

# TOWARDS EFFECTIVE MONITORING OF COMPLIANCE WITH OBLIGATIONS AND PROGRESSIVE REALIZATION OF ESCR

by

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## I.

### METHODS, MISCONCEPTIONS AND MISUNDERSTANDINGS

The International Secretariat of FIAN (arguably one of the most important NGOs focusing on ESCR, and certainly one of the oldest), on the front cover of their publication Economic Human Rights: Their Time Has Come, reminds us that, "Like other human rights, economic rights are straight forward expressions of human dignity, innate to all human beings". The concepts of ESCR are basically the same as the concepts of other human rights. But there are some differences and it is precisely around the differences that misconceptions and misunderstandings abound. Two differences are especially noteworthy:

- X the principle of "**progressive realization** of ESCR; and
- X the concept of "**violation**" of ESCR and its distinction from "**failure to realize**" ESCR.

Misunderstandings relate to:

- X the very nature of ESCR--are they human rights? are they legal rights if they are not justiciable? are they "**second generation**" rights?
- X the nature of the obligation related to ESCR as being positive (doing) or negative (refraining);
- X the question of the resources needed to realize ESCR;
- X the question as to whether ESCR prescribe patterns of resource allocation.

Properly understood, many of the perceived distinctions between ESCR and CPR turn out to differences of degree rather than of dichotomy; differences of practice rather than principle. Practitioners of human rights, especially in the developed world, have long focused mainly on CPR to the neglect of ESCR. They focused mainly on a violations approach rather on a promotional approach and on the interrelationships between those two approaches.

This paper provides a checklist for monitoring progressive realization of ESCR. However, it must be readily recognized that some of the elements in such checklist are also elements relevant to monitoring violations of ESCR.

Most approaches to monitoring violations of ESCR struggle with the requirement that ESCR are to be "progressively realized". Hence, the reliance of a concept of "core content" of each ESCR which enables the labelling of "core violation" of such right. There are obvious problems in determining what the "core content" is, how to make such determination and who makes such determination? This checklist does not attempt to deal with violations of ESCR.

Rather, it is based upon a distinction between violations and compliance with obligations under the Covenant on Economic, Social and Cultural Rights. The violations approach to CPR does not draw any such distinction and treats each and every noncompliance with obligations as a violation. However, given the requirement of "progressive realization" under the CESCER, as will be shown later, it might be useful to draw a distinction between "violations" and "noncompliance with obligations" under CESCER.

The checklist provided below is one for monitoring:

- X the Covenant itself,
- X the General Comments and working methods adopted by the Committee on ESCR,
- X progressive realization of ESCR, and
- X State party compliance with obligations under CESCER.

The checklist represents a modest (possibly crude) attempt to compile and distill the jurisprudence on ESCR contained in the following sources:

- X the Limburg Principles, and
- X the Maastricht Guidelines.

The insights of various meetings (e.g., Bangalore, 1995; Vancouver, 1998) and commentaries of those with interest, experience and expertise on ESCR have also been drawn upon. The checklist has been drawn up with a national audience (governmental and non-governmental) in mind. It has been drawn up primarily for purposes of assisting technical cooperation and development cooperation towards the fuller realization of ESCR. The checklist seeks no more than to:

- X enable an assessment of aspects of the current state of realization of specific ESCR; and
- X provide a diagnostic and guide to the design of development projects and programmes with the specific objective of promoting fuller realization of specific ESCR of specific communities, groups or sectors of society.

## II.

### ELEMENTS OF A MONITORING CHECKLIST

#### 1. Monitoring Obligations Under CESR

Several aspects of obligations can be monitored:

- X obligations to respect, protect, promote and fulfil;
- X obligations of commission or of omission;
- X obligations of immediacy or of progressive realization;
- X obligations of conduct or of result.

### A. The Four Basic Human Rights Obligations

- (1) obligation to respect: requires refraining from interfering with the enjoyment of the right.
- (2) obligation to protect: requires the prevention of violations of such rights by third parties;
- (3) obligation to promote: requires raising public awareness as to the right and procedures for asserting and protecting the right (e.g., through human rights education), creating and publicizing opportunities for participation, and capacity-building to enable meaningful participation;
- (4) obligation to fulfil: requires States to take appropriate measures towards the full realization of the right.

Limburg and Maastricht focus solely on State obligations. However, given the increasing significance of non-state economic actors, it may well be argued that the obligation to respect applies to all actors, state and non-state alike. So, too, the obligation to protect, at least against the consequences of one's own acts, could apply to all actors, state and non-state alike.

The obligation to promote is of special relevance to development cooperation and deserves emphasis given the adoption of a UN Decade on Human Rights Education.

Limburg and Maastricht focus on violations and therefore do not address the obligation to promote.

### B. Obligations of Commission and Omission

One popular misconception about the difference between ESCR and CPR is that the former entail positive obligations (of commission) while the latter entail negative obligations (of restraint). In fact, both sets of rights involve both positive and negative obligations and, consequently, violations of both sets of right can occur through acts of commission (see, for example, para 14 of the Maastricht Guidelines for seven examples of such violations of ESCR) or through acts of omission (see, for example, para 15 of the Maastricht Guidelines for ten examples of such violations of ESR).

### C. Obligations of Immediacy and of Progressive Realization

Another popular misconception about CPR and ESCR is that the obligation regarding the former is one of immediate realization while the obligation regarding the latter is one of progressive realization.

It is true that CESCR does provide for "progressive realization" and acknowledges the constraints due to "the limits of available resources". But it should be emphasized that the

obligation under Article 2(i) of CESCER makes it clear that the obligation is to achieve progressively "the full realization of the rights recognized" and the jurisprudence of the Committee makes it clear that the obligation is "to move as expeditiously and effectively as possible" towards that goal of full realization.

Moreover, CESCER also does impose at least two obligations which are of immediate effect:

- X "undertaking to guarantee" that the relevant rights" will be exercised without discrimination" (Article 2(2); and
- X undertaking, "to take steps" ("to act" in the French version, "to adopt measures" in the Spanish version of the Covenant) towards "the full realization of the rights" (Article 2(1)). Here, again, the Committee has clarified that the steps taken should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.

The Committee has also clarified that there is "a minimum core obligation to ensure the satisfaction of, at the very least, minimal essential levels of each of the rights". Such minimum core obligation is one of immediacy and applies irrespective of the availability of resources of the country concerned.

#### D. Obligations of Conduct and Obligations of Result

The obligations under CESCER contain elements of both conduct and result. The obligations of conduct require action reasonably calculated to realize the enjoyment of a particular right. Article 2(1) of CESCER requires the State to use "all appropriate means, including, particularly the adoption of legislative measures". The phrase "all appropriate means" also includes, but is not limited to administrative, financial, educational and social measures. Especially "appropriate", is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee has gone on to identify specific rights for countries to consider making justiciable under national law.

Hence, an important task of monitoring would relate to an identification of "the steps" taken and the "appropriate measures" adopted. These would help assess obligations of conduct. But the Covenant also establishes obligations of result and requires States to ensure that the steps they have taken and the appropriate measures they have adopted do produce the desired results enabling the State to achieve specific targets to satisfy a detailed substantive standard.

An important task of monitoring, therefore, relates to the implementation of legislation and of other measures taken. Both national human rights commissions and NGOs can contribute to this task.

## **2. Monitoring Progressive Realization**

Monitoring of progressive realization is the main mechanism envisaged by the Covenant, and is at the heart of the system of State-party reporting to the Committee. State Parties are under an obligation to report initially, after ratification and also periodically, thereafter. The Committee has worked out its methodology for monitoring progressive realization by State Parties and has

developed a seven step process:

(a) Within two years of the Covenant's entry into force for the State Party concerned, the State must undertake a comprehensive review of:

- X national legislation,
- X administrative rules and procedures, and
- X practices

to ensure the fullest possible conformity with the Covenant. This will involve the twin tasks of:

- X amending existing laws, rules, procedures and practices which are inconsistent with the Covenant, and
- X enacting new legislation and adopting implementing measures to secure national incorporation and implementation of obligations under the Covenant.

As part of this initial reporting process, **benchmarks** will have to be set, and **baseline information** will need to be collected regarding the current situation regarding each Covenant right, in the country.

(b) Thereafter, the State is required to monitor the actual situation with respect to each of the rights, in order to be aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within the State. This will need **indicators** and **measures** which are appropriate and relevant in the country context. This is a costly and time-consuming process and involves the gathering of:

- X aggregated national statistics and estimates,
- X special data regarding any worse-off regions or areas of the country,
- X specific data regarding groups which appear to be "particularly vulnerable or disadvantaged".

Countries may require international assistance and cooperation to undertake this process of monitoring and, if so, they may note this fact in their report to the Committee, indicating the nature and extent of the international assistance needed.

(c) The above step of monitoring is designed to give a detailed overview of the existing situation. The Committee sees the principal value of such an overview as providing the basis for establishing **priorities** (reflecting the provisions of the Covenant) and elaborating "clearly stated and carefully targeted **policies**". The third step of the reporting process requires the government to report as to the priorities it has set and the policies it has adopted. This obligation is explicitly stated in Article 14 of the Covenant (regarding free and compulsory primary education) and the Committee is of the view that the obligation "to work out and adopt a detailed plan of action for the progressive implementation" of each of the covenant rights "is clearly implied by the obligation in Article 2, paragraph 1" to take steps... by all appropriate means.

(d) The fourth step relates to the **preparation** and **consideration** of the Report at the national level. The Committee encourages State Parties:

- X "to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies";
- X to encourage "inputs by such nongovernmental groups into the preparation of their reports"; and
- X to ensure "the widespread dissemination of their reports with a view to enabling comments to be made by the public at large".

(e) The fifth step involves the State Party itself, and the Committee, "effectively" evaluating "the extent to which progress has been made towards realization of the obligations contained in the Covenant". For this purpose, the Committee is of the view that, "global benchmarks are of limited use, whereas national or other more specific benchmarks can provide an extremely valuable indication of progress". Thus, for example, the Committee suggests the setting of specific goals with respect to:

- X reduction of infant mortality,
- X the extent of vaccination of children,
- X the intake of calories per person,
- X the number of persons per health-care provider, etc.

Of course, in some countries, some of these goals and benchmarks may be more difficult to measure than others. The first two of the above four are perhaps easier to track than the third (caloric intake per person). For the fourth, it may be easier to start with rough measures such as ratio of licensed medical practitioners to population, and gradually develop more specific indicators that will cover paramedics, primary health care workers, etc., and that will differentiate on an urban-rural basis as well

(f) The sixth step involves the State Party itself, developing a better understanding of the problems and shortcomings encountered in efforts to realize, progressively, the rights and to report on "factors and difficulties" inhibiting such realization. This, then, provides "the framework within which more appropriate policies can be devised"

(g) The seventh step involves the Committee and the State Parties as a whole to:

- X "facilitate the exchange of information among States";
- X "develop a better understanding of the common problems faced";
- X develop "a fuller appreciation of the type of measures which might be taken to promote effective realization", and
- X "identify the most appropriate means by which the international community might assist States, in accordance with Article 22 and 23 of the Covenant".

The above seven step method is set out in General Comment 1 adopted by the Committee at its Third session in 1989. The next year, at its Fourth session, the Committee adopted General Comment 2 which details international technical assistance measures under Article 22 of the Covenant. This General Comment is of special relevance to National Human Rights Commissions who are planning to seek technical cooperation assistance from the OHCHR and/or development cooperation assistance from UNDP and the UN Development Group.

National Human Rights Commissions and NGOs can contribute to any (or all) of the above seven steps; in general or relating to a specific right (e.g., education) of a specific social sector (e.g., the girl child); before, during or after the preparation of the report by the State Party.

### **3. Publicizing and Monitoring Responses to the Concluding Observations of the Committee on a State Party Report Under the Covenant.**

The Committee carefully studies the report submitted with the State Party. It enters into a dialogue with the State Party on the basis of the report submitted, seeking clarifications and elaborations. It then submits its Concluding Observations on the report which form a very important basis for ongoing and future monitoring by national human rights commissions and NGOs. A typical Concluding Observation contains:

- (a) Commendation on positive measures taken and best practices adopted. There remains the twin tasks of ensuring the continuance of such measures and practices and of evaluating the impact thereof so one can move from conduct to result.
- (b) Identification of areas where problems persist. These warrant ongoing monitoring at the national level.
- (c) Recommendations and suggestions as to measures to be taken by the State Party.

There is a crucial task to be played in publicizing such recommendations and measures (especially in local languages and dialects), obtaining feedback and response, and reappraising the "steps" taken and the "appropriateness" of the measures. Indicators and measures adopted may need to be recalibrated or revised. Goals and targets set may also need reappraisal and revision. The success of the reporting process under the Covenant is crucially linked to the follow-up efforts launched at the national level, responding to the Concluding Observations. National Human Rights Commissions and NGOs have crucial roles to play:

- X Promoting human rights education on the report and related issues.
- X Developing disaggregated data and statistics on specific groups (e.g., women, children) or on specific areas or regions of the country.
- X Monitoring and promoting participation in future, report-related processes. The principle of subsidiarity (that decisions should be taken as close as possible to the level at which they impact) can be applied to ensure participation in decision making on economic,

social and cultural rights. Indeed, a variation of that principle can be developed to ensure that accountability is also susceptible of being secured as close as possible to the level at which such decisions impact.

- X Justiciability at the national level is a possible approach to enforcement of several ESCR, as the Committee has clearly articulated in respect of housing rights. National legal aid programmes can prioritize support for legal assertion of ESCR. There is need also to devise other forms of enforcement as an alternative to litigation.
- X Dialogue with UN agencies (UNDP, UNICEF, OHCHR) may catalyze technical assistance and development programme initiatives responsive to the Concluding Observations and the needs and priorities of the country.

In sum, much can be done to take economic, social and cultural rights seriously and thereby ensure that concepts of universality and indivisibility move from the realm of rhetoric to reality.