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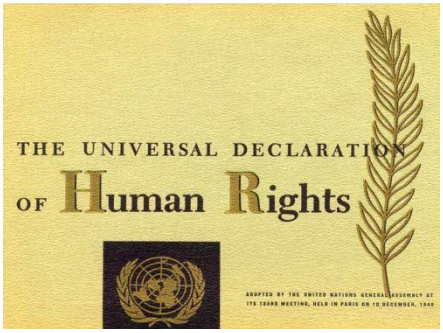
Kapok Tree Diplomacy

20 March 2011



The Critical Differences between First and Second Generation Human Rights

Introduction

The recognition of individual human rights under international law took on a "formal and authoritative expression" following the end of World War II when the United Nations (UN) General Assembly adopted the Universal Declaration of Human Rights (UDHR) in 1948 (Steiner, Alston & Goodman (SAG) 134). The UNDHR was designed to "take the form of a declaration – that is, a recommendation by the General Assembly to Member States that would exert a moral and political influence on states rather than constitute a legally binding document" (SAG 135).

Following approval of the UDHR, the UN Commission, General Assembly and Third Committee began work on a more "detailed and comprehensive" expression of human rights that emerged in the form of "two principal treaties – The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)" which were both approved in 1966 and both entered into force in 1976 through the required number of ratifications (SAG 136). The ICCPR and ICESCR were designed to be more legally binding than the UDHR. Collectively, these three documents are often referred to as the 'International Bill of Human Rights' (SAG 133).

While the ICCPR and ICESCR are said by the Vienna Conference (1993) to be "universal, indivisible, interdependent and interrelated" (263), there is not universal

agreement that the two sets of rights are in fact universal or that they are of equal political and moral weight. The complete set of rights was split into two documents for a reason. With the advent of the Cold War, ideological differences began to emerge over commitments to "first generation" civil and political rights (CPRs) and "second generation" economic and social rights (ESRs) (SAG 136). This bifurcation of rights is often challenged by many as an unfair hierarchical categorization, while others may point to CPRs as being an attempt at Western "ideological imperialism" (SAG 140-141).

This essay will explore the critical differences between the two documents as well as some similarities. Moreover, the essay will examine the content, application and enforcement characteristics of each document, challenges to enforcement, the nature of each set of rights and their critical differences, and conclude with the assertion that CPRs are more important.

Section One – The ICCPR – Application, Content and Enforcement

The ICCPR indicates that its rights apply to "the inherent dignity and … equal and inalienable rights of all members of the human family" (ICCPR "Preamble"). State parties are bound "in accordance with its terms and with international law" (SAG 152). Treaty obligations are to be governed by the Vienna Convention's Article 26 fundamental principle of *pacta sunt servanda* which states, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" (Dunoff, Ratner & Wippman 58).

As far as content goes, Steiner, Alston & Goodman declare that the ICCPR's rights fall into five categories: (1) "Protection of the individual's physical integrity;" (2) "procedural fairness;" (3) "equal protection norms;" (4) "freedoms of belief, speech and association;" and (5) the "right to political participation" (154). State parties undertake to

protect, promote and ensure these rights are secured. Among the rights the ICCPR recognizes are the right to life (Article 6), freedom from torture (Art. 7), freedom from slavery (Art. 8), right to liberty and security of person (Article 9), right to equality under the law (Art. 14 & 26), right to the freedom of thought, conscience and religion (Art. 19), right of peaceful association (Art. 21) and peaceful assembly (Art. 22), and the right to vote (Art. 25) (ICCPR).

For states have not previously recognized CPRs, the ICCPR represents normative statements of *lex ferenda*, though carrying an implied obligation to recognize the rights nonetheless (SAG 163-164). For many states, the ICCPR represented an obligation to end racial and gender discrimination (SAG 175). In China, for example, one study suggests there are 50 million missing women based on the ration of men to women, and in Brazil women are often raped and assaulted without punishment being meted out to the violator (SAG 181, 183). With China being a signer to ICCPR (1998) and Brazil acceding to it as well (1992), such statistical information begs the question of what enforcement mechanisms are available to address infanticide and rape (UN Treaty Collection). It's up to Brazil and China.

Regarding <u>enforcement</u> and potential remedies, Article 2.3 of the ICCPR declares, "Each State Party to the present Covenant undertakes:

> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an *effective remedy* …
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities … to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted

Therefore, the state authorities must have the "institutional machinery" necessary to recognize, secure and enforce CPRs (SAG 188). Moreover, the Inter-American Court of Human Rights acknowledged, "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal … to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation" (SAG 215). However, the U.S. Senate Committee on Foreign Relations qualified an implied ICCPR obligation to regulate private conduct by saying, "Individual privacy and freedom from government interference in private conduct are also recognized as among the fundamental values of our free and democratic society" (SAG 211). Engle counters, "the public/private divide [is] a convenient screen to avoid addressing women's issues" (SAG 222).

Challenge of Enforcement - Defining Violations. Beyond the public/private barrier to enforcement of CPRs, we have the challenge of defining what constitutes a violation of a CPR, obtaining agreement on a particular definition, and ensuring a remedy is enforced against the violation. One example is torture which is prohibited by Article 7 of the ICCPR. It has been very difficult to define the act of torture in a uniform way, let alone mandate zero tolerance for it through a human rights convention like ICCPR.

The Convention Against Torture (CAT) Article I defines torture as "any act by which **severe** pain or suffering, whether physical or mental, is **intentionally** inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or **intimidating** or **coercing** him or a third person, or for any reason based on discrimination of any kind" (CAT). The ICCPR's General Comment No. 20 notes that torture

refers to "acts that cause physical pain but also to acts that cause **mental suffering** to the victim," "corporal punishment," and "prolonged solitary confinement" (CCPR Committee).

Every word I've bolded is subject to dispute by numerous parties. The State of Israel, for example, has asserted in the Landau Commission that a "*moderate degree of pressure*" is not torture (Dunoff et al. 455). "The European Court of Human Rights ruled that "ill treatment must reach a *certain severe level* in order to be included in the ban [of torture and cruel, inhuman or degrading punishment]" (Dunoff et al., 456), while the European Court of Human Rights noted that the "*difference in the intensity* of the suffering" is what separates torture from non-torture (Dunoff et. al 457).

In ratifying the Torture Convention in 1994, the U.S., for example, put in a reservation limiting the obligation to prevent "cruel, unusual and inhumane treatment or punishment" to that defined in the 5th, 8th and 14th amendments to the Constitution (Dunoff et. al 465). Without uniform agreement on a definition, trying to address violations is very difficult. How do you define a violation to something undefinable? Some exceptions are merely other valid definitions.

Elshtain observes, "Coercion, by contrast to "torture," is not only demanded in certain extreme circumstances, it is arguably the "least bad" thing to do" (qtd. in SAG 245). Gross adds, "An absolute ban on torture cannot be morally defensible" (qtd. in SAG 247). Moreover, the 8th Amendment to the U.S. Constitution, in referencing 'cruel and unusual,' limits the phrase to *punishments* not *treatment* (SAG 251). However, the ICCPR's 20th General Comment expanded the definition of torture to include punishments, although states could interpret 'punishment' in many different ways. What is a punishment?

The bottom line is that while the regulation and absolute prohibition on torture is an admirable goal of the ICCPR, there is no universal agreement on what torture actually is, and the strength of enforcement mechanisms are only as effective as the political will and flexibility of the nations that are in violation of them to make the requisite changes in conflicting national law to remedy those violations. In the case of the U.S., recent changes to the U.S. Army Field Manual eliminating waterboarding and food and water deprivation as intelligence-gathering techniques seem to bolster the claim that the U.S. did in fact bow to international pressure to abide by other international legal commitments, though not necessarily the ICCPR, to eliminate some forms of torture (5-21).

This goes to show that not all enforcement mechanisms need be judicial. Freedom from torture is a valid CPR, and may be a valid inalienable right, but prosecution of acts of torture requires the commitment and vigilance of state authorities to investigate and prosecute them. Without its own enforcement mechanism, the ICCPR must rely on states to enforce CPRs. States will vary in their commitment and political will to do so, right China?!

Section Two – The ICCPR – Expanding on the Nature of First Generation Rights

Simmons describes the nature of CPRs as “the complex of "Enlightenment rights" that in their day were crucial in overthrowing feudalism and shattering the uncontested divine right of kings. Infused with Enlightenment notions of individualism and laissez-faire, this first generation of rights, with their focus on the rights of the individual vis-à-vis political authority, has come largely to be thought of as a set of "negative rights," or rights that require government to abstain from denigrating (rather than requiring governments to intervene on

behalf of human dignity" (4). Thus, Simmons has delineated between 'positive' and 'negative' rights at the heart of the debate between first and second generation rights.

"Negative rights basically imposed a duty of "hands-off", a duty of a state not to interfere with, say, an individual's physical security … Positive rights, on the other hand, imposed affirmative (positive) duties on the state" (SAG 186). In terms of the difference between CPRs and ESRs, "economic and social rights such as the right to food were considered positive rights, which frequently required financial expenditures by the state, unlike the classic negative rights that were thought to require merely abstention from unjustified interference with another person" (SAG 186).

Section Three – The ICESCR – Application, Content and Enforcement

In identical fashion to the ICCPR, the application of the ICESCR applies to "all members of the human family" (ICESCR). The preamble says, "All peoples have the right of self-determination," or what seems to be the assertion of a CPR. State Parties agree to "undertake to take steps, individually and through international assistance and co-operation … 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" (ICSCR).

Such terms as "achieving progressively" and "maximum of available resources" have proven to have a direct bearing on content and enforcement by affecting how states interpret their responsibilities and obligations under the covenant. Signatory parties agree not to discriminate based upon numerous factors (Art 2.2). Rights are typically couched in terms of: "*recognize the right of everyone to …* "or "*undertake to ensure*" through some combination

of reasonable steps (SAG 275). The subjective terminology creates numerous questions. What is reasonable? Who decides what is reasonable - the courts, the legislature, the executive? How are resources measured? What is "progressive" realization versus realization that falls short of ICESCR obligations? Thus, the qualifier of the availability of resources and the concept of progressive realization set the ICESCR apart from ICCPR (SAG 275).

The content of the ICESCR includes the following rights: the "right to work" (Article 6), to "just and favorable conditions of work" (Art. 7), to "fair wages and equal remuneration for work of equal value" (Art. 7.a.i), to "form trade unions" (Art. 8), to "social security" (Art. 9), 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" (Art. 11), to "enjoyment of the highest attainable standard of physical and mental health" (Art. 12), to "primary education [which] shall be compulsory and available free to all" (Art. 13), and to "take part in cultural life" (Art. 15) (ICESCR). It should be noted that an adequate standard of living in Zambia will be markedly different than that of a Sweden or Germany.

Regarding the enforcement of ICESCR, the covenant provides for a reporting mechanism that is administered by the 18-member Committee on Economic and Social Rights (CESCR) who serves in a compliance-related capacity (SAG 277). CESCR collects reports at the two-year mark after ratification and every five years thereafter (SAG 277). They "develop the normative content of the rights," "act as a catalyst for state action," and "hold states accountable at the international level through examination of reports" (SAG 277). Beyond this simple reporting mechanism which is often ignored, the CESCR is dependent upon the political will and commitment of signatory states to enforce the rights.

Challenge of Enforcement – What is Reasonable and Progressive? The government of South Africa has chosen not to ratify the ICESCR, but to write many of its provisions into the national constitution. It provides a good example of enforcement challenges. The South African constitution has defined certain state obligations to its citizens in the national constitution that mirror the rights in ICESCR and give them legal constitutional protection and guarantee of fulfillment.

The South African constitution affirms the following: "Everyone has the right to have *access* to adequate housing. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right" (Art 26.1 and 26.2) (SAG 328). "No legislation may permit arbitrary evictions" (Art 26.3) (SAG 328). "Everyone has the right to have *access* to health care services, including reproductive health care" (Art 27.1(a)) (SAG 329). "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right" (Art 27.2). But South Africa has gone beyond guaranteeing access to direct fulfillment.

In *Government of South Africa vs. Grootboom*, the court noted that the "cause of the acute housing shortage lies in apartheid," and "the question is therefore not whether socio-economic rights are justiciable … but how to enforce them in a given case" (SAG 334). In context to enforcement, the court evaluated whether the government had taken reasonable measures, or "created conditions" through a public housing program to realize the "right to have access to adequate housing" and prevent arbitrary evictions (SAG 336-337).

Ultimately, the court determined that the state "fell short of its obligations" in Art. 26.2 in that "no provision was made for relief to the categories of people in desperate need" (SAG 338). The court also determined, and I think this was really the kicker, that the eviction

notice was executed inhumanely (SAG 338). Therefore, the South African Constitutional Court determined that the state must take reasonable measures to achieve realization of ESRs which may be defined as a comprehensive program that must satisfy a minimum level of core obligations. Additionally, the state must vigorously enforce non-discrimination, and judicial enforcement is often necessary to make sure that ESRs are realized.

In a second case, *Treatment Action Campaign (TAC) V. Minister of Health*, the Court ruled that the government violated the right to public health care access and had not faithfully implemented a comprehensive program for the distribution of nevirapine as a reasonable measure to **fulfill** and realize this right (SAG 346). Although the court noted, "the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them," and stated, "It is impossible to give everyone access to even a "core" service immediately," it concluded that the state cannot "impair" the right nor "exclude a significant segment of society" from realizing the right (SAG 342-343).

Furthermore, the court concludes they have "particular responsibility … to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal" (SAG 345). The court order was nothing short of a policy directive, directing the state to "remove the restrictions that prevent nevirapine from being made available" without delay (SAG 346).

Thus, the court reserved the right to determine whether the comprehensive program of progressive realization was "reasonable" or not. Their definition of 'reasonable' overrode their statements that it is "impossible to give everyone access even to a "core" service immediately" (SAG 341). In effect they ruled that the program as constructed will not bring progressive realization to some people in their society, ever. Thus, the program itself is flawed. Therefore, in the minds of the jurists, the program need not be immediately universal

(available to all), but it must be immediately and universally non-discriminatory. That sounds like it must be available to all. These two cases illustrate the subjective nature of determining what is reasonable and progressive for compliance and enforcement purposes given the available resources states have to implement ICESCR rights.

Section Four – The ICESCR – Expanding on the Nature of Second Generation Rights

ESRs may have their roots in the world's major religions like Catholicism which expressed the concept of the "right to subsistence with dignity" (SAG 269). Philosophers like Paine, Marx and Kant advanced the concept of ESRs as did the Fabian socialists of the late 1800's (SAG 269). The International Labor Organization further developed the concept, and President Roosevelt expanded on it. As the rights were being debated, it was decided that ESRs be split off from CPR rights under intense pressure from Western nations (SAG 269).

During these negotiations, those in favor of two covenants often pointed out the ESRs needed to be "progressively implemented," might not be inalienable, required positive action by the state to promote, and would also require a program of implementation with periodic reports to be realized (SAG 272). This was contrasted against the perceived inalienable nature of CPRs, their immediate justiciability, their position as negative rights, and the fact that no program of implementation would need to be created (in most cases) (SAG 272).

Section Five – Critical Differences between First and Second Generations Rights

Inalienable vs. Aspirational. Philosophically, some commentators make the case that ESC rights are aspirational "rights to goods" through specific state actions, while civil and

political rights (CPR) are inalienable rights to "freedom of action" (286). To elaborate on this difference in content, men and women are not born with ESRs to fair wages, job promotions, rest and leisure, adequate standards of living, a right to a free education, and a right to join unions. These rights are not inalienable and instead come within the boundaries of the social contract, requiring legislation, negotiation and economic tradeoffs to create the necessary conditions in the private sector for them to flourish and be secured.

Incidental vs. Significant Costs to Implement. Neier notes that CPRs only have the "incidental costs of protecting" them through the judicial process (SAG 283). There is no haggling over economic resources to provide CPRs. Provision of ESRs, on the other hand, involve the "substantial costs of economic redistribution" and must be allocated "through the process of negotiation and compromise" within the democratic process (SAG 284). Providing an adequate standard of living, food, clothing, housing, health care, primary education, and social security can be an expensive proposition. If a country wants to provide $200 per month in social security to say 3,000,000 retirees, that's $7.2 billion per year, and that's just one entitlement and probably not enough to meet the "adequate" standard at that.

Different Meanings. CPRs like freedom of religion ought "to mean exactly the same thing every place in the world" (Neier, qtd. in SAG 285). What constitutes education, leisure, health care, adequate housing, and adequate standards of living can mean different things to different people in different states depending on resources available, culture and form of government. The subjectivity of the definition of ESR terms can make judicial enforcement a tricky subject under the law. Some CPRs like freedom from torture carry subjectivity as well, but most CPRs are fairly straightforward.

Liberty Rights (CPRs) vs. Rights to Goods (ESRs). Kelley explains, "The classical rights guarantee freedom from interference by others – and may thus be referred to as liberty rights – whereas welfare rights guarantee freedom to have various things that are regarded as necessities" (qtd. in SAG 286). Kelley adds that liberty rights are concerned with "processes" and constitute negative rights that protect citizens from government intrusion, while welfare rights are concerned with "outcomes" and require "transfer programs" from taxpayers and government bureaucracies to implement a provision of goods (qtd. in SAG 287).

Recognizing Rights vs. Establishing Rights. A recent article by the Constitution Society explained that ESRs are not natural rights in the sense that they are not privileges and immunities ***recognized*** by the governments as being inalienable (2007). Instead they must be ***established*** by the governments through either the provision of legislation or administrative functionality or both. The ICESCR has historically seemed to recognize that the progressive establishment of these rights is somewhat conditioned upon the resources available and ease of implementation. Zambia even registered a Declaration with ICESCR noting, "*the problems of implementation*, and particularly the financial implications, are such that full application of the principles in question cannot be guaranteed at this stage."

Similarly, the U.S. Constitution *recognizes* natural rights, immunities and privileges that restrict the powers of government … It does not *establish* them ("Social Contract" 2007). The democratic process is the appropriate vehicle for which to establish contractual access to other resources (rights) through legislation that would need to have commensurate remedies and enforcement mechanisms to secure them. The ICESCR both recognizes universal human rights and obligates signatory states to establish ESRs progressively according to available resources. As laid out in prior sections of this essay, establishing a

right that requires significant economic allocations to fulfill should involve the input of local citizens and will also require a more complex and detailed implementation scheme.

Individual Rights vs. Collective Rights of the Greater Good. Helle Dale explains, "Natural rights are derived from the idea of common human nature and, as such, are inalienable. They cannot be bought, sold, or taken away," while the "second set of "rights" has grown out of the different philosophical tradition … of Social Democracy, Socialism, and Communism … [characterized as the] collective "greater good" or General Will" (2006). Dale concludes that ESRs are "more entitlements or goals than *a priori* rights of the individual," and adds that "many of today's "rights" are based on nothing more than an ambiguous and indefensible notion of the "common good … [and] invariably leads to coercion against the individual."

Justiciability. The ICCPR has a provision requiring "state parties to 'develop the possibilities of a judicial remedy', but there is no equivalent provision in the ICESCR" (SAG 313). Some consideration is being given to an Optional Protocol to ICESCR which would examine complaints "in a quasi-judicial procedure" (SAG 313). States like South Africa have written ESRs into their national constitution and in effect crafted their own judicial remedy. Cass R. Sunstein says of incorporating ESRs into national constitutions, "This is a large mistake, possibly a disaster" (qtd. in SAG 317). It makes the judiciary subject to politicization.

Sunstein adds that judicial enforcement of ESRs may lead to undue interference with free markets, removal of state budgetary resources from the democratic process, unenforcability in the courts, and may discourage individual entrepreneurship (SAG 318). He concludes that private entitlements guaranteed by the constitution could "jeopardize constitutional rights altogether, by weakening the central function against preventing the abusive or repressive exercise of government power" (SAG 319). CPRs must be judicially

enforced as well, but their detachment from significant economic considerations makes them better candidates for inclusion into national constitutions. Neier adds, "Rights only have meaning if it is possible to enforce them" (SAG 283).

Chong cites the reluctance of courts to adjudicate ESRs, U.S. opposition to ESRs, an overly legal approach to ESRs versus a potentially more effective grassroots social and cultural approach, and controversies over both what constitutes a violation of ESRs *and* the remedies that would satisfy violations as five major challenges to legalizing and enforcing ESRs through judicial processes (183-204). I think Chong has some great points, but grassroots social activism has its limits. CPRs in contrast seem to be more easily enforceable and lack the controversies over budgets, definitions and remedies that Chong points out.

Rights vs. Resources. The ICESCR does an admirable job at outlining the ***needs*** of citizens," But needs are different than true rights. Needs are fulfilled with the provision of resources. One of those needs is the need for water or food. Another could be said to be the need for an adequate standard of living. Thus, water, food or income is a resource that meets that need, like oil meets the need to have transportation, or electricity meets the need to heat the home. You can go buy food, water and oil. You can't go and buy freedom of religion or freedom of speech. When governments take on the obligation to directly fulfill the needs of disadvantaged citizens they must necessarily intervene in the economy with some measure of central planning to allocate resources and/or redistribute income to make welfare payments.

Section Six – Conclusion

CPRs and ESRs do not differ so much in application, but they do differ significantly in content and enforcement. The characterizations of these rights as positive (ESRs) and

negative (CPRs), individually-oriented (CPRs) and collective good (ESRs), freedom from (CPRs) and freedom to (ESRs), inalienable (CPRs) and aspirational (ESRs), recognition (CPRs) versus establishment (ESRs), liberty rights (CPRs) and welfare rights (ESRs), and costly rights (ESRs) and incidental rights (CPRs) do very much accurately reinforce what is a true distinction between these two types of rights. The UN General Assembly made the right call to keep them separate.

ESRs that are written into constitutional law or implemented through legislation must then be safeguarded by those national governments. At the point of implementation, or when states take on the progressive realization of the fulfillment of ESRs through reasonable measures in good faith, they do become rights, positive rights, but not inalienable rights. CPRs, however, provide the foundation for the realization of all human rights inasmuch as they represent inalienable rights derived from God or reason that men have from birth and cannot be impaired without some form of injustice on the part of the government.

The concept of a hierarchy of rights whereby some rights are more important than others is a correct assertion in my estimation. The ICCPR recognizes this hierarchy by prohibiting the derogation of several rights even under conditions of a national emergency (Art. 4.2). The concept of *jus cogens* peremptory norms also validates this important distinction. Freedom from hunger and adequate standards of living for all human beings are worthy goals but not rights. In efforts to fulfill these rights, ESRs require major funding, and the issue of what constitutes reasonable progress complicates the task of calculating what level of resources are necessary.

Moreover, ESRs are not *a priori* human rights and require significant challenges to be overcome in terms of their implementation and defining their violations and remedies.

Implementation can be especially tough on a developing states with little economic resources left over for redistribution. In contrast, the equal right of men and women to enjoy CPRs is fairly straightforward and requires only incidental funding to realize, though it does require a healthy dose of political will in some cases.

Some CPRs are also highly contentious and difficult to enforce such as the right not to be tortured or disagreements over the death penalty. A global recession has perhaps made the implementation of ESRs and further expansion of the 'welfare state' more difficult to implement and promote at the present. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights assert that states have obligations to "respect, protect and fulfil" ESRs (4). The "fulfil" part of that guideline is at the core of what separates CPRs from ESRs. There is not unlimited resources for state governments to try and fulfil every ESR listed in the ICESCR. NGOs and international organizations like the UN can help states document and monitor violations of ESRs. "The UN Commission on Human Rights should appoint thematic Special Rapporteurs" to help with violations and enforcement of ESRs (Maastricht 12). However, what one cannot recognize as a birthright can be costly to establish and progressively realize for all citizens of a state.

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