

Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization

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ABSTRACT

International organizations like Human Rights Watch are legitimately urged to pay more attention to economic, social and cultural rights. But practical prescriptions are often simplistic—typically involving only the rhetorical invocation of these rights. The strength of organizations like Human Rights Watch is not their rhetorical voice but their shaming methodology—their ability to investigate misconduct and expose it to public opprobrium. That methodology is most effective when there is relative clarity about violation, violator, and remedy. That clarity is best achieved when misconduct can be portrayed as arbitrary or discriminatory rather than a matter of purely distributive justice.

Over the last decade, many have urged international human rights organizations to pay more attention to economic, social and cultural (ESC) rights. I agree with this prescription, and for several years Human Rights Watch has

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been doing significant work in this realm.¹ However, many who urge international groups to take on ESC rights have a fairly simplistic sense of how this is done. Human Rights Watch's experience has led me to believe that there are certain types of ESC issues for which our methodology works well and others for which it does not. In my view, understanding this distinction is key for an international human rights organization such as Human Rights Watch to address ESC rights effectively. Other approaches may work for other types of human rights groups, but organizations such as Human Rights Watch that rely foremost on shaming and the generation of public pressure to defend rights should remain attentive to this distinction.

During the Cold War, ESC rights tended to be debated in ideological terms. This consisted of the West stressing civil and political rights while the Soviet bloc (in principle if not in practice) stressed ESC rights. Many in the West went so far as to deny the very legitimacy of ESC issues as rights. Aryeh Neier, the former head of Human Rights Watch and now the president of the Open Society Institute, is perhaps the leading proponent of this view—most recently in his memoirs, *Taking Liberties*.² Certainly, interesting philosophical debates can be had about whether the concept of human rights should embrace positive as well as negative rights.³ Since consensus in such debates is probably unattainable, the international human rights movement, in my view, has no choice but to rest on a positive-law justification for its work. That is, unless there are concrete and broadly understandable reasons to deviate from existing law, we must defend human rights law largely as written if we are to have any legitimacy and force to our work. That law, of course, codifies civil and political as well as ESC rights.⁴

That said, I must admit to finding the typical discussion of ESC rights rather sterile. I have been to countless conferences and debates in which advice is freely offered about how international human rights organizations

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1. See the Human Rights Watch website on Economic, Social and Cultural Rights at www.hrw.org/esc.
 2. ARYEH NEIER, *TAKING LIBERTIES: FOUR DECADES IN THE STRUGGLE FOR RIGHTS XXIX–XXX* (2003).
 3. See ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 122–34 (1969) for more on the concepts of positive and negative freedom. See also, e.g., AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) (discussing this debate within a contemporary human rights framework).
 4. See International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976); International Covenant on Economic, Social and Cultural Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (*entered into force* 3 Jan. 1976) (hereinafter ICESCR); see also Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, part 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949).

must do more to protect ESC rights. Fair enough. Usually, the advice reduces to little more than sloganeering. People lack medical care; therefore, we should say that their right to health has been violated. People lack shelter; therefore, we should say that their right to housing has been violated. People are hungry; therefore, we should say that their right to food has been violated. Such “analysis,” of course, wholly ignores such key issues as who is responsible for the impoverished state of a population, whether the government in question is taking steps to progressively realize the relevant rights, and what the remedy should be for any violation that is found. More to the point, for our purposes, it also ignores which issues can effectively be taken up by international human rights organizations that rely on shaming and public pressure and which cannot.

There are obviously various ways to promote ESC rights. One way is simply to encourage people to insist on respect for these rights. The language of rights can be a powerful organizing tool. But given that respect for ESC rights often requires the reallocation of resources, the people who have the clearest standing to insist on a particular allocation are usually the residents of the country in question. Outsiders such as international human rights organizations are certainly free to have a say in such matters. In an imperfect world in which the fulfillment of one ESC right is often at the expense of another, however, their voice insisting on a particular tradeoff has less legitimacy than that of the country’s residents. Why should outsiders be listened to when they counsel, for example, that less be spent on health care and more on education—or even that less be spent on roads, bridges or other infrastructure deemed important for long-term economic development, and more on immediate needs?

I would suggest that merely advocating greater respect for ESC rights—simply adding our voice to that of many others demanding a particular allocation of scarce resources—is not a terribly effective role for international human rights groups such as Human Rights Watch. By expending our accumulated moral capital, we may well be listened to more than others in the short term, but that moral capital does not accumulate through our voice alone (why should our opinion count more than others?) but through our investigative and reporting methodology. It is a finite resource that can dissipate rapidly if not grounded in our methodological strength.

I am aware that similar tradeoffs of scarce resources can arise in the realm of civil and political rights. Building prisons or creating a judicial system can be expensive. However, my experience has been that international human rights organizations implicitly recognize these tradeoffs by avoiding recommendations that are costly. For example, Human Rights Watch in its work on prison conditions routinely avoids recommending large infrastructure investments. Instead, we focus on improvements in the treatment of prisoners that would involve relatively inexpensive policy

changes.⁵ Similarly, our advocacy of due process in places such as Rwanda with weak and impoverished judicial systems implicitly takes account of the practical limitations facing the country leading us to be more tolerant of prosecutorial compromises such as *gacaca* courts than we would be in a richer country.⁶

A second way to promote ESC rights is through litigation—or, of greater relevance to most countries, by promoting the legislation that would make it possible to enforce ESC rights in court. It is clearly in the interest of those who believe in ESC rights that these rights be codified in enforceable national law. Many countries have such laws in various forms—be they guarantees of a minimum level of income (minimum wage or welfare), food, housing, or health care—but too many countries do not. International human rights organizations might press governments to adopt the legislation—the statutory rights—needed to make litigation a meaningful tool to enforce ESC rights. That is inevitably useful, but it is a procedural device that still falls significantly short of actual implementation. When it comes to deciding which ESC rights should be implemented first, or which tradeoffs among competing economic demands should be made, the advocacy of legislation does not give international human rights organizations any greater standing to address the concrete realization of ESC rights.

Similar shortcomings plague efforts by international human rights organizations to press governments to adopt national plans to progressively realize ESC rights.⁷ Even though such plans would facilitate enforcement through public shaming for failure to live up to the plan, the international human rights movement is poorly placed to insist on the specifics of the plan.

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5. See, e.g., HUMAN RIGHTS WATCH, PRISON CONDITIONS IN SOUTH AFRICA (1994); HUMAN RIGHTS WATCH, OUT OF SIGHT: SUPER-MAXIMUM SECURITY CONFINEMENT IN THE UNITED STATES Vol. 12 (2000); HUMAN RIGHTS WATCH, PRISON CONDITIONS IN JAPAN (1995); HUMAN RIGHTS WATCH, PRISON CONDITIONS IN CZECHOSLOVAKIA (1989); HUMAN RIGHTS WATCH, PRISON CONDITIONS IN CZECHOSLOVAKIA: AN UPDATE (1991); HUMAN RIGHTS WATCH, PRISON CONDITIONS IN POLAND: AN UPDATE (1988); HUMAN RIGHTS WATCH, PRISON CONDITIONS IN POLAND: AN UPDATE (1991).
 6. See, e.g., Press Release, Human Rights Watch, Rwanda: Elections May Speed Genocide Trials: But New System Lacks Guarantees of Rights (4 Oct. 2001) *available at* www.hrw.org/press/2001/10/rwanda1004.
 7. See ICESCR, *supra* note 4, art. 2:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

See also General Comment No. 3, Comm. on Econ., Soc. Cultural Rts., 5th Sess., Annex III, UN Doc. E/1991/23 (1990) (interpreting the meaning of the progressive-realization requirement).

Another way to promote ESC rights is by providing technical assistance to governments. Many development organizations perform this service, and presumably international human rights organizations could as well. But as in the realm of civil and political rights, technical assistance works only when governments have the will to respect ESC rights but lack the means or know-how to do so. This assistance thus is ill-suited to address the most egregious cases of ESC rights abuse—the area where, as in the civil and political rights realm, international human rights organizations would presumably want to focus. Indeed, the provision of technical assistance to a government that lacks a good-faith desire to respect rights can be counterproductive by providing a facade of conscientious striving that enables a government to deflect pressure to end abusive practices.

In my view, the most productive way for international human rights organizations, like Human Rights Watch, to address ESC rights is by building on the power of our methodology. The essence of that methodology, as I have suggested, is not the ability to mobilize people in the streets, to engage in litigation, to press for broad national plans, or to provide technical assistance. Rather, the core of our methodology is our ability to investigate, expose, and shame. We are at our most effective when we can hold governmental (or, in some cases, nongovernmental) conduct up to a disapproving public. Of course, we do not have to wait passively for public morality to coalesce on a particular issue; we can do much to shape public views by exposing sympathetic cases of injustice and suggesting a moral analysis for understanding them. In the end, the principal power of groups like Human Rights Watch is our ability to hold official conduct up to scrutiny and to generate public outrage. The relevant public is best when it is a local one—that is, the public of the country in question. Surrogate publics can also be used if they have the power to shape the policies of a government or institution with influence over the officials in question, such as by conditioning international assistance or trade benefits, imposing sanctions, or pursuing prosecution.

Although there are various forms of public outrage, only certain types are sufficiently targeted to shame officials into action. That is, the public might be outraged about a state of affairs—for example, poverty in a region—but have no idea whom to blame. Or it might feel that blame is dispersed among a wide variety of actors. In such cases of diffuse responsibility, the stigma attached to any person, government, or institution is lessened, and with it the power of international human rights organizations to effect change. Similarly, stigma weakens even in the case of a single violator if the remedy to a violation—what the government should do to correct it—is unclear.

In my view, to shame a government effectively—to maximize the power of international human rights organizations like Human Rights Watch—

clarity is needed around three issues: violation, violator, and remedy. We must be able to show persuasively that a particular state of affairs amounts to a violation of human rights standards, that a particular violator is principally or significantly responsible, and that a widely accepted remedy for the violation exists. If any of these three elements is missing, our capacity to shame is greatly diminished. We tend to take these conditions for granted in the realm of civil and political rights because they usually coincide. For example, one can quibble about whether a particular form of mistreatment rises to the level of torture, but once a reasonable case is made that torture has occurred, it is fairly easy to determine the violator (the torturer as well as the governments or institutions that permit the torturer to operate with impunity) and the remedy (clear directions to stop torture, prosecution to back these up, and various prophylactic measures, such as ending incommunicado detention).

In the realm of ESC rights, the three preconditions for effective shaming operate much more independently. (For these purposes, I exclude the right to form labor unions and bargain collectively since while codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR), this right functions more as a subset of the civil and political right to freedom of association.)⁸ I accept, for the sake of this argument, that indicia have been developed for subsistence levels of food, housing, medical care, education, etc.⁹ When steady progress is not being made toward realizing these subsistence levels, one can presumptively say that a “violation” has occurred.

But who is responsible for the violation, and what is the remedy? These answers flow much less directly from the mere documentation of an ESC rights violation than they do in the civil and political rights realm. For example, does responsibility for a substandard public health system lie with the government (through its corruption or mismanagement) or with the international community (through its stinginess or indifference). If the latter, which part of the international community? The answer is usually all of the above, which naturally reduces the potential to stigmatize any single actor.

8. See ICESCR, *supra* note 4.

9. See, e.g., *Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, adopted 22–26 Jan. 1997, reprinted in *The Masstricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691 (1998); *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, adopted 8 Jan. 1987, U.N. ESCOR, Comm’n on Hum. Rts., 43rd Sess., Agenda Item 8, U.N. Doc. E/CN.4/1987/17/Annex (1987), reprinted in *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 122 (1987); *Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies*, adopted 10 Oct. 2002, U.N. OHCHR.

Similar confusion surrounds discussions of appropriate remedies. Vigorously contested views about “structural adjustment” are illustrative. Is structural adjustment the cause of poverty, through its forced slashing of public investment in basic needs, or is it the solution by laying the groundwork for economic development? Supporting evidence can be found on both sides of this debate. When the target of a shaming effort can marshal respectable arguments in its defense, shaming usually fails.

The lesson I draw from these observations is that when international human rights organizations such as Human Rights Watch take on ESC rights, we should look for situations in which there is relative clarity about violation, violator, and remedy.

Broadly speaking, I would suggest that the nature of the violation, violator, and remedy is clearest when it is possible to identify arbitrary or discriminatory governmental conduct that causes or substantially contributes to an ESC rights violation. These three dimensions are less clear when the ESC shortcoming is largely a problem of distributive justice. If all an international human rights organization can do is argue that more money be spent to uphold an ESC right—that a fixed economic pie be divided differently—our voice is relatively weak. We can argue that money should be diverted from less acute needs to the fulfillment of more pressing ESC rights, but little reason exists for a government to give our voice greater weight than domestic voices. On the other hand, if we can show that the government (or other relevant actor) is contributing to the ESC shortfall through arbitrary or discriminatory conduct, we are in a relatively powerful position to shame: we can show a violation (the rights shortfall), the violator (the government or other actor through its arbitrary or discriminatory conduct), and the remedy (reversing that conduct).

What does this mean in practice? To illustrate, let us assume we could demonstrate that a government was building medical clinics only in areas populated by ethnic groups that tended to vote for it, leaving other ethnic groups with substandard medical care. In such a case, an international human rights organization would be in a good position to argue that the disfavored ethnic groups’ right to health care is being denied. This argument does not necessarily increase the resources being made available for health care, but it at least ensures a more equitable distribution. Since defenders of ESC rights should be concerned foremost with the worst-off segments of society, that redistribution would be an advance. Moreover, given that the government’s supporters are not likely to be happy about a cutback in medical care, enforcement of a nondiscriminatory approach stands a reasonable chance of increasing health-related resources overall.

To cite another example, imagine a government that refuses to apply available resources for the benefit of its population’s health. (South African President Thebo Mbeki’s long refusal to allow donated nevirapine or AZT to

be given to HIV-infected mothers to prevent mother-to-child transmission of the disease comes to mind.) A credible case can be made that such a government is acting arbitrarily—that it is not making a sincere effort to deploy available resources to progressively realize the ESC rights of its people. Again, by investigating and exposing this arbitrary conduct, an international human rights organization would have all the elements it needs to maximize the impact of its shaming methodology—a violation (the ESC shortcoming), a violator (the government acting arbitrarily), and the remedy (end the arbitrary conduct). Once more, there is no need to argue for more money to be spent or for a different allocation of available money (areas where there is little special power to the voice of international rights organizations), since in the case of arbitrary conduct the money is available but is being clearly misspent.

To cite yet another example, Human Rights Watch recently investigated conditions facing child farm workers in the United States. Had we been forced to delve into details about the appropriate maximum level of danger or pesticide exposure, or the appropriate number of working hours per day, we would have been in the amorphous realm of costs and benefits and thus lacked the clarity needed for effective shaming. However, we were able to show that child farm workers stand virtually alone in being excluded from the laws regulating working conditions for children in the United States. In making this revelation, we were able to demonstrate that US laws governing child farm workers were both arbitrary (the exception was written in an era when the family farm was predominant; it has little relevance to the agribusiness that typifies the field today) and discriminatory (most of the parents of today's farmworker children are immigrants, politically an easy category to ignore).¹⁰

Education has been a productive area for this approach as well. For example, Human Rights Watch has been able to show that governments' failure to address violence against certain students (girls in South Africa, gays and lesbians in the United States) or bonded child labor (in India and Egypt) discriminatorily deprives these disfavored children of their right to education.¹¹

10. HUMAN RIGHTS WATCH, *FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS* 55–73 (2000).

11. HUMAN RIGHTS WATCH, *HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS* 3–7 (2001); Press Release, Human Rights Watch, *South Africa: Sexual Violence Rampant in Schools: Harassment and Rape Hampering Girls' Education* (27 Mar. 2001) *available at* www.hrw.org/press/2001/03/sa-0327; HUMAN RIGHTS WATCH, *UNDERAGE AND UNPROTECTED: CHILD LABOR IN EGYPT'S COTTON FIELDS* (2001); HUMAN RIGHTS WATCH, *THE SMALL HANDS OF SLAVERY: BONDED CHILD LABOR IN INDIA* 14–19 (1996).

If one accepts that international human rights organizations like Human Rights Watch are at our most powerful in the realm of ESC rights when we focus on discriminatory or arbitrary conduct rather than matters of pure distributive justice, guidance for our ESC work is provided. An important part of our work should be to shape public opinion gradually so that it tends to see ESC issues not only in terms of distributive justice but also in terms of discriminatory or arbitrary conduct. For example, governments' failure to provide universal primary education would seem to be a classic case of distributive justice—there is not enough money to go around, so governments cannot provide education to all children. Human Rights Watch is considering a project that would focus on the practice of funding education in such circumstances through school fees. We would hope to argue that this is a discriminatory and arbitrary way of funding education because it has the foreseeable effect of excluding children from poor families. If we succeed in promoting this perspective, we hope to transform the debate from one on which international human rights organizations have had little if any impact to one in which our ability to stigmatize and hence shape public policy on education would be much enhanced.

We used the same approach to highlight the neglect of "AIDS orphans" in Kenya. The provision of care for children without parents, while classically a state responsibility, is frequently limited by scarce resources. In Kenya, as in many African countries, the responsibility was typically delegated to, and accepted by, the extended family. However, given the devastation of the AIDS crisis, extended families increasingly are unable to bear this burden, leaving many of these orphans destitute. By demonstrating that the classic state approach to the problem had become arbitrary (it was no longer working in light of the AIDS pandemic) and discriminatory (it falls on a group of people who are already stigmatized, AIDS-affected families), Human Rights Watch succeeded in generating significant pressure on the Kenyan government and international organizations to recognize and address the problem.¹²

Similar efforts might be made to address issues of corruption. For example, if it can be shown that government officials are pocketing scarce public resources or wasting them on self-aggrandizing projects rather than meeting ESC needs, international human rights organizations can use our shaming capacity to enlarge the size of the economic pie without entering into more detailed discussions about how that pie should be divided to realize ESC rights.

12. HUMAN RIGHTS WATCH, *IN THE SHADOW OF DEATH: HIV/AIDS AND CHILDREN'S RIGHTS IN KENYA* (2001).

In making these observations, I recognize that there are certain realms where international human rights organizations might be able to take on distributive justice questions more directly. If the issue is not how a foreign government divides a limited economic pie, but rather how much money a Northern government or an international financial institution spends on international assistance for the realization of ESC rights, Northern-based international human rights organizations speak less as an outside voice and more as a domestic constituent. Even then, given our relative weakness at mobilizing large numbers of people at this stage in our evolution, pressure simply to spend more, rather than stigmatization over arbitrary or discriminatory spending, is less likely to resonate with decision makers. That is all the more true when Northern governments point to the failure of many needy governments to establish sufficient transparency and public accountability to reasonably assure that international assistance will be well spent. As noted, the international human rights movement's ability to shame diminishes significantly if the target has a credible rebuttal.

To conclude, let me offer a hypothesis about the conduct of international human rights organizations working on ESC rights. It has been clear for many years that the movement would like to do more in the ESC realm. Yet despite repeated professions of interest, its work in this area remains limited. Part of the reason, of course, is expertise; the movement must staff itself somewhat differently to document shortfalls in such matters as health or housing than to record instances of torture or political imprisonment. But much of the reason, I suspect, is a sense of futility. International human rights activists see how little impact they have in taking on matters of pure distributive justice so they have a hard time justifying devoting scarce institutional resources for such limited ends. However, if we focus our attention on ESC policy that can fairly be characterized as arbitrary or discriminatory, I believe our impact will be substantially larger. And there is nothing like success to breed emulation.

Thus, when outsiders ask international human rights organizations such as Human Rights Watch to expand our work on ESC rights, we should insist on a more sophisticated and realistic conversation than has been typical so far. It is not enough, we should point out, to document ESC shortcomings and to declare a rights violation. Rather, we should ask our interlocutors to help us identify ESC shortcomings in which there is relative clarity about the nature of the violation, violator, and remedy, so that our shaming methodology will be most effective. As we succeed in broadening the number of governmental actions that can be seen in this way, we will go a long way toward enhancing the ESC work of the international human rights movement—work that, we all realize, is essential to our credibility.

Coincidentally, international development and humanitarian organizations are increasingly adopting the view that poverty and severe deprivation

is a product less of a lack of public goods than of officially promoted or tolerated policies of social exclusion. That insight meshes well with the approach I have outlined for promoting ESC rights. A lack of public goods tends to be a matter of distributive justice. In ESC right terms, however, policies of social exclusion tend to have a relatively clear violation, violator, and remedy. If development and humanitarian organizations indeed move in this direction, it portends useful partnerships with international human rights organizations such as Human Rights Watch.