

**Panel session: Human Rights in the Twenty First Century:  
Challenges and Opportunities**

**Enforcement of International Human Rights Obligations: Scattered  
Reflections**

**1. Hard Enforcement: Serious Breaches of International Law:  
War Crimes and Crimes Against Humanity**

- a. Nation states still act on the principle of self-interest first. The United Nations structures favour the powerful and the friends of the powerful. It is only when you lose all of your friends that you are subject to accountability for serious international crimes.
- b. Accordingly, we have seen strong international support for accountability for war crimes committed in the Former Yugoslavia because that state collapsed and there were no votes at stake on other key issues to prevent the alleged war criminals from being brought to account.
- c. Similarly, the fragmented state of many African countries has meant that similar accountability has been brought to bear in Rwanda; the Ivory Coast and other countries, particularly, in West Africa.
- d. On the other hand, there are credible allegations of war crimes in Sri Lanka committed during 2009 and early to mid-2010. The history of war crimes in Myanmar is long and far from pretty. Even when the west puts on pressure for accountability, the PRC and many smaller countries are prepared to side with the Sri Lankan and Myanmar governments to keep an inquiry at bay.
- e. I think the progress has been very significant. I think the establishment of first the ad hoc tribunals and then the ICC and the resourcing of the whole process have been

very commendable. I think the referral of Libyan crimes at an early stage to the ICC was also a recognition of the legitimacy of international accountability even for countries (like the US) that do not recognise it for its own citizens. However, the ICC desperately needs to be seen exercising its jurisdiction with regard to some defendants who are not friendless black Africans.

- f. Another important matter for the ICC is the proper resourcing of defence lawyers and the proper separation between the administration of the prosecution and the court. International accountability will only work if it continues to be seen as impeccably fair.

## **2. Soft Enforcement: Enforcement of ordinary obligations under human rights instruments:**

- a. We do well to remember that the two broad reaching HR instruments, the ICCPR and the ICESCR were only opened for signature in 1966 and came into force in 1976 which is less than four decades ago. The extent to which they are accepted as standards even when honoured in the breach is a pretty significant achievement by the NGOs like Amnesty that have promoted their status over that time.
- b. On the other hand, some of the enforcement processes that exist feel less than effective at the moment. We all go through a charade of consultation with regard to a number of these processes and, at the end of that process, one wonders how much notice governments take and how serious they are about trying to comply when any degree of political or policy difficulty is involved.

- c. A recent example of this is the Universal Periodic Review process that reached its climax, earlier this year. All the interested NGOs dutifully attended meetings and the public servants looked suitably appreciative. In the end, the government's responses were pretty disappointing and appeared driven by political expediency. I think the Attorney-General only issued one press release on the subject and that was when the meetings were about to take place in Geneva. It appears like the government wants the NGOs to feel appreciated and the general public not to take any notice.
- d. These processes are being worked on. There is a Dublin Statement on the Process of Strengthening Treaty Bodies (the UN committees responsible for the different treaties). NGOs have responded with suggestions of their own on how this kind of soft enforcement can be improved.
- e. One way of making treaties more influential is to continue the education and promotion process. Obligations are more difficult to ignore if large sections of the general public are aware of the obligations and the rationale on which they are based. Amnesty, for example, has made the adoption of the Declaration on the Rights of Indigenous people a more significant event than it would have been by running a strong campaign promoting its terms particularly among Australians with an Aboriginal or Torres Strait heritage.
- f. Soft enforcement will continue to be an important challenge.

### **3. Enforcement (and economic, social and cultural rights):**

- a. A growing realisation is occurring that ESC rights deserve at least as much attention as civil and political rights. Certainly, the absence of good health and access to treatment make freedom of speech seem fairly academic.
- b. ESC rights raise enforcement and policy changes that are quite different to civil and political rights. For example, if your government has a policy of torturing prisoners, in one sense, you can solve it by no longer torturing. If women with disability are severely disadvantaged in areas of health and education, the solutions are more complicated than building more schools and hospitals. And even that simplistic response may be difficult to achieve in a country where resources for public infrastructure are already severely stretched. In the same way, the right to work has particular policy difficulties as the vagaries of the international economic system buffet countries, both large and small.
- c. The obligation on a country under article 2 of ICESCR is “to take steps ... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR]”. This involves both strictness and leeway. It is strict in that it requires a maximum commitment of resources. On the other hand, only progressive realisation is demanded.
- d. However, many enforcement questions are raised by those phrases. How much expenditure on defence at the neglect of other policy areas is too much? How much corruption in developing countries is permissible? How many tax deductions may rich countries give to their richest citizens and still cry poor about resources?

- e. Equally difficult is the notion of progressive realisation. Some aspects of chronic disadvantage are so profound that generations of good policy may be needed to overcome them. On the other hand, progressive realisation may be used as an excuse to do nothing or to do nothing that is either politically difficult or effective.
- f. For Australia, these issues are going to become increasingly important. What are we doing, what will we do, in each case, to address pockets of disadvantage? How many resources are we going to continue to throw at rich schools? Are we going to give in to the proprietors of poker machines so that problem gambling can cause us to take several steps backward for every step forward? What other politically difficult changes do we have to effect to assist disadvantaged communities who have little or no political power to bring to bear (in our political defence) in any event?
- g. To what extent will our obligations to report to treaty committees and special rapporteurs under various treaties affect the domestic politics that bear on these issues? What advantage can NGOs like Amnesty and ALHR take of these obligations to empower those persons who have continued to miss out on important ESC rights like education, health and employment?

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