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International Human Rights Treaties

Recognizing that the UDHR was not binding, the world community began the second phase of incorporating human rights at the international level by codifying it into a treaty. Drafting started soon after the adoption of the UDHR in 1948. The original intention of converting the UDHR into a single treaty was soon abandoned and rather two treaties were planned, although it was not till eighteen years later in 1966, that the two treaties were presented at the UN General Assembly (UNGA) for signature and ratification.

There were many reasons for deciding on having two treaties rather than one: the emerging political divisions caused by the Cold War; the entry of numerous decolonizing States from Asia and Africa into the UN who brought with them other perspectives on human rights; and the fact there were several options on how to legally enforce different rights.

While the Cold War is considered by some to be the main contributor to the delay, other reasons also proved significant. States were cautious about the notion of legally binding rights as opposed to a broader declaration; therefore, the drafting needed to be more precise in the duties and obligations it placed on them. In addition, during this period (1948-1966), the UN was a rapidly evolving organization with about 60 members joining in this period (doubling its size), many of whom also wanted input into the international treaties. Finally, there were major differences in the theory of human rights between the democratic capitalist states of the west, the socialist countries of the Soviet Union, and later, the decolonizing states of the developing world. As far as the latter was concerned, the right to be free from colonialism (self-determination) and the right of non-discrimination were of the utmost importance. For many western states (predominantly capitalist democracies), political rights and freedom of expression were considered vital. For communist countries, State duties regarding health, education, and the rights of workers were considered very important. Thus, these competing interests had the effect of slowing down the negotiations around the treaty drafting process.

Early on, it was realized that keeping the two different types of rights (civil and political versus economic and social) in one treaty would be challenging because compliance to each type of right differs. These differences also drove the division between civil and political rights, on the one hand, and economic and social rights on the other. It was eventually decided that the two sets of rights should be enforced through different procedures. For civil and political rights, compliance in most cases is now enforced from the moment the treaty comes into force. For example, States should not gradually introduce changes to stop torture, rather they must immediately cease the practice. However, poorer and developing States may need to work gradually towards giving its citizens full economic and social rights such as access to healthcare, or ensuring the wide availability of high schools. Upon agreeing to a treaty, it was decided that it would be unrealistic to expect developing nations to immediately provide rights to healthcare, education, and housing. Finally, how rights in the treaties would be protected was a concern for many governments. Who would ensure governments complied with the treaties? And if they did not comply, could governments be sanctioned? It was decided that civil and political rights have clear legal obligations, and these can be assessed through a treaty body. The ICCPR treaty sets out the working details of this body. However, there was no treaty body initially planned for ICESCR because it was considered that these rights are much harder to assess if a violation has occurred, and so the treaty itself does not establish a treaty body (though, these ideas changed and a body was established at the same time as the ICCPR treaty body, but not by the ICESCR treaty itself).

In the end, a system emerged which enforced the rights in the ICCPR immediately upon coming into force. The only exception is that some rights are derogable, which means that under special circumstances, States do not have a duty to enforce them. In a sense, ICCPR rights are either on or off (much like turning on a light, it is either on or off), though some rights (the non-derogable ones) must be on all the time. In contrast, rights in the ICESCR are somewhat different in nature. It was realized that as a State cannot instantaneously build a health or education system, it must be given the time to do this gradually, under a process called the 'progress realization.' As will

be detailed below, the State has an obligation to progressively move towards fulfilling everyone's economic and social rights. As a result of these differences, two treaties were drafted separately but simultaneously adopted at the UNGA, and entered into force at nearly the same time (the ICESCR came into force three months before the ICCPR on 3 January 1976). As an indication of their importance, these two treaties are titled 'covenants' as opposed to conventions, because the term covenant implies a more important or serious contract.

3.1 The ICCPR

The International Covenant on Civil and Political Rights entered into force on 23 March 1976. To date nearly 170 countries have ratified this covenant. The ICCPR was ratified in Southeast Asia first by Vietnam (1982), followed by the Philippines (1986), Cambodia (1992), Thailand (1996), Laos PDR (2000), and Indonesia (2006). It has not been ratified by Brunei, Malaysia, Myanmar, or Singapore.

While it is not possible to give the exact reasons why a government refuses to ratify a treaty, Singapore has said within UN venues (in this case during its reporting within the Universal Periodic Review of 2011), that "The Singapore Government takes its treaty obligations very seriously and prefers not to sign Conventions until it is sure it can comply fully with all their obligations." While the government did not detail exactly which obligations it cannot meet, it is common knowledge that Singapore does not allow full freedom of expression, the right to assemble, and the right to associate. These limitations were not mentioned by the government of Singapore, but rather they noted that, "As a young city-state with a multi-racial, multi-religious and multi-lingual population, Singapore has no margin for error," implying that too much freedom could lead to racial instability. Finally, the Singapore government also referred to its position that human rights must comply with their national standards, and not the reverse when it comments, "The manner in which all rights are attained and implemented must nevertheless take cognizance of specific national circumstances and aspirations." Here, the Singapore government is referring to the debate between universal rights and 'national and regional particularities', which occurred around the adoption of the Vienna Declaration and Plan of Action in 1993.

The ICCPR makes civil and political rights in the UDHR legally binding. It is not identical to the UDHR in that the ICCPR also adds rights which are not in the UDHR, such as self-determination and the prohibition of expulsion and hate speech, and it also drops some rights which are in the UDHR, such as the right to property and asylum, which does not appear in the ICCPR.



FOCUS ON

ICCPR Optional Protocols

There are two Optional Protocols to the ICCPR. The first allows individuals to make complaints to the Human Rights Committee, a process which will be discussed more in coming chapters. The Second Optional Protocol outlines a commitment to abolish the death penalty which is discussed below.

Jurisdiction
Jurisdiction basically means where the law (juris) speaks (diction). In other words, jurisdiction is where the law is in operation.

State parties to the ICCPR are immediately obliged to “respect and to ensure” the rights in the treaty for all people within the territory of the State, and under its power. The **jurisdiction** of human rights treaties is territorial, meaning that people acquire their rights not through citizenship but through physically being in the country. This is detailed in Art 2.1 which states that “all individuals within its territory and subject to its jurisdiction” will have ICCPR rights, although there are two rights in the ICCPR which are exclusive to citizens only, that of political rights to vote in that country, and the freedom of movement. This jurisdiction also includes territory under the power of the state; for example, colonies or protectorates. While there are presently few of these, examples of territories outside a state’s jurisdiction where ICCPR rights apply, do exist, such as the French Pacific Islands of Tahiti (part of French Polynesia). In Southeast Asia, no territories have such jurisdiction. More recently, there has been some debate over jurisdiction. An example is the USA which claims that the ICCPR does not extend to their detention facility at Guantanamo Bay.

Human rights treaties are mainly based on territorial jurisdiction, meaning they operate in the territory of a state but end at its borders. There are other types of jurisdiction, such as universal jurisdiction and jurisdiction over citizens. While defining territorial jurisdiction is mostly simple as State borders are clearly marked, it may be complex in situations where one state occupies another, or on boats in international waters, or on airplanes. *For example, when the US occupied Iraq from about 2003-2008 which laws are in power? In these cases, do human rights obligations come with the occupying force, because the occupied State is now under the jurisdiction of the invading force?*

A similar issue concerns the turning away of refugee boats, which has happens in Southeast Asia. After the Vietnam conflict of the 1970s, a number of boats containing Vietnamese refugees were turned away by the Singaporean and Malaysian navies. More recently, the Australian navy also turned away refugee boats and the Thai navy has been heavily criticized when it refuses entry to boats containing Rohingyas. As the ICCPR Committee has recently suggested, when naval forces turn a refugee boat around, that boat should be considered under their power and jurisdiction of the navy and therefore the ICCPR rights of the people in the boat should be recognized. In a recent case under the Convention Against Torture (*Sonko vs Spain*, 2011), when the Spanish Civil Guard failed to rescue a drowning migrant in Moroccan waters trying to enter Spain, even though the migrant was not actually in Spain, the committee “observes that the Civil Guard officers exercised control over the persons on board the vessel and were therefore responsible for their safety.” Hence, jurisdiction is not purely territorial, but also includes areas where the government exercises effective control.

3.2 Rights in the ICCPR

This section briefly lists some of the important articles in the Covenant. Many of these rights will be discussed in depth in later chapters of this textbook, but here only the main elements will be outlined.

3.2.1 Self-Determination (Article 1)

The first article in the ICCPR on self-determination is identical to the first article of the ICESCR. This concerns the rights for political groups to choose their own political system, and to use their own resources as they wish. Self-determination in the ICCPR and the ICESCR essentially refer to a freedom from colonialism. They were not intended to also allow freedom to indigenous, cultural, or ethnic groups to start their own countries, although this article does give some rights to ethnic and cultural groups. This right is relevant to the context of Southeast Asian countries movements for self determination.

3.2.2 Non-Discrimination (Article 2)

All human rights treaties recognize rights to equality and non-discrimination (Art. 2 in the ICCPR). As was covered in Chapter One, it is never justified nor permitted to discriminate on the grounds of race, sex, language, political opinion, and so on. The ICCPR provides a list of possible grounds of discrimination, but also contains an important 'catch all' ending – “or any other status,” meaning that discrimination can arise from any categorization. An important development in this area is discrimination based on sexuality. Sex is listed in the article, but not sexuality.

3.2.3 Right to Life (Article 6)

A significant development from right to life in the UDHR rights is the inclusion in the ICCPR of limitations to the use of the death penalty. The right to life must be protected by law; though, in reality, all States have already criminalized murder or other actions which lead to a person's death. The ICCPR requires States to have conditions on the use of the death penalty: The ICCPR requires States to insert conditions on their use of the death penalty: thus, it can only be used for the most serious crimes, the sentence must be open for appeal, and a death sentence cannot be given to certain people such as pregnant women, children, mentally disabled and the elderly. While the article does not ban the death penalty, States can agree to the Second Optional Protocol, which deals with the abolition of the death penalty. The Optional Protocol has been agreed to by 75 states, and has been in force since 1991. However, in Southeast Asia, only the Philippines and Timor Leste have ratified it. The Optional Protocol requires States to abolish the death penalty for ever. This has already been done in Europe, and a majority of Latin American countries have also abolished it, though both these regions have achieved this mainly through regional agreements and treaties.

DISCUSSION AND DEBATE

The Death Penalty

Around the world, countries have abandoned the death penalty. Over 100 countries have now banned it. A further 50 countries have not used the death penalty for more than 10 years. Currently, only about 42 countries still regularly use it.

Many argue that the death penalty is an important crime fighting tool, and a necessary means to punish the most severe of crimes. For example, Singapore, Malaysia, and Indonesia argue that the only effective way to combat drug trafficking is through the death penalty. In these countries, executions usually involve drug smugglers.

Others argue that the death penalty should be abolished because it can be wrongly given to an innocent person, that it does not reduce crime, and that people who face this punishment are mostly poor and discriminated against. A further problem in the region concerns the use of mandatory death penalty sentences in Singapore and Malaysia. A mandatory sentence means that, for example, anyone found with a certain amount of drugs will automatically be sentenced to death, regardless of the circumstances.

Is the death penalty necessary? Surely, if a person commits a heinous crime (such as rape or murder), they deserve to face the most severe of punishments? But, who is to say death is a worse punishment than life in prison?

Does the death penalty actually deter people from committing crimes? Admittedly, the problem of drugs in Malaysia and Singapore has been reduced compared to other countries. However, people are still regularly convicted and awarded the death penalty, which means drug smuggling still occurs despite the deterrent.

Shouldn't an aggrieved family member be given the right to see a killer sentenced to death? It will give a much greater sense of justice for that person. But shouldn't justice be determined by a fair trial, and not an emotional and aggrieved family member?





FOCUS ON

Death Penalty in Southeast Asia (as of 2013)

Country	Death Penalty in Use?	Use of the Death Penalty
Brunei	Yes	Last execution in 1957 when a British Protectorate
Cambodia	No	No law on death penalty; last execution in 1989
Indonesia	Yes	Last execution in 2008
Laos	Yes	Last execution in 1988
Malaysia	Yes	Mandatory death penalty, yearly executions
Myanmar	No	Last Execution in 1993
Philippines	No	Abolished from 1987-1993, and 2006 onwards
Thailand	Yes	Last execution in 2009
Singapore	Yes	Mandatory death penalty recently limited, yearly executions
Vietnam	Yes	Yearly executions

3.2.4 Legal Rights (Articles 9, 10, 14, 26)

A number of articles in the ICCPR ensure that legal systems are just, fair, and effective. These rights cover such concepts as equality before the law (Art 26), unjust imprisonment (such as arbitrary arrest in Art 9 and humane imprisonment in Art 10), and the right to competent, unbiased, and fair courts (outlined in Art 14, the largest article in the treaty). There are three main areas of legal rights: (1) rights upon arrest and detention, (2) rights in the courtroom, and (3) rights when imprisoned. Looking very briefly at the main rights in these areas:

- Arrest: A person cannot be arrested without reason (that is, they cannot be arrested arbitrarily); they must understand why they are being arrested; have access to a court; and be presumed innocent until the court decides their innocence or guilt.

- Trial: Judges in the court must be qualified and unbiased. Individuals should have access to a lawyer, be able to cross-examine witnesses, and be brought to trial within a reasonable period of time. The accused should also have the right to challenge or appeal a finding of the court. There should be a different trial system for children. The punishment should suit the severity of the crime.
- Detention: Individuals cannot be detained without reason. The reasons for their detention should be made known to them. They cannot be detained for a long period without being taken before a court. The conditions of the detention should be humane.

3.2.5 Freedom of Movement (Article 12)

The freedom to move addresses both movement inside a country and movement between countries. However, both have many limitations. A person has the right to leave any country, but only the right to enter their own country. A State, for whatever reason, can refuse a non-citizen entry into their country, and even act completely arbitrarily in making this decision. For example, a condition of entrance may be hair length (Singapore in the 1960s and 70s regularly refused entrance to males with long hair, and as a result the rock band, Led Zeppelin, cancelled shows after refusing to cut their hair).

People are also free to move inside a country, although the ICCPR limits this right to people who are “lawfully within the territory.” There are obvious limitations to the freedom of movement: people cannot enter other people’s houses, and women cannot enter male toilets. These limitations, as will be detailed below, must be in law, and be regarded as necessary for reasons such as morality or the rights of others.

3.2.6 Freedom of Religion (Article 18)

People have the right to believe and practice their religion. This freedom overlaps with the minority and cultural rights outlined in Art. 27. The freedom of religion protects individuals who want to express or practice their faith. This may be done individually or collectively. The freedom of religion can extend to the workplace and place of education. The right also protects people from being forced to believe a religion. As detailed, there are always complex debates around religious freedoms and human rights. While the article allows the right to change religions, this is not always accepted by many religions. Further, some Southeast Asia States have a State religion, making it challenging for those not of that faith to be free from discrimination. Finally, some religious practices, such as the selection of religious leaders, discriminate against women. Some religious practices can be limited by law, for example polygamy, but like limitations to freedom of expression or movement, it must be in the law and demonstrated necessary for specific reason such as morals or security.

3.2.7 Freedom of Expression (Article 19)

Laws in Southeast Asia that limit freedom of expression include: (a) libel and slander, (b) insulting people in authority, (c) treason, (d) pornography, and (e) intellectual property laws protecting authors’ rights. However, the limitations imposed by some countries in Southeast Asia may violate Art 19. For example, certain books on the monarchy cannot be sold in Thailand, and the novel, *The Satanic Verses*, has been banned in Malaysia and Indonesia.

3.2.8 Right to Marry and to Have Children (Article 23)

The right to marry includes the right for anyone to marry, and insists that both partners have equal status within the marriage. Anyone can marry once they have reached a 'marriageable age,' though this is not specified in the treaty. In Southeast Asia, the minimum legal age to marry is generally eighteen, which is the most common standard around the world, though there are some allowances for people under eighteen to marry with parental consent. Some States want their citizens to marry later, so they impose a higher marrying age; for example the age to marry in China is 21 for females and 24 for males. Further, people must marry with free and full consent: nobody can be forced to marry. An arranged marriage is not necessarily a violation of this right as people can give full consent to an arranged marriage.

It is expected that men and women enter and leave marriages equally. Unfortunately, this has not always been the case in many Southeast Asia countries. Divorce laws in certain Southeast Asia countries often favor the male over the female, but this is now changing. For example, previous divorce laws in Thailand required a woman to prove her husband's infidelity, whereas the husband did not need to prove anything. Similarly in Indonesia, under the old system, women divorcing under Islamic law were treated differently. Divorce is not allowed in the Philippines, the only state in the world to maintain this law, and as yet same sex marriage is not recognized anywhere in Southeast Asia.

3.2.9 Right to Associate and Assemble (Articles 21, 22)

While these were included as a single article in the UDHR, the two rights were separated in the ICCPR. Both the right to assemble (to hold a peaceful public meeting), and to associate (to form groups) can be limited by laws. These ensure the right to have a political life by both forming organizations and meeting, although not only political groups are protected by the covenant. Across the world in 2011 and 2012, the right to assemble was tested to its limits; for example, the mass gatherings of people in Arab countries, the protests in Bangkok, and the Bersih movement in Malaysia. However, there are limitations to this right as the long term occupation of an area may severely impact the rights of other people; for example, the occupation of the airport and central shopping district by two separate groups in Bangkok severely impacted the rights of others to use those facilities.

3.2.10 Right to Vote (Article 25)

Political human rights cover a number of different elements. It includes the right to participate in politics, to be a politician, to be a public servant or a government officer, and the right to vote.

While the covenants do not explicitly mention democracy, political rights assume that people should have the right to participate in the political process through elections, or the right to vote. Voting alone does not constitute a democracy, as some countries not considered democracies do hold elections; for example, Vietnam and Laos. However, given that democracies are the only political system that requires voting as a necessary component, one can hardly deny a strong connection between the two.

Essentially, the right to vote focuses on the process of voting: thus, voting shall take place at a genuine periodic election, by universal and equal suffrage, and by secret

ballot. All of these elements, have the objective of ensuring that the election process is fair and equal. Nearly all Southeast Asia countries claim they are democracies, although one could argue the quality of their democratic procedures are debatable. Across Southeast Asia, nearly all citizens can vote in some kind of election, and all people are allowed to become politicians. However, whether the governments that result from these elections represent the “will of the people” is again open to debate.

3.3 Limits to Civil and Political Rights

Some ICCPR rights can be legitimately limited in specific circumstances. There are different types of limitations. These categories are: (1) limits to all rights, (2) limits to specific rights made by governments, and (3) limitations through derogation.

3.3.1 Limits to All Rights

It is important to remember that human rights do not allow individuals ultimate freedom to do whatever they wish. Rather, all human rights are limited because individuals cannot use their rights to violate the rights of others. For example, a person cannot use their right to freedom of expression if it violates another’s rights. This is detailed in Art. 5 of the ICCPR.

3.3.2 Limits to Specific Rights Made by Governments

Limitations to specific rights in the ICCPR are explicitly detailed in the treaty. In these cases, governments can make laws to limit the scope of a right. A common example is limiting the freedom of expression through censorship. Similarly, the rights of movement, religion, expression, assembly, and association are also limited. However, they can only be limited if the following criteria are met:

1. The limitation must be authorized by a written law. This is to ensure the rule of law which prevents States from arbitrarily making rules to limit rights. A State cannot limit a right based only on moral attitudes or economy efficiency, for these views must be backed up by a written law. Examples of laws limiting rights include those concerning the right to demonstrate (for example, not being allowed to block roads), laws regarding religious practices (thus, groups are prohibited from taking illegal drugs for religious purposes), or laws on private property (which limit people’s freedom of movement to public areas).
2. The government must demonstrate these laws are necessary to ensure human rights. Just because a law exists does not necessarily mean it is correct. As an example, a government would have great difficulty defending a law to ban people from reading a book on human rights simply because they claim it threatens national security. Such cases have previously occurred in Myanmar where people have been jailed for carrying a copy of the UDHR (though there is strictly no law which bans the reading of human rights books).
3. The limitation can only exist for a specific reason. The specific reasons given in the ICCPR are public order, upholding the rights of others, public health, national security, or morality. The limitation can only occur for these reasons

and no other. States cannot limit rights because of economic efficiency or cultural practice, say, because this is not included. Public order refers to the government's duty to ensure people in public are not disturbed by others who are also exercising their rights (for instance, by blocking streets and airports, or denying access to public facilities). Public health can be used to limit rights; for example, when attempting to stop the spread of a disease the State limits freedom of movement. National security can be used to limit freedom to assemble, and morals are frequently used as a basis of censorship. While some of these limitations make sense, there will always be room for governments to exploit these definitions. Examples include the definition of public morality (for example, to limit the rights of sexual minorities), and national security (for example, to ban or limit political opposition).

3.3.3 Derogations in Public Emergencies

Certain rights can be limited in very specific situations such as public emergencies. A public emergency (also commonly known as a 'state of emergency') is something which according to the ICCPR "threatens the life of the nation:" this could be a natural disaster, a conflict, or a coup d'état. In these situations, States are permitted to break free, ignore, or derogate some of their obligations towards civil and political rights for a limited time. Derogation is a legal term which means a temporary repeal of a law. The ICCPR distinguishes between these two types of rights: those which can be **derogated** from, and those which are non-derogable (meaning that regardless of the circumstances, such rights must be upheld). Non-derogable rights include freedom from torture and slavery, the right to religion, non-discrimination, and the right to be recognized as a person before the law.

The process of derogating rights starts when a State believes a situation has arisen which demand the declaration of a state of emergency. Recent examples in the region include Bangkok during the red shirt protests of 2010, the Philippines after various cyclones, and various Vietnamese provinces upon the outbreak of bird flu in 2009. There are also states of emergency in regions where there is conflict, such as the three southern Thai provinces or on the island of Mindanao in the Philippines. In each of these cases, the government was allowed to derogate from some rights: for instance, people were not allowed to assemble, or their movement was limited, or they could be arbitrarily arrested and detained for longer periods of time. Upon declaring an emergency, the government should also detail what rights it is derogating from, such as limiting the freedom of movement, expanding police powers to prevent looting, or allowing suspects to be detained longer. Public emergencies do grant States more power, and there are often complaints that they sometimes abuse this power by arresting political opposition groups or detaining suspects for months without charging them.

Derogable Rights

Under extreme conditions, a government may declare a state of emergency which allows it to avoid complying with some rights (or derogate from these rights). In other words, for this short period, some rights will no longer be binding. In a state of emergency, the right to freedom of movement is frequently withdrawn to allow governments to introduce curfews. However, other rights are binding regardless of the situation. These are called non-derogable rights, and include freedom from torture and slavery, the right to life, and freedom of thought, conscience, and religion.

Discussion and Debate

States of Emergency.

At the beginning of 2014 the Thai Government announced a State of Emergency for Bangkok and surrounding areas in response to increasing political protests which were blocking roads, government offices, and transportation. The Emergency Decree was for a period of 60 days. The Emergency decree gives authorized officials extra powers. Looking at the following powers, do you think these derogations are justified to maintain public order? (Note: this is not the full list of derogations)

1. To arrest and detain persons suspected of having a role in causing the emergency situation: derogating the freedom from arbitrary arrest and detention
2. To inspect letters, books, printed matters, telephone communications or any other means of communication: derogating the right to privacy.
3. To prohibit the obstruction and closure of transportation routes: derogating the right to assemble
4. To prohibit anyone from leaving the kingdom where there are reasonable grounds to believe that they are supporters in causing the emergency situation: derogating the right for people to leave any country.
5. To order to aliens to leave the Kingdom where there are reasonable grounds to believe that they are supporters in causing the emergency situation: derogation the freedom from expulsion



3.4 The ICESCR

The International Covenant on Economic, Social and Cultural Rights came into force on 3 January 1976. As of January 2012, the ICESCR has 160 member States, which is slightly less than the 168 States which have ratified ICCPR. In Southeast Asia, States parties to the treaty include Cambodia, Laos, Indonesia, Philippines, Thailand, Timor Leste and Vietnam. As yet Brunei, Malaysia, Myanmar and Singapore have not ratified. The first State to ratify the treaty was the Philippines, which was one of the very first States to ratify in 1976. More recently Indonesia and Laos ratified the treaty in 2006 and 2007 respectively. This section will cover the main concepts of economic, social, and cultural rights (ESCR), detail important rights in the treaty, and also examine livelihood rights.

As Chapter one details, the three categories of rights - economic, social, and cultural - are related but different categories. As such, different bodies within the UN system work on their promotion and protection. For example, economic rights predominantly concern rights around work, and these are closely documented and defined by the ILO. This body, which predates the UN, has produced nearly 200 conventions on workers standards, covering topics such as equal pay, work conditions, maternity leave, and safety for fishing boats.

Social rights, which include rights to healthcare, education, food, water and housing, are protected and promoted by specific UN organizations alongside other human rights bodies. The rights to health are promoted and protected by the World Health Organization (WHO) which has standards on minimum health requirements. Education and culture is also addressed by the United Nations Education, Scientific and Cultural Organization (UNESCO). Food rights are taken up by the Food and Agricultural Organization (FAO). Thus in some cases there are theories and concepts on these rights emerging from different parts of the UN system

The division between civil and political rights (CPR), and ESCR, still influences human rights protection today. Some consider ESCR more important, because they guarantee life: one needs food, water, and health to survive. Others argue that because of their different nature, ESCR are not really rights at all, but aspirations or wishes. These arguments concentrate on two aspects of ESCR. First, it is argued that economic and social rights are not immediate, but rights which will be met at some point in the future. As such, they are more akin to aspirations or wishes than immediately available rights such as CPR. This argument centers on how rights are progressively realized, and how to determine a right and a violation within this concept. The second argument concerns how to protect and enforce human rights, as some have argued that it is difficult to prove a violation of ESCR. If a person is homeless, is the government responsible for finding that person housing? Can they do it through a court of law? This is the argument about the justiciability (or ability to determine rights and duties in the justice system). Both these concepts of progressive realization and justiciability are discussed next.

3.4.1 Progressive Realization

When a country becomes a State party to the ICESCR, they must protect and uphold some rights immediately upon ratification. These rights are called the minimum core rights. Minimum core rights, like primary education or non-discriminatory access to high school, are legally binding once the treaty is in force. Other rights, however, do not create immediate obligations on the State. Many rights in the ESCR fall under this category of progressive realization, which means that rather than immediately realizing these rights, States have a duty to work towards fulfilling them in the near future. The obligation is for the States to show progress towards fulfilling these rights. For example, poor and developing States which cannot immediately provide adequate healthcare, social welfare, or high schools for everyone must demonstrate policies and plans that work towards these goals. The details of progressive realization are found in Art. 2 of the treaty. The wording of Art. 2 initially seems very complex, repetitive, and confusing but there is method to its madness. In particular, it details the actions States must undertake.

Simply stated, progressive realization requires States to always advance, or progress towards meeting their duties to provide healthcare, education, work, food, and so on. While the exact measurement of what progress means is flexible, there are some recognized standards. Two documents clarify the obligations of progressive realization. These are called the Limburg Principles and the Maastricht Guidelines. While both of these documents are not treaties and are therefore not legally binding, they can, however, be considered as general principles of international law. These documents explain that ESCR are measured on obligations of results, not obligations of action. That is, the measurement of ESCR asks how many people have access to water or education and not how hard the government tried to provide water or

education. Further, States are duty bound not to take away anyone's ESCR (known as the principle of non-regression). If someone's right is being met (for instance, their right to housing), this cannot be removed under any circumstances, even if they are living in illegal dwellings or they lack any documents or lease agreements to give them legal tenure to live in the dwelling. If a government wanted to evict these people, it could only do so if they are provided with alternative housing. In other words, if someone is living in a house, they cannot be evicted if it means they will be left homeless. Such is the principle of non-regression at work. It would be a violation for a State to cause an individual's homelessness or hunger, regardless of the situation. However, the duty of the State and the individual is a little more complex than this. It is the individual's duty to meet ESCR themselves, and it is only if they cannot do this, say they are disabled, they live in poverty, or they live in a conflict zone, that the State must assist them.

3.4.2 Justiciability

A common criticism of ESCR is that it is difficult to prove either a State's obligations, or its violations, or specific rights. This is the problem of justiciability, or the ability to take violations of ESCR through a justice system. There are many elements which influence how an ESCR can be brought before a court. First, there must be a law on the ESCR, and one which the courts recognize and use. As noted above, some Southeast Asia countries lack basic laws protecting rights to food and water. Rights protecting housing or access to healthcare may be very weak. Further, most constitutions in Southeast Asia only offer limited protection of ESCR. In most of Southeast Asia, a person's access to food or water is only protected in policy, not in law.

Second, from the discussion on progressive realization, it can be seen that legally enforcing a State's progress proves very difficult in some areas and questions abound: Is the State progressing fast enough? Is it using its maximum resources? Has it taken steps? Can the State produce results to show people are getting their rights met?

Further complications arise because many elements of ESCR place the rights holder as the initial duty bearer. That is, it is first up to the individual concerned to meet their rights to work, food, housing, and so on. A person cannot claim all their food, water, and housing from the government unless it becomes clear they are unable to access these things themselves.



DISCUSSION AND DEBATE

Who is Responsible for Ensuring ESCR: the Government or the Person?

As detailed above, it is first up to individuals to meet their own ESCR.

Question: But what happens if someone is about to become homeless because of their gambling debts? What obligations does the State have to this unfortunate person? Ordinarily, the government cannot allow someone to become homeless as this amounts to not progressively realizing their rights. However, should the government also be responsible for someone losing their home by their own mistakes? What about people who want to give up smoking? Should the government provide services to help them quit? In these cases, it seems fairly obvious that the individuals themselves ultimately caused their own problems (by smoking or gambling), but does the government (by allowing smoking and gambling), share some of the responsibility?

A further complexity asks which part of government should manage these duties. Rights around work, food, housing, water, and education are managed mostly by government departments (such as the Ministries of Labor, Health, or Education). But having legislation in this area implies that the courts will decide if the policies are effective, potentially leading to conflicts between ministries and the courts. As an example, a person with cancer requires expensive treatment, but the government hospital insists this treatment is too expensive to provide to everyone. Who should determine this: health officials who have an idea of budgets, illnesses, and the capacity of hospitals, or the courts who ensures people have their rights to healthcare?

Enough examples exist now to show that ESCR are justiciable. This is particularly true in the area of work, as most Southeast Asian countries now have effective labour laws and labour courts. The same can also be said for housing, as all Southeast Asian countries now have laws of property rights and rental laws. These laws and courts do not guarantee people's rights are met, but they do show their justiciability.

CASE STUDY

Adjudicating Housing Rights

There is much conflict over land and housing rights in throughout Southeast Asia. For developing States there is a need to take land so that roads, industries, and services can be provided. However, how this has been done in many countries is unfair: there is little compensation for the land owners, often business interests profit significantly, and displaced people have nowhere to go.



Land disputes in Cambodia have created much news. The reasons date back to the Khmer Rouge period when all housing records were destroyed and many people do not possess legal documents showing ownership to their property. As a result, cases abound where the government or private companies have moved in to seize such properties. A recent example of this includes the Boeung Kak Lake community in Cambodia, who filed a complaint with the World Bank Inspection Panel in September of 2009 which led to an investigation into a project the World Bank itself had with the Cambodian government. In March 2011, the World Bank agreed with a housing rights NGO, The Centre on Housing Rights and Evictions (COHRE), that the Boeung Kak Lake residents were excluded from properly registering their land, and agreed to take steps to mitigate the ongoing impact of the project on these people. In August 2011, the World Bank announced they would suspend lending to the Cambodian government until it resolved a dispute over mass evictions of families from the Boeung Kak Lake community in Phnom Penh.

There are many cases similar to this throughout Southeast Asia, with developments displacing people in Vietnam, Myanmar, Indonesia, and Thailand. A related concern is the pollution from developments which make people's dwellings uninhabitable.

3.5 Rights in the ICESCR

The rights in the ESCR can be summarized into three groups: economic, social, and cultural rights.

FOCUS ON

ESCR Summary



Article 1	Right to self-determination
Article 2	Right to progressive realization
Article 3	Equal rights of men and women
Article 4 & 5	Limitations only when necessary
Article 6	Right to work
Article 7	Right to good work conditions
Article 8	Right to trade unions
Article 9	Right to social security
Article 10	Family protection, especially for mothers and children
Article 11	Livelihood rights, including food, clothing, housing
Article 12	Right to physical and mental health
Article 13	Right to education
Article 14	Right to compulsory and free primary education
Article 15	Right to culture

3.5.1 Economic Rights

Economic rights help to ensure a person's economic security. This is achieved in three ways. First, they cover the right to work, and rights at the workplace. Many workplace standards are determined by the ILO, which has promoted such ideas as minimum age, minimum wage, and maximum hours in a working week. Other key rights include non-discrimination in the workplace, leisure time, and the provision of safe and healthy work conditions. Second, the right to work includes the right to access welfare or social security; that is, if a person is unable to work or find their

economic livelihood, the government must provide them with some form of welfare. Third, economic rights include the right to form a trade union which would set up organizations to protect their rights should a worker be mistreated.

3.5.2 Social Rights

Social rights include rights to health, education, food, water, and housing. A main objective of these rights is to ensure an adequate standard of living. The rights to food, water, and housing (livelihood rights) are not directly provided by the government. Nor is it expected that governments should provide everyone with a house and a meal. However, when people are unable to provide these necessities for themselves (because of war, disaster, or because they are sick, disabled, or otherwise unable to work), it is expected that the government will provide for them. The rights to education and health have been extensively researched by UNESCO and WHO respectively.

Livelihood Rights

Livelihood rights are literally rights to a minimum standard of living. These ensure that people have access to adequate nutrition, including hydration, adequate clothing, and housing. Livelihood rights are thus about assuring the most minimum standards of human existence are met.

Livelihood rights are normally classified as food, water, and shelter. However, the ICESCR lists them as food, clothing and housing. There are reasons for this distinction. First, there are very few people whose right to clothing is threatened. It is rare to find situations where people do not have access to clothes although it may occur in some cold countries where poor people may not have access to warm clothing during winter. But, mostly governments and NGOs have been able to deal with this. Admittedly, there are homeless people or people in abject poverty who may not be dressed with dignity, but the much larger problem here is not clothing, but housing, food, water, and health.

Water has only become a rights issue more recently because, for a long period of time water was a free and widely available resource, and few people had trouble accessing clean water. However, as cities and industries grew generating more need for water while also polluting water systems, water itself became limited resource. As a response governments began charging for water use, and many people lost their free access to water. The status of water in the covenant was not clear. Although, it was not written in the covenant, some argued the right to water existed as a part of the right to food. To clarify the situation, a General Comment was released which confirmed that the right to water is included in the ICESCR, and is described as the right to sufficient, safe, acceptable, physically accessible, and economically affordable water.

FOCUS ON

Ensuring the Standard of Livelihood Rights

For a person to get their livelihood is not just providing a certain number of calories, or liters of drinking water per day. Livelihood must also ensure that the person's rights and dignity are secure. To help States ensure these standards, the General Comments to the treaty show the elements that a State must consider ensuring ICESCR compliance. The most common four elements that occur across health, education, food, water, and housing are:

- **Available:** There must be a sufficient supply of these goods for everyone. For example, there must be enough schools to provide all children with a place, enough food for everyone to eat a sufficient amount, enough water for personal and domestic use (such as drinking, cleaning, and preparing food), and enough health clinics so all people can have access to a medical officer.



- **Accessible:** Even if the supply is sufficient, people must also have access to it. It is not uncommon for there to be enough food, but people are still malnourished. For example, they may be prevented from accessing services because they are too poor, discriminated against, or it is too dangerous for them to travel to get the service. There are generally three dimensions to accessibility: physical accessibility (is the service close enough and safe enough to travel to?); economic accessibility (can the person afford it?); and non-discrimination (is access blocked because of gender, ethnicity, or other status?). Food may be too expensive, girls may not be allowed to attend school, or some Castes of people are not allowed to use the local water well.
- **Acceptable:** The goods need to be of a certain quality. Attending school is not enough; the school also needs to teach children what they need to know. Food and water need to be of an acceptable level of cleanliness and free from contaminants. Housing cannot be considered a cardboard box under a bridge, as it should also ensure the person is safe, protected from the environment, and is located near other services.
- **Appropriate.** Goods should also be appropriate to the person's specific needs. This can be cultural appropriateness, of suitability for disabled people. The right to food is not met by delivering the necessary 2,200 calories of food as mush in a bucket; the right to food also ensures individuals eat like human beings. This may mean the food should fit their cultural values (for instance, if they are vegetarian), and be eaten in a normal human way, (for example, with family and friends).

Full details of these elements to livelihood rights can be found in several specific general comments in the following documents:

- Food: General Comment 12
- Water: General Comment 15
- Housing: General Comment 4, 7
- Education: General Comment 13
- Health: General Comments 14

3.6 Culture and Human Rights

Cultural rights remain one of the more contentious human rights. Cultural rights in ESCR are close to minority rights in Art. 27 of the ICCPR. There are some obvious distinctions as not all cultures are minorities. However, both articles face the difficulty of defining precisely what 'cultural life' is. As no clear standard of culture exists, the protection of such rights has become a source of much debate. It may be assumed cultural life incorporates cultural events surrounding births, deaths, and marriages. Cultural rights also include those relating to food, education, marriage, and traditional law. There is still much debate as to whether clothes, social events, media, entertainment, and non-religious spirituality can also be included. In particular, the issue of clothes, exemplified by the Islamic veil, has been heavily debated across the world. There has been some development of the concept of cultural economies

through various state, regional, and international legal mechanisms. In these cases cultural economies, such as herding, hunting, or agriculture (for example, Maori fishing rights in New Zealand, or reindeer herding of the Sámi in Finland and Sweden, and hunting rights of Native Canadians) have all been protected as a cultural right. However, no Southeast Asian State has recognized these rights.

There may be political reasons for the lack of clarity around cultural rights. Some governments strive to ensure the dominant culture remains dominant, or that minority cultures do not gain too much power. There may also be clashes between cultural rights and government cultural policy, as some States in the region have a very conservative idea of their culture – that it is only traditional dances and traditional songs – and any forms of contemporary culture, such as modern art, are not given the same promotion and protection. The basis of cultural rights should be more related to ideas of multiculturalism, or that States should allow many cultures and not support only one dominant culture. However, across Southeast Asia, most governments favor, both directly and indirectly, a majority culture and religion.

CASE STUDY

The Chinese Lion Dance in Indonesia

The Lion Dance came to Indonesia in the 1900s when Tiong Hoa Hwe Koan (or the organization of Indonesian Chinese) was founded. However, former President Suharto (ruling from 1965 to 1998) applied a unified policy on State ideology, culture, society, and politics, and applied the idea to all aspects of Indonesian society. One of the policies prohibited all kinds of ‘foreign culture.’ Chinese culture was one of the prohibited cultures as stated in Presidential Instruction Number 14 (1967). Based on this, Confucianism or Khonghucu was not recognized as religion; resulting in many building bans on Confucian temples, bans on using Chinese names which forced the Chinese to use Java or Malay names, and showing the lion dance in public.

This situation changed after the downfall of Suharto in 1998. Abdurrahman Wahid (the Indonesian President from 1999 to 2002) withdrew Presidential Instruction Number 14 and introduced Presidential Decree Number 19 (2001) to recognize ‘Imlek’ (Chinese New Year) as a statutory holiday (for those who wished to celebrate it). In 2002, President Megawati Soekarnoputri announced further that ‘Imlek’ would be recognized as a national public holiday. In effect, Presidential Decree Number 19 (2001) erased the terminology of ‘native’ and ‘non-native’ Indonesian peoples and cultures. Proclaiming ‘Imlek’ as an Indonesian national holiday acknowledged Confucianism as a religion, permitted the construction of temples, and allowed the lion dance to be shown in public again for the first time in decades.

A second issue asks whether cultural rights are collective or individual. A collective right belongs to a group or community (as opposed to the right of an individual). For some, this amounts to an automatic exclusion of cultural rights from human rights, because it revolves around protecting a set of social values or social institutions, rather than a human. However, a close examination of how these rights are written in the treaties reveals they were articulated as primarily individual rights, that is, as the rights of individuals to participate in a culture, and not the right of the culture itself.



All three documents, the UDHR, the ICCPR, and the ICESCR, state that cultural rights are the rights of an individual or of everybody, to practice culture, or to “not be denied the right ... to enjoy their culture.”

In promoting and protecting cultural rights, human rights defenders do not rely on ESCR alone, but often use non discrimination, minority rights in the ICESCR, the freedom of expression of cultural practices, and freedom of religion, showing that cultural rights are heavily interdependent and inter-related between the two treaties

A. Chapter Summary and Key Points

Introduction

The process of changing the rights in the UDHR into an international treaty resulted in two conventions: the ICCPR (covering basically articles 1-21 of the UDHR) and the ICESCR (covering articles 1-2, and 22-27 of the UDHR). The reason for dividing the UDHR into separate treaties was the result of legal distinctions (between derogable CPR and progressively realized ESCR); and also some argue political differences (western States favoring CPR and Communists States favoring ESCR). When both treaties came into force in 1976 much of the UDHR became legally binding to those countries who ratified the treaties. Rights protected by the ICCPR and the ICESCR apply to all people in the jurisdiction of the State, regardless of their citizenship.

The International Covenant on Civil and Political Rights

The ICCPR protects fundamental rights; for example, the right to self-determination, the right to non-discrimination, and the right to life. A feature of the right to life is limits upon the use of the death penalty. Other important rights include those in the legal system, such as rights under arrest, detention, and in the court. CPR also includes human rights in the political arena and life in civil society, such as freedom of religion, freedom of expression and the right to vote.

The ICCPR allows the limitation of these rights in three ways: first, all rights are limited in that they cannot be used to violate the rights of others; second, specific rights may be limited by law if this is necessary to provide public order, public health, national security, or for moral reasons. Thirdly, States can be allowed to derogate from a right for a limited time under specific circumstances of a public emergency. There are a number of rights which are non-derogable and they must be observed at all times regardless of the situation.

The International Covenant on Economic, Social and Cultural Rights

Like the ICCPR, the ICESCR protects fundamental rights such as the right to self-determination and equality for men and women. Furthermore, the ICESCR includes rights concerning work, education, family protection, health, education and housing. Rights in the ICESCR are sometimes defined and researched by related UN bodies such as the WHO for health and ILO for labour.

ESCR differs from CPR in that some rights are *progressively realized*, or where the State does not have immediate obligations but rather obligations to work towards achieving the right. States must have policies and plans which are put into action and use the *maximum available resources* available to them. Some argue that ESCR are not real rights like CPR because they are rather *goals or ambitions* rather than rights. Also, because it is difficult to define State obligations towards progressive realization it is difficult to *define a violation of ESCR*. For many rights such as work, health, and food the *person is primarily responsible* for meeting their ESCR, but in some cases the State has a duty to fulfill the right if that person is unable to meet the right themselves. For this reason it is argued that ESCR are *non-justiciable*, or they are difficult to put through the justice system. An important category of ESCR is *livelihood rights*, or the rights to food, water, housing, education and health. States must ensure these rights are *available, accessible, of an acceptable standard and appropriate* to people's needs.

Culture and Human Rights

Cultural rights are much debated in the field of human rights protection. The definition of a culture is unclear, and culture is often politicized by States. Cultural rights occur in many parts of the ICESCR and ICCPR, for example in religious rights, minority rights, and freedom from discrimination.

B. Typical exam or essay questions

- When did your country ratify the ICCPR and the ICESCR? Can you find reasons why it chose to ratify the conventions?

OR

- Why has your country not ratified the ICCPR and/or ICESCR? What arguments are given by the government, and how valid do you think are its reasons?
- Look for reservations or understandings that your government might have imposed on the ICCPR or ICESCR. Are these reservations necessary? Have there been reservations which have been dropped by your country?
- What are the situations or issues of most concern to people's civil and political and/or Economic and Social rights in your country?
- Considering the case of death penalty, is there any public debate about this topic in your home country? What are the reasons that your country has chosen to use or abolish the death penalty, and do you think these reasons are strong?

- Has there been a Public Emergency in your country ever? Examine a period when it was used and detail what rights were derogated, and were these derogations necessary to restore order?
- Detail examples in your home country where the government is working strongly towards the progressive realization of a ESCR. What policy, plans, and results has the government achieved?
- Are there examples of cultural rights in your country which are not being respected? What are the reasons for this violation?

C.1 Further Reading

ICCPR and ICESCR

All introductory textbooks on human rights should overview the ICCPR and the ICESCR. The texts given at the end of Chapter One are good starting points. You should be able to find some of these in a University library.

The International Covenant on Civil and Political Rights

The main textbooks on ICCPR include:

- Sarah Joseph, Jenny Schultz, Melissa Castan. *International covenant on civil & political rights: Cases, commentary & materials*. (Oxford: Oxford University Press).
- Manfred Novak. *UN Covenant on Civil and Political Rights: CCPR Commentary*. NP Engel, 2005.

The death penalty has been a subject of research for Amnesty International, which puts out an annual report, which can be found by searching the Amnesty International site. There are other organizations working against the death penalty such as:

- The World Coalition Against the Death Penalty,
- Anti-Death Penalty Asia Network,
- International Commission Against Death Penalty.

Information on States of Emergency can be found in General Comment 29 (2001) from the Human Rights Committee, which is available from the OHCHR website.

The International Covenant on Economic, Social and Cultural Rights

The NGO ESCR-Net provides a useful page with numerous links to important issues on economic, social, and cultural rights.

The most useful resource on Economic Social and Cultural rights (because it is freely available on the internet and can be found with a simple internet search):

- *Circle of Rights: economic, social & cultural rights activism: a training resource*.

Other textbooks include:

- Asbjørn Eide, Catarina Krause, and Allan Rosas, eds. *Economic, Social and Cultural Rights: A Textbook*. Dordrecht: Martinus Nijhoff, 2001.
- Manisuli Ssenyonjo. *Economic, Social and Cultural Rights in International Law*. Hart Publishing 2009.
- Olivier de Schutter. *Economic, Social and Cultural Rights as Human Rights*. Edward Elgar, 2013

For more information on the justiciability of ESCR, there is a resource guide at ESCR-Net. Also, publications have been done by:

- International Commission of Jurists. *The Justiciability of Economic, Social and Cultural Rights: National, Regional and International Experiences* (2008),
- OHCHR. *Economic, Social and Cultural Rights. Handbook for National Human Rights Institutions*. United Nations: New York and Geneva, 2005.

For studies on specific livelihood rights, the following organizations have resources available on their websites:

Food

- The Food and Agricultural Organization (FAO) has many resources
- The Special Rapporteur on the Right to Food, Olivier de Schutter, has a web page with United Nations related documents

Water

- Peter Gleick has many articles on the right to water
- Special Rapporteur on the human right to safe drinking water and sanitation, has a web page with United Nations related documents
- The World Health Organization (WHO) has resources on Water Sanitation and Health

Housing

- The Special Rapporteur on adequate housing has a website titled “Housing is a Human Right”
- UN-Habitat has resources on its website.
- The NGO COHRE (Centre for Housing Rights and Evictions) was once the main international NGO working in this area, but it has been closed now for a number of years. Its website is still accessible, and it has many legal and advocacy resources.