a legal test and its similarities to the non-retrogressive test lie in the fact that a measure is presumed to be prohibited unless it can be justified (in human rights terms, that it pursues a legitimate aim, is proportionate and cannot be achieved by other means (or at least that other means were taken into account first)).

But even where we have a legal test the question arises as to who measures and who decides that a State has violated the right to non-retrogression? In the absence of individual complaints being considered under the Optional Protocol to ICESCR to date (or indeed a significant body of collective complaints jurisprudence under the Council of Europe's Revised European Social Charter (RESC)[21], we must rely on national courts for guidance or on other inter-governmental bodies. And here I would suggest that the developing jurisprudence of the European Court of Human Rights on effective

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[19] See P Hunt, *Report of the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Geneva, Economic and Social Council, Commission on Human Rights (2008) at para 49.

[20] See General Comment 14 (right to health) which states "Accordingly, in the Committee's view, these core obligations include at least the following obligations: (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups…"; at para 43.

[21] The European Committee of Social Rights ("ECSR") monitors State's compliance with the RESC. The ESCR adopts conclusions on national reports and decisions on collective complaints made to it. Under a 1995 optional protocol, complaints of violations of the ESC/RESC may be lodged with the ECSR. However, only certain organisations are entitled to lodge complaints.

as opposed to theoretical remedies under Article 13 ECHR where social, economic and civil rights under the ECHR are triggered ("arguable") places the obligation back on the nation State to take positive measures to address gaps in its governance - whether of State or non-State actors and to demonstrate what those measures were.

The challenges which accompany privatisation

States in receipt of structural adjustment funds from the IMF or indeed in Europe from the Troika of IMF, EU and ECB only receive funds on the basis of conditionality. The memoranda of understandings entered have never been subjected to a human rights framework, much less a human rights impact assessment. In negotiating with international financial institutions, national governments may feel compelled to agree to the conditions being suggested to them in much the same way as developing States have felt compelled to agree to TRIPs or TRIPs-plus provisions when joining the World Trade Organisation.[22]

Two direct results of this conditionality are touched on in the CESR report. One is privatisation where the State shrinks and the second is the funding of social assistance and social support programmes including through civil society organisations to deliver practical assistance (as opposed to advocacy).

In Ireland, the disposal of some State assets is an element of the agreement with the Troika. Thus in 2013 the State passed the Water Services Act 2013 as a precursor to the privatisation of water services to a subsidiary of Ireland's

[22] It could be argued that the threat of trade sanctions under WTO "TRIPS-plus provisions" (its 2006 Agreement on Trade Related Aspects of Intellectual Property Rights) can act as a disincentive to developing States prioritising public health over trade liberalisation policies.

Gas Company later this year. Although a statutory body, the new entity will herald the privatisation of water services which will effectively replace State subvention by private subvention. One will receive water when one becomes a customer. One becomes a customer by paying the relevant tariff. One is expected to have a fixed address to become a customer and to be a legal resident in the State.

This is not to suggest that a solely publicly funded water utility is required by human rights standards or even acceptable where tax revenues could be directed to other pressing areas of social need. However, the point here is that it is a choice which might not have been made at this time by the State in this way absent the Troika agreement. It is a direct deliberate, concrete and targeted downstream impact of the 2010 Agreement. Whether the privatisation will meet its economic and social aims is unknown. The fact that as currently proposed the regulator is to be the energy regulator with no precise social rights remit is a concern.

So how does the "respect, protect, fulfil" obligations on the State survive such privatisation? Clearly under the "protect" arm of the framework States must exercise "control" and "due diligence" but the question of justiciability is raised again. If one becomes a customer one has access to the law of contract or tort for restitution but where one has no relationship with the private entity delivering State services – be it private health, private education or private water, recourse to domestic remedies may be limited. This is the spectre of the shrinking State and to date we lack the tools in addressing such deficits.

There is also the spectre of the shrunken State. This refers to many States where the traditional charitable model has been continued and constitutionalised. For example in Ireland, health and educational facilities are often in legal terms privately delivered insofar as the relevant institutions are charitable institutions. Hence any claims for failings or omissions of the State – often a central argument of economic and social rights advocacy – will necessarily fall where the State asserts that it failed no one and that complaints should be addressed to the private body.[23]

Whether the UN *Guiding Principles on Business and Human Rights* ("UNGPs")[24], which replicate ICESCR's "respect, protect, fulfil" pillars (with "remedy" taking the place of "fulfil") can provide a template for national justiciability or whether national law tort reforms are required is unclear, although, as with the concept of universal jurisdiction in international criminal law, there is both scope and wider societal demands in arguing for such developments.

And yet a number of those private bodies are civil society organisations which dispense funds to vulnerable groups on behalf of the State. Another downstream impact of austerity measures in Ireland is the serious erosion of funding to support groups working with Travellers, persons with disabilities etc. There was already a challenge being faced between advocacy and

[23] This issue is currently before the Grand Chamber of the European Court of Human Rights in *O'Keefe v Ireland* (Application No. 35810/09). See submissions of the Irish Human Rights Commission at *www.ihrc.ie/enquiriesandlegal/thirdpartyinter/html*.

[24] *Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework,* UN Doc. A/HRC/17/31, 21 March 2011, see *www.business-humanrights.org/.../Home/Protect.../GuidingPrinciples* accessed on 11 January 2013.

recipient of State largesse but now the very presence of a vibrant civil society is under threat with the dual withdrawal of State and philanthropic largesse.

International obligations on inter-governmental organisations

States will often point to their international obligations in explaining why they take certain actions. This does not necessarily equate to international human rights obligations, rather to international agreements with the IMF/ Troika etc. For national courts and national authorities (including NHRIs), there can be a sense of futility where the upstream decision-taking occurs outside the control of the State. Developing States have complained about the impact of TRIPS and TRIPs-plus provisions for a number of years but it is only now that developed States are more regularly coming to understand what structural loan conditionality means. And yet, if bodies such as the IMF are specialised bodies of the UN, are they not obliged to act in compliance with the Charter and indeed the ICESCR?[25]

Whereas UNICEF, UNESCO and the CESCR were UN agencies created in order to give meaning to the UDHR, some commentators have argued that the IMF, World Bank and later the World Trade Organization (WTO)[26] were agencies established to protect the "rights" of banks and corporations in "developing" countries to keep with financial policies advantageous to the stockholders in

[25] The current trajectories of these bodies differ from their origins. The Articles of Agreement of the IMF and of the International Bank for Reconstruction and Development, concluded at Bretton Woods Conference in 1944, saw the World Bank originally designed to aid postwar reconstruction, whereas the IMF was originally designed to correct disequilibria in the balance of payments and maintain an orderly system of receipts and payments between nations.

[26] The WTO entered into force in 1995 at the end of the Uruguay Round of global trade negotiations and according to the Preamble of the Marrakesh Agreement was founded upon the premise of liberalising trade amongst nations, with a specific goal of opening up world markets to developing countries in order for those nations to decrease poverty and become developed.

those banks and corporations.[27] I do not intend to tread too deeply into normative debates on liberalisation policies except to suggest that where decision-making reaches beyond the nation State and emanates from intergovernmental bodies, it behoves UN supervisory committees to temper their review of State action/ omission pursuant to ratified conventions such as the ICESCR by placing in context the impacts of such decisions on their ability to act or avoid omission. It would no doubt be a welcome addition to the consideration of State reports if the IMF or Troika (or indeed the WTO or World Bank in other contexts) were to be invited to engage and did engage in the process before the relevant Committee. Certainly it would assist in ensuring that where States argue that they have little choice but to take certain policy decisions with human rights impacts as a result of conditionality agreements, those assertions can be put and if necessary refuted by the relevant specialised UN body.

A number of ICESCR General Comments address the obligations of intergovernmental bodies but in general terms only. Thus the 1999 General Comment No 12 on the right to adequate food under Article 11 ICESCR stated that "The international financial institutions, notably the International Monetary Fund (IMF) and the World Bank, should pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the debt crisis. Care should be taken, in line with the Committee's general comment No. 2, paragraph 9, in any structural adjustment programme to ensure that the right to food is protected" (at para 41).

[27] See See T MacDonald, *Health, Human Rights and the United Nations, inconsistent aims and inherent contraditictions?* Radcliffe Publishing Oxford, New York (2008).

The following year General Comment No 14 on the right to health under Article 12 ICESCR stated that "in conformity with articles 22 and 23 of the Covenant, WHO, the International Labour Organization, the United Nations Development Programme, UNICEF, the United Nations Population Fund, the World Bank, regional development banks, the International Monetary Fund, the World Trade Organization and other relevant bodies within the United Nations system, should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to health at the national level, with due respect to their individual mandates. In particular, the international financial institutions, notably the World Bank and the International Monetary Fund, should pay greater attention to the protection of the right to health in their lending policies, credit agreements and structural adjustment programmes. When examining the reports of States parties and their ability to meet the obligations under article 12, the Committee will consider the effects of the assistance provided by all other actors. The adoption of a human rights-based approach by United Nations specialized agencies, programmes and bodies will greatly facilitate implementation of the right to health. In the course of its examination of States parties' reports, the Committee will also consider the role of health professional associations and other non-governmental organizations in relation to the States' obligations under article 12."

Similar exhortations are made in General Comment 15 (2002) on the right to water but with greater specificity where it stated "[w]hen examining the reports of States parties and their ability to meet the obligations to realize the right to water, the Committee will consider the effects of the assistance provided by all other actors. The incorporation of human rights law and

principles in the programmes and policies by international organizations will greatly facilitate implementation of the right to water".

These exhortations are welcome but remain weak. The incorporation or non-incorporation of human rights laws and principles into the policies of intergovernmental bodies should be subjected to greater scrutiny by UN supervisory committees and by Special Procedures alike and lately the Special Procedures in particular have been linking economic policies to human rights impacts and placing greater scrutiny on the design of those policies. What is needed now is to take one further step back and to scrutinise the upstream design of the agreements which govern the policy framework.

To date I have not addressed the role of the EU or ECB in the Troika but as with the EU's foreign policies, the space for protection of human rights and equality in the Union where it has competency and exercises power is still unclear some three years after Lisbon and the introduction of the Charter into all our law. Furthermore, it cannot be gainsaid that the apparent imposition of fiscal policies in EU recipient States at the apparent behest of the ECB in circumstances where no EU (as opposed to Council of Europe) organ save perhaps the Fundamental Rights Agency is addressing the human rights impacts of those policies is leading to a view of the EU which put politely, is different from the largely benign view that was there previously.

National Human Rights Institutions

I turn finally to NHRIs.

One of the frustrations with the EU is that there is no EU NHRI which national institutions can turn to in order to gain understanding or purchase of EU fiscal policies. The Charter of Fundamental Rights may have been propounded in the Lisbon Treaty but for many NHRIs its usefulness in domestic work is limited.

So what if any roles do NHRIs have? In a response to the economic crisis a number of NHRIs are now placing an increasing focus on the impact of austerity measures on minority populations. This is because of the very real impact of budgetary decisions on persons at risk of discrimination on the basis of their identity. Economic measures which on their face may appear neutral are not, we know, neutral in their effect. Thus even if there is no intention to discriminate, minority populations do tend to suffer disproportionately in recessions. An across the board tax – for example Valued Added Tax – will take the same amount of budget from rich and poor alike but its impact on households experiencing food poverty will be higher than on middle-income families. If that household is also experiencing cuts in disability supports for a dependant child or in maternity benefit for a lone mother or a cut off point for social benefits where there are unemployed migrants, the effects can become pernicious. This is why human rights law places positive obligations on States to identify at-risk groups and to formulate economic and other policies to take into account their vulnerabilities and to mitigate the impact of Governmental decisions. States can do this by implementing the principles of non-discrimination, equality, transparency, participation and accountability taking into account in particular the needs of at-risk groups.

The problem is that these positive obligations are not supported by domestic law. NHRIs can make recommendations to Government but ultimately it is Government that decides. NHRIs can support individuals taking legal challenges or intervene in those challenges, but ultimately it is domestic law which will be the arbiter of the challenge. NHRIs can seek to educate and train the public servants formulating policies and taking discretionary decisions, but take-up of training may be limited where there is no duty on the public servant to do so while implementation of best practice is predicated upon good will and enlightened civil service management.

All is not lost however. International human rights is a growing corpus of law and its influence is increasing. States dislike being called to account by the European Court of Human Rights, UN Committees, Special Procedures or by the Human Rights Council during their UPR. Voluntary commitments to legal obligations may seem to be a tautology but are gaining ground. Reform of the UN treaty body system may yet streamline and deepen this protection but only if it does not replicate the generality of UPR reviews. Thus the Executive's interaction is changing but so too is the Legislature's. Parliamentarians now more frequently interact with the European Parliament and Parliamentary Assembly of the Council of Europe. They also understand human rights principles more fully. Judiciaries are also more aware of human rights, particularly the Convention and, as much as any institution, fear the consequences of themselves violating individual rights, be it through judicial delay or a violation of fair trial rights. Perhaps it awaits the European Court of Human Rights to pronounce on positive social and economic rights duties on all organs of State, including the judiciary under Article 13 ECHR when read in conjunction with other provisions of the Convention.

At the UN level, the trilogy, to borrow an expression of the respect, protect, fulfil obligations can shape the concept of positive obligations into something more tangible. So for housing rights, we can look beyond evictions as representing a negative intrusion on rights and speak more of the State's obligations under Article 11 ICESR to ensure public housing for those in need is habitable (having adequate space and protection from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors), is accessible to those entitled to it (including in particular disadvantaged groups) and is in an adequate location (which allows access to employment options, health-care services, schools, child-care centres and other social facilities). These self-evident criteria for good public housing are also human rights which people are entitled to enjoy.

Applying the "respect" criterion, we can see that States must refrain from denying or limiting equal access to Covenant rights. If we take the right to health under Article 12 under the "respect" criterion, the acts of public or private entities[28] may render the State in violation of the right where those entities for example adopt "any retrogressive measures incompatible with the core obligations under the right to health".[29] The only response of the State to such an ongoing violation by the acts of private entities I would suggest is through clear "control" measures.

[28] Delegation to private actors may occur through a legislative doctrine or be tacitly permitted where for example historically the "public function" was always delivered by charities etc. with limited State involvement apart from funding.

[29] See paragraph 43 of General Comment 14, *The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights),* Committee on Economic, Social and Cultural Rights, Twenty-Second Session, Geneva, 25 April-12 May 2000, Agenda Item 3, General Comment 14 (2000), E/C.12/2000/4.

The duty to "protect" criterion in healthcare requires States to adopt a framework comprising legislation and other measures to, *inter alia*, prevent third parties or private companies from depriving people of equal access to health care or services and "control" their activities.[30] The duty to "fulfil" criterion requires States parties, *inter alia*, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of constitutional or legislative doctrines including "the adoption of a national health policy with a detailed plan for realizing the right to health".[31]

Applying the trilogy to the positive measures required by States to ensure economic and social rights, NHRIs can act as the bridge between the international and domestic systems. But they need assistance. Supervision and enforcement of the rights in ICESCR is poor. Poor because of the manner in which States interpret their obligations and remain wedded to a rights doctrine premised on non-interference with indivdual rights rather than a wider conception of the individual's relationship with her or his community and the State. This wider conception is really no more than a human rights doctrine of Society. A Society where rights are held by all and where responsibility is assigned to the State and its actors, be they public or private when performing public action and where in return both citizens and non-citizens participate through engagement (democratic voting cycles) and compulsion (taxation, community involvements, duty to my neighbour) but also consultation, transparency, accountability and other processes. Here we

[30] Thus General Comment 14 states that in addition to adopting legislation or taking other measures ensuring equal access to health care and health-related services provided by third parties, States are obliged "to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services; to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct…"; at para 35.

[31] General Comment No 14 at para 36.

step beyond the linear lines of the Legislature, Executive and Judicial spheres to avoid the tyrannies of the majority, we sidestep, though acknowledge, those Separation of Powers doctrines which determine and dictate institutional responses. Rather, we recognise and incorporate the univerality, indivisibility and inherency of human rights and the rule of law as dimensions without which societies fade.

NHRIs with their domestic and international human rights mandates, their bridge to the UN and Council of Europe and their institutional links to the Executive, Legislature, Judiciary, and as importantly, to civil society and the community, have the ability to name, identify, analyse and recommend that which may otherwise go unreviewed. However, if NHRIs are to match their success in the realm of some civil, political and social rights to ESC rights generally, they need greater clarity and precision from UN treaty bodies and greater attention to the role of supranational bodies, be they the EU or the international financial institutions.

If there is neither forum nor framework within which we can address conditionality in bailout agreements and their down-stream impacts on human rights, we will face similar problems of credibility in the lending institutions and the bodies they represent as beset the WTO where its Dispute Settlement Body was limited in its ability to account for the social impact of trade policies coming before it; a lack of credibility strong in developing States and which has slowed the Doha Development Round since 2001. Arguably one of the reasons why the Arab Spring has not brought the social benefits hoped for was that the institutions of State in those countries were too weak to allow for human rights to truly deepen. Institutions are not immutable but

must be supported. So whereas in countries which have seen political or economic crises we should rightly ask why national institutions did not prevent aspects of the crisis (whether a failure of economic regulation etc.) we should also seek answers to these questions when looking at intergovernmental organisations where their decision-making or omissions have deliberate, concrete and targeted downstream impacts.

END