



Key note address by the United Nations
High Commissioner for Human Rights
at the Irish Human Rights Commission's (IHRC) and Law
Society of Ireland's joint annual human rights conference

“The legal protection of economic, social and cultural rights”

Dublin, 21 November 2009

I. (Introduction)

Ladies and Gentlemen,

I am honoured to deliver the key note address at your annual human rights conference. I am particularly pleased to speak to you this morning about the legal protection of economic, social and cultural rights – an issue of utmost importance and which constitutes one of the strategic priorities of my Office.

I would like to express my appreciation to the Law Society of Ireland and the Irish Human Rights Commission for co-hosting this important event. Allow me to acknowledge the strong cooperation between my Office and the Irish Human Rights Commission under the leadership of Maurice Manning, an “A” status institution actively involved in the International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights. Your contribution as the Chair of the European Group of National Human Rights Institutions is very significant to national institutions in this region and complementary to my Office’s

role in strengthening the capacity of national institutions worldwide.

More than 60 years have elapsed since the adoption of the Universal Declaration of Human Rights, with its promise of universality, indivisibility and equal value of *all* human rights. The Universal Declaration manifested the relationship between fundamental freedoms and social justice, and the connection of both of these elements with peace and security. Its framers wisely chose not to rank rights and regard all human rights as inextricably linked. Violations of one right reverberate on other rights and enfeeble them all. This conception was strongly endorsed by the Vienna Declaration and Programme of Action, adopted by the World Conference of Human Rights in 1993, which reaffirmed the universality, indivisibility, interdependence and interrelatedness of all human rights.

Despite this recognition, economic, social and cultural rights have not always been given the same consideration as civil and political rights. Critics say that economic, social and cultural rights are too vague, or that they are just aspirations or policy goals, and not legal rights. As a result, in many situations, the judicial protection of economic, social and cultural rights – or their justiciability – was denied.

A number of recent developments suggest that this categorization of economic, social and cultural rights as second-class rights is no longer acceptable. My discussion will highlight some of these developments, as well as point to the role that national human rights institutions can play in the protection and promotion of economic, social and cultural rights.

II. (The content of economic, social and cultural rights)

One of the most common misconceptions against the consideration of economic, social and cultural rights as full-fledged rights has been the uncertainty about their exact content and the extent of States' obligations stemming from these rights. This is, without a doubt, an important issue to clarify: if the content of a right cannot be defined, it will be difficult to assess its compliance and to assert that violations have occurred.

To a certain degree, the deficit in the definition reflects the secondary place that these rights were given. Thus, their content remains inadequately developed. This definition gap, however, has been gradually bridged by the work of international human rights treaty bodies, such as the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child, as well as by several special rapporteurs and independent

experts of the Human Rights Council (formerly the Commission on Human Rights). For example, the Committee on Economic, Social and Cultural Rights has produced an impressive number of general comments which provide an interpretive framework for specific rights enshrined in the International Covenant on Economic, Social and Cultural Rights, as well as an elaboration of the content of most of these rights, including the right to adequate housing, the right to health, the right to food, the right to education, the right to work and the right to water.

The Committee also asserted that economic, social and cultural rights entail both negative and positive State obligations; that while some duties are linked with the notion of “progressive realization”, others are of immediate effect; and that cross-cutting principles – such as transparency, access to information, respect for the rule of law, consultation and participation of right-holders, non-discrimination and access to remedies in case of violations – equally apply to economic, social and cultural rights. Moreover, the Committee developed the concept of “minimum core obligations” of rights, or the immediate obligations that should be prioritized by States regarding to respect, protect and fulfill rights.

Another important source for the clarification of the content of economic, social and cultural rights lies at the

national level. This may happen through statutes defining the scope of these rights and their legal guarantees or other legislative measures. Of crucial importance for effective implementation are legal safeguards and monitoring mechanisms, such as victims' access to remedies in case of violations, and indicators and benchmarks to measure progress in implementation.

National human rights institutions play an important role in better defining the scope and applications of ESCR, as they consider complaints and elevate knowledge of these rights among the general public. Furthermore, national human rights commissions in Latin America and elsewhere have brought claims on economic, social and cultural rights to the courts.

Of course, these developments may not solve all questions about the substantive content of economic, social and cultural rights. However, they do shine a spotlight on the existence of relevant international and national standards that help clarify their meaning.

III. (Justiciability)

As I already mentioned earlier, a second concern in relation to economic, social and cultural rights has been the questioning of their justiciability – that is, questioning the possibility of the adjudication of these rights before courts and quasi-judicial mechanisms.

Surely, the long absence of an international individual complaints mechanism for the rights included in the International Covenant on Economic, Social and Cultural Rights has contributed to these misconceptions. However, such doubts are gradually being overcome as in many national jurisdictions the introduction of legal remedies in cases of violations of economic, social and cultural rights has played an important role in not only clarifying the content of these rights, but also bringing concrete benefits or remedies to rights-holders.

My own country of origin, South Africa, has been repeatedly referred to as an example. In South Africa, the Constitution, drew from international law and went even further by explicitly enshrining ESCR in the Bill of Rights and by recognizing their justiciability. The experience of the South African Constitutional Court, reflected in emblematic cases such

as the famous *Grootboom*¹ and *Treatment Action Campaign*² decisions, has generally been considered by scholars and critical observers as an example of the path that international human rights law should take in the area of economic, social and cultural rights.

National courts, regional human rights bodies and some international human rights treaty bodies have actually applied some of the standards referred to above in their consideration of individual and collective cases.

For instance, courts have considered that the protection against unwarranted forced evictions is of immediate effect and is not subject to the progressive realization of the right to adequate housing. Many courts and quasi-judicial bodies have applied the prohibition of discrimination to the right to health, the right to social security, the right to education and the right to housing. Likewise, procedural protections, such as the right to a fair trial, the right to access courts for the review of administrative decisions or the right to be consulted before administrative decisions are taken, have also been applied to economic, social and cultural rights.

¹ See Constitutional Court of South Africa, *Government of the Republic of South Africa v. Grootboom*, 2001 (1) SA 46 (CC).

² See Constitutional Court of South Africa, *Minister of Health v. Treatment Action Campaign*, 2005 (5) SA 721 (CC).

Moreover, courts have also addressed the protection of economic, social and cultural rights against the action of non-state parties – which may include pollutant industries, privately run public utilities, employers, landlords and private service providers, such as health care providers or private schools.

Other national courts have considered compliance with the “minimum core content” of economic, social and cultural rights by public authorities. The Supreme Court of India and the Constitutional Court of Colombia considered cases where judges reacted against the lack of implementation of adequate programmes to counter a famine, and to address the situation of thousands of internally displaced persons and families.

Comparative experience shows that, even in those jurisdictions where the justiciability of economic, social and cultural rights is limited in law, the mandate of national human rights institutions often allows them to work in this area, as suggested by the Paris Principles and in General Comment No. 10 of the Committee on Economic, Social and Cultural Rights on the role of national human rights institutions in protecting economic, social and cultural rights.

Against this fecund jurisprudential background, arguments against the justiciability of economic, social and cultural rights

appear to ignore the significant accumulated experience of many courts and adjudicative bodies globally.

IV. (Optional Protocol)

Following these national and regional developments, on 10 December 2009, the UN General Assembly made a significant step towards closing the historic gap in the legal protection of economic, social and cultural rights by the adopting the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol was opened for signature and ratification in September this year –30 States have already signed it. Ten ratifications are needed for the Optional to enter into force.

The significance of the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights lies precisely in recognizing that victims of violations of economic, social and cultural rights also deserve access to remedies at the international level. As is the case under other human rights treaties, the Optional Protocol now allows the Committee on Economic, Social and Cultural Rights to consider communications from individuals or groups claiming violations

of their economic, social and cultural rights, and to initiate inquiries, in cases of grave or systematic violations.

The Optional Protocol can offer national courts and adjudicating bodies guidance on the interpretation of economic, social and cultural rights in concrete situations, thus clarifying the scope of State obligations.

In return, previous experiences by national human rights institutions in addressing economic, social and cultural rights will inform the Committee's work. I urge national human rights institutions to advocate for the ratification of the Optional Protocol and to further assist in disseminating and raising awareness nationally.

V. (Implementing economic, social and cultural rights beyond legal protection)

Judicial protection is just one of the means for monitoring the compliance with State obligations arising from human rights. Other methodologies are also available. One of them is the development and use of indicators which provide a valuable yardstick to measure progress or identify obstacles to implementation. Moreover, disaggregation of data is required to

consider gaps in the enjoyment of rights by different social groups, included those suffering discrimination and requiring special measures to compensate disparities. My Office is developing a common conceptual framework on human rights indicators.

Dear Colleagues,

In my view, the most fascinating and challenging field for the full realization of economic, social and cultural rights is of course the adoption of adequate public policies.

In order to be considered appropriate for the full realization of economic, social and cultural rights, public policies – and plans and programmes – should be formulated, implemented and monitored in compliance with human rights norms and principles, such as non-discrimination, participation, transparency, accountability and respect for the rule of law. Public policies should consider the provision of remedies and complaints mechanisms in case of violation or non-compliance.

Moreover, the content of each economic, social and cultural right gives some substantive guidance about priorities and needs to be taken into account. For example, the concept of “minimum core obligation” offers decision-makers specific

elements to make priority choices when developing public policies in fields such as health, education or housing. Thus, human rights-compatible health policies should give priority to ensuring universal coverage of the health services, with a view of including vulnerable and marginalized groups, instead of expanding the range of treatments and facilities for those who already benefits from health services.

Also in this respect, national human rights institutions can play a crucial role in monitoring compliance with the spirit and the letter of public policies, as these insititutions are often empowered to require relevant information from public authorities and compare it against indicators and budget allocations

Allow me to note that national human rights institutions play an increasingly relevant role in the international human rights system, by providing information to several supervisory mechanisms, such as the review of State party reports by treaty bodies and the Universal Periodic Review conducted by the Human Rights Council, that is the assessment at regular intervals of all UN Member States' human rights record. NHRI can also monitor the implementation of recommendations emanating from these mechanisms. In turn, the experience of national human rights institutions in monitoring these rights at

the national level can bolster the work of international treaty bodies.

VI. (Conclusion)

Let me also state unequivocally that economic, social and cultural rights should no longer be seen as the Cinderella of human rights: they are an expanding and promising field, which should be followed with consistent international and national attention, including legal protection.

This requires a multi-sectoral cooperative approach that includes national human rights institutions, civil society, Governments and international organizations. We need to learn from best practices. To measure both progress and gaps, we also need periodic reporting and accountability to the international human rights system

I wish to take this opportunity to encourage the Irish Human Rights Commission to continue to reach out to its national Parliament, with the support of the Law Society, to advocate appropriate legislation regarding adequate justitiability of economic, social and cultural rights in Ireland.

In conclusion, national human rights institutions and lawyers are well placed and equipped to enhance the protection of economic, social and cultural rights at the national and international level. My Office stands shoulder to shoulder with you in pursuit of this vital work.

Thank you.