

# АКТУАЛЬНЫЕ ВОПРОСЫ МЕЖДУНАРОДНОГО ПРАВА

## ROLE OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN IMPLEMENTATION AND DEVELOPMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOM

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The main aspects of competence and activities of the CESCR, its *suis generis*'s nature and the role of its general comments in progressive development of the norms and principles, dealing with human rights are availed in the thesis.

**Key words:** UN, treaty bodies, human rights, general comments, norms, principles.

### **The *suis generis* nature of CESCR**

The Committee on Economic, Social and Cultural Rights (hereinafter, CESCR or Committee) is in many aspects a unique organ in the system of UN human rights treaty bodies. This Committee is the only treaty body among the existing 10 mechanisms (1) that was not established on the basis of specific provisions of an existing international treaty. The mandate to monitor the implementation of the International Covenant on Economic Social and Cultural Rights (hereinafter, ICESCR or Covenant) is given under the terms of Part IV of the Covenant directly to the UN Economic and Social Council (hereinafter, ECOSOC) (2). The Committee was therefore established by a resolution of ECOSOC with delegated authority from it to monitor the implementation of the Covenant obligations by member States (para. f) [10].

At the beginning, the reports of States parties were reviewed by a Sessional Working Group established by ECOSOC in 1978 [6]. This Working Group included representatives of the regional groups of States parties represented in the ECOSOC. In 1982, these official representatives were replaced by Government experts [9] and three years later, in 1985, this Sessional Working Group was replaced by the Committee on Economic, Social and Cultural Rights comprising 18 independent experts (para. a) [10]. To confirm the *sui generis* nature of the establishment of CESCR, its members are also elected not by a Conference of States parties to ICESCR as it hap-

pens with the other human rights treaties (3), but by ECOSOC from a list of persons nominated by States parties to ICESCR (para. c) [10]. The Committee holds 2 sessions annually, each for a period of up to three weeks, which follows the one-week meeting of the pre-sessional working group. As of the end of 2011, the Committee held 47 sessions. CESCR is required to submit regular reports concerning its activities to ECOSOC (para. f) [10].

### **Increasing the use of General Comments as a tool for enhancing the implementation of Treaty Bodies' Recommendations and Views**

One way treaty bodies can use to assist States parties in the implementation of their treaty obligations is through the preparation and adoption of the so-called General Comments.

Although most of the recommendations being made towards enhancing the implementation of treaty bodies' outputs take the obvious approach of adopting measures that can virtually "force" States parties to implement those outputs (the so called 'stick method'), such as more follow-up controlling mechanisms and etc [14], however, in my opinion, it might be too easy to presuppose that States are not implementing the recommendations because they need to be forced to do so. No less important is to reflect on the reasons of the silent resistance of States parties in implementing these treaty bodies' outputs, something that does not come out clearly in the discourse so far about ways of enhancing the implementation of treaty bodies' outputs.

According to the international law principle *pacta sunt servanda*, States parties are required to fulfill in good faith their obligations under international treaties (art. 26) [20]. Aware of the role that international monitoring bodies can play in helping to identify gaps in the way States parties implement their obligations, States parties freely agreed to incorporate in the international human rights treaties, provisions on the establishment of such bodies. The implementation of treaty bodies' outputs is therefore part of the commitment undertaken by States parties while ratifying the relevant treaties. Why would States then refuse to implement the recommendations of these treaty bodies?

Apart from the obvious 'stick method', some other ways of convincing States to take a more positive approach to these outputs is by looking at the ways the treaty bodies could improve their own work with regard to the substance and contents of those outputs. In this particular, the practice of adopting General Comments plays a role, which should not be underestimated.

Although General Comments are now adopted by virtually all the treaty bodies, with the exception of the Subcommittee on Prevention of Torture (4), the practice takes its beginning with CERD in 1972 (5). CESCR is not an exception and already at its second session, in 1988 (paras. 366 and 367) [7], it decided pursuant to an invitation addressed to it by ECOSOC [11] and endorsed by the General Assembly [16] to begin, as from its third session, the preparation of General Comments based on the various articles and provisions of the ICESCR in order to assist the States parties in fulfilling their reporting obligations [8]. By the time the request was made, CESCR

had reviewed no less than 138 initial reports and 44 periodic reports of States parties which gave the Committee sufficient experience to develop recommendations of general character intended to contribute to the implementation of provisions of the Covenant by States parties (6).

*i) Objectives of the reporting process*

The example of the work of treaty bodies, such as the HRCttee and CESCR, shows that a particularly important role in enhancing the implementation of treaty bodies' Recommendations and Views could play those General Comments that elaborate on the objectives pursued with the obligation incumbent on States parties to prepare and submit regular reports, as well as those that clarify how States should implement such treaties.

For example General Comment 1 adopted by CESCR in 1989 (E/1989/22), on the submission of reports by States Parties to the ICESCR, has identified a number of important objectives of the reporting process among which the following:

*– to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant (para. 2) [2].*

This objective is important, since the essential first step towards promoting the realization of the rights protected by specific human rights treaty is diagnosis and knowledge of the existing situation in the relevant country. Once this diagnosis is made, treaty bodies can assist in developing carefully targeted policies, including the establishment of priorities which reflect the provisions of the relevant treaty. In this connection it can be said that one of the objectives of the reporting process is to enable the Government to demonstrate that such principled policy-making has in fact been undertaken.

States parties should prepare such reports in a timely basis. In case of failure to do so, treaty bodies have the legitimate right to address a list of questions to the relevant State party or alternatively review the performance of the State in question on the basis of any available information (7) including submissions of the relevant State party to the Universal Periodic Review (UPR) process (8).

According to CESCR, among the most important objectives of the reporting process is *to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies* (General Comment 1, para. 5) [2]. In this connection, the contribution of civil society organizations to the discussion of the reports of States parties is crucial and should be encouraged. Committees should adopt effective mechanisms preventing practices of reprisals against civil society organizations, which contribute to the work of treaty bodies with their shadow reports. In this regard the adoption of similar General Comments by all treaty bodies on the role of civil society organizations and their right to submit shadow reports to the Treaty bodies should be encouraged.

Further on this CESCR considers it one of the important aims of the reporting process *to provide a basis on which the State party itself, as well as the Committee, could effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant*. CESCR requires States parties to identify specific benchmarks or goals against which their performance in a given area can be assessed (General Comment 1, para. 6) [2].

Another important objective of the reporting process is *to enable the State party to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range of economic, social and cultural rights* (General Comment 1, para. 8) [2]. In this sense the reporting process also contributes to the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realization of each of the rights contained in the ICESCR (General Comment 1, para. 9) [2].

*ii) Nature of the legal obligations undertaken by States parties*

*An example of another important General Comment which can contribute to the implementation of Treaty Body Recommendations and Views is CESCR General Comment 3 on the nature of the legal obligations undertaken by States parties.*

General Comment 3 (E/1991/23, 1990), describes the nature of general legal obligations undertaken by State parties to the ICESCR, and in essence defines what complying with ICESCR entails.

It explains the meaning of provisions of article 2 (para. 1) of the ICESCR which states: «Each State Party to the present Covenant undertakes 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 present Covenant by all appropriate means, including particularly the adoption of legislative measures».

In this respect the CESCR examined the matters concerning the nature and the scope of State parties' obligations. The Committee notes that while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant (General Comment 3, para. 2) [2].

CESCR further notes: the fact that realization over time or in other words, progressively, is foreseen under the Covenant for most of its provisions, should not be misinterpreted as depriving the obligation of all meaningful content. According to the Committee, "progressively" *only* means that a flexible approach should be made, "reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights". However, the term «progressively» must be read in the light of the overall objective, "indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question" (General Comment 3, para. 9) [2].

Otherwise, according to the Committee, paragraph 1 of the Article 2 of the ICESCR «imposes an obligation to move as expeditiously and effectively as possible towards that goal». In this regard, CESCR considers that there is a minimum core obligation to ensure the satisfaction of, at the very least, the “minimum essential levels of each of the rights”, and the State party should demonstrate it has made every effort to use whatever resources it has to satisfy, «as a matter of priority, those minimum obligations». This obligation applies even in times of severe resources constraints, in which situation, “the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programs” (General Comment 3, para. 9) [2].

In order to assist States to fulfill their human rights commitments under the relevant treaties, including those stemming from treaty bodies’ Recommendations and Views it is also essential that all treaty bodies develop similar generic General Comments that explain for States parties to the relevant human rights treaties, what complying with those specific treaties entails.

*iii) Ways of domestic implementation of Treaty obligations*

*Close and corollary to the issue of the nature of legal obligations under a treaty is the clarification of the way in which States parties are to implement provisions of their human rights treaties domestically.*

CESCR has devoted its General Comment 9 (E/1999/22 of 1998) to this issue. CESCR notes that the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State to be taken into account. The Committee is of the view that the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place (General Comment 9, para. 1) [2].

CESCR underlines that questions relating to the domestic application of the ICESCR must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties of 1969, is that “[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”. This means that whenever domestic law is in contradiction with the international law commitments, States should modify it rather than present it as an excuse to violate international law. The second principle, CESCR said, was reflected in article 8 of the Universal Declaration of Human Rights, according to which “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law” (General Comment 9, para. 2) [2].

In this connection it is important the position taken unambiguously by CESCR according to which States should ensure that legally binding international human rights standards operate directly and immediately within the domestic legal system of each State party, so as to enable individuals to seek direct enforcement of their rights before national courts and tribunals (General Comment 9, para. 4) [2]. Doing so is

important because, as CESCR rightly notes, international law requires exhaustion of domestic remedies before a person can seek redress of their grievances with recourse to international complaints procedures. Therefore proper implementation of international law commitments is in the interest of States parties, since international law actually reinforces the primacy of national policies and remedies and views international relevant procedures only as complimentary to effective national remedies (General Comment 9, para. 4) [2].

This conclusion is very important as it clearly recognizes that law-abiding States parties should not fear the presence of an international complaints procedure mechanism. On the contrary, they should be encouraged to ratify the recently adopted in 2008, Optional Protocol to the Covenant, which entitles individuals with the right to submit petitions to the CESCR for violation of their human rights [12]. A safety net for States is that recourse to such procedures becomes necessary only there, where, either local remedies are unavailable or they have been exhausted without bringing the desired effect. The presence of such international mechanisms is therefore an incentive for States parties to implement the provisions of the relevant human rights Conventions by themselves.

It is crucial therefore that all treaty bodies clarify in similar terms to States parties to the relevant human rights treaties why is it important and in their interest full implementation of their commitments under human rights treaties, rather than ignorance of such. International law mechanisms and procedures are the best guarantee of the sovereign interests of States parties. Developing generic guidance in this area by all treaty bodies is therefore an important assurance for States parties and treaty bodies should adopt relevant similar General Comments.

*iv) Issues not directly reflected in existing treaties (the cases of the rights of persons with disabilities and the rights of the elderly persons)*

*The adoption of General Comments on issues not directly regulated by existing specific treaties is another area that can help States parties in fulfilling their human rights commitments and the implementation of treaty bodies' outputs. In this regard two areas merited specific attention by CESCR: the rights of persons with disabilities, and the right of the elderly persons.*

General Comment No. 5, adopted by CESCR in 1994 (General Comment 5) [2] deals with the rights of persons with disabilities. In this connection two facts are worth mentioning: the first is that the Convention on the rights of persons with disabilities was adopted 12 years later, i.e. in 2006; and the second is that ICESCR has no article specifically concerning persons with disabilities. While preparing this General Comment, CESCR used mainly the Standard Rules on the Equalization of Opportunities for Persons with Disabilities adopted by the UN GA in 1993 [17].

This General Comment therefore not only spearheaded efforts to adopt a specific Convention on the rights of persons with disabilities, but in the absence of this Convention it helped to close the apparent gap in the protection of the rights of persons with disabilities. Ultimately the recommendations contained in this General Comment

were taken into consideration when the Convention on the rights of persons with disabilities was drafted and adopted in 2006 [4].

In a similar case, CESCR has spearheaded efforts to adopt a specific treaty on the rights of elderly persons. In 1995 CESCR adopted General Comment 6 concerning economic, social and cultural rights of older persons (E/1996/22) (General Comment 6) [2]. This remains a pressing issue for all countries: according to forecasts the total number of persons aged 60 and above will reach 2 billion by the year 2050 [15]. This tendency might have unpredictable effects. Most States are faced with the task of adapting their social and economic policies to the ageing of their populations, especially as regards social security. In many countries, the absence or deficiencies of social security coverage are being aggravated by the emigration of the younger members of the population and the consequent weakening of the traditional role of the family, the main support of elderly persons.

CESCR reminds that article 9 of ICESCR contains an inexplicit reference to the right to retirement benefits. But neither the Covenant nor the Universal Declaration of Human Rights refers explicitly to age as one of the prohibited grounds. Meanwhile CESCR is convinced that this is not determinative of the matter, however, since the prohibition of discrimination on the grounds of «other status» could be interpreted as applying to age (General Comment 6, paras. 10–12) [2]. The Committee cautiously notes that while it may not yet be possible to conclude that discrimination on the grounds of age is comprehensively prohibited by the Covenant, the range of matters in relation to which such discrimination can be accepted is very limited (General Comment 6, para. 12) [2].

The Committee's own role in this regard is rendered all the more important by the fact that, unlike the case of other population groups such as women and children, no comprehensive international Convention yet exists in relation to the rights of elderly persons and no binding supervisory arrangements attach to the various sets of United Nations principles in this area. For this reason CESCR has been requesting that reports of the States parties reflect on the actual situation of elderly persons according to each of the rights recognized in the Covenant.

Since no-discrimination is one of the identified areas of congruence that comes across all human rights treaties [1; 3; 5; 19], it is important that all treaty bodies adopt similar/single General Comments clarifying the obligations of States with regard to important human rights issues such as the right of the elderly persons, to maximize the impact and enhance the implementation of treaty bodies' Recommendations and Views in these human rights gray areas, to which we can include the issue of the human rights of gays, lesbians and transgender persons, and the human rights of indigenous persons, among others.

### **Conclusions**

Because a number of issues are *common* to all treaty bodies (the list of such issues researched above is only but an example), it appears to me pertinent in the proc-

ess of enhancing the implementation of treaty bodies' outputs, that not only General Comments are adopted on these issues by all treaty bodies. More importantly, Committees could think of the real possibility of adopting *common joint General Comments* by all treaty bodies as a *single* document, to maximize the impact, through the importance given to the pertinent issue by all treaty bodies. I understand, the practical implementation of this proposal could bring additional difficulties, but these are not insurmountable (9). However, with the same effect, and taking the easier approach, Committees could agree through the Meeting of Chairpersons that they start adopting *similar in contents General Comments* by each treaty body under the provisions of their own treaties on pertinent issues, including those related to the areas of congruence such as non-discrimination and remedies already identified for inclusion in the Common Core Documents (9).

This would enhance in the eyes of States parties and civil society the importance of the issues reflected in the *single/similar* General Comments of all treaty bodies, and this way contribute to the implementation of treaty bodies' Recommendations and Views. For example, one particular area that merits adoption of a *single/similar* General Comment is the protection of human rights defenders (in the context of the issue of the objectives of the reporting process), and their right to submit reports to the Committees freely and unimpeded, without fear of repercussions. The crucial importance of these NGOs' submissions for the monitoring work of treaty bodies, that are required to consider the reports of States on the basis of all available information including from sources independent from States parties, cannot be emphasized enough.

The same practice should be adopted in cases in which a number of States are faulty in the implementation of specific common congruent rights provided under the relevant human rights instruments to which they are a party (10).

#### FOOTNOTES

- (1) The remaining 9 human rights mechanisms are the following: Committee on the Elimination of Racial Discrimination (CERD), Committee against Torture (CAT), Committee on the Elimination of Discrimination Against Women (CEDAW), Subcommittee on Prevention of Torture (SPT), Committee on the Rights of Persons with Disabilities (CRPD), Committee on Enforced Disappearances (CED), Committee on the Rights of the Child (CRC), Committee on the Rights of Migrant Workers (CMW), Human Rights Committee (HRCtee).
- (2) According to article 16 (para. 2a) of ICESCR «All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant». It should be noted the Economic and Social Council is one the six principal organs of the United Nations. Thus it is indeed the ECOSOC which in accordance with the Covenant has the primary mandate to accept and consider States parties' reports, and to make recommendations to the relevant States parties.
- (3) Compare, for example, the text of article 30, para. 4 of the International Covenant on Civil and Political Rights, which states: "Elections of the members of the Committee shall be held at a meeting of the States Parties to the present Covenant convened by the Secretary General of the United Nations at the Headquarters of the United Nations".



- (4) Under the Optional Protocol to the Convention against Torture, the SPT has an exclusive mandate to conduct on site visits to the States parties and make specific confidential recommendations to those States parties.
- (5) Based on article 9, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination, which entitles the Committee to make suggestions and general recommendations based on the examination of the reports and information received from the States parties, CERD adopted its first general recommendation at its fifth session in 1972 [2].
- (6) Clarifying the objectives of the general comments CESCR noted in its report addressed to ECOSOC in 1989, the following: to enable a wider dissemination of the experience gained while considering the reports of individual states; to facilitate the further implementation of the Covenant; to draw the attention of the States parties to insufficiencies identified in the reports reviewed; to suggest improvements in the reporting procedures; and to stimulate the activities of the States parties, international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant [8].
- (7) The practice is already followed by a number of treaties bodies. For example, recently in October 2011 the HRCtee at its 103rd session reviewed the situation in one State party (Malawi) in the absence of a report. It is desirable that this practice is followed by all treaty bodies.
- (8) The UPR was created by UN General Assembly resolution 60/251 of 15 March 2006, as one of the innovative mechanisms of the new Human Rights Council, with the mandate to review the human rights records of all 193 member States of the United Nations [18].
- (9) There are a number of ways in which this could be done, but which will not be discussed in this modest contribution, given its specific purpose. It suffices to note that the process of adoption of joint General Comments/Recommendations is timidly being developed in the framework of the work of two treaty bodies (CEDAW and CRC). However it has not been attempted yet by all treaty bodies, which we argue in this paper that should be done.
- (10) The important practice of developing congruent areas should be given a fresh look and expanded through this method.

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**РОЛЬ КОМИТЕТА ООН ПО ЭКОНОМИЧЕСКИМ,  
СОЦИАЛЬНЫМ И КУЛЬТУРНЫМ ПРАВАМ  
В ОСУЩЕСТВЛЕНИИ И РАЗВИТИИ ПРАВ ЧЕЛОВЕКА  
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В статье освещаются основные аспекты полномочий и деятельности договорного органа системы ООН — Комитета по экономическим, социальным и культурным правам. В ней освещаются такие важные аспекты, как особый характер Комитета, роль его замечаний общего порядка в деле прогрессивного развития норм и принципов, связанных с правами человека.

**Ключевые слова:** ООН, договорные органы, права человека, замечания общего порядка, нормы, принципы.