

# The Role of the UN Committee on Economic, Social and Cultural Rights in Strengthening Implementation and Supervision of the International Covenant on Economic, Social and Cultural Rights<sup>1</sup>

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### I. Introduction

In 2002, it will be fifteen years since the UN Committee on Economic, Social and Cultural Rights (hereafter the CESCR or the Committee) started its supervisory role in the field of economic, social and cultural rights. Central to the work of the Committee is the key obligation of Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (hereafter the Covenant): the obligation for State Parties to take steps aimed at the progressive realisation, to the maximum of its available resources, of the rights listed in the Covenant.<sup>2</sup> Supervision of the realisation of economic, social and cultural rights is both a complex and challenging issue. There are a number of reasons for this. First, there is a lack of a common and agreed understanding of the meaning of these rights and of obligations of states. Secondly, it is being recognised that there is a big variety and diversity of means and measures to make these rights operational. Thirdly, there is a complex relationship between the rights listed in the treaty and the availability and allocation of resources, taking into account the ability and/or inability of states and the presence or lack of political will to implement the rights. Finally, there is the fact that other actors than the state play a role in the process of realisation of economic, social and cultural rights. These other actors include international financial institutions (IMF, World Bank), multinational corporations and other states. The question is whether these other actors are also bound by the provisions of the

<sup>1</sup> A revised version of a paper prepared for the Expert Seminar on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Leuven (Belgium), 30 November 2001. See for an early contribution on the work of the Committee, *B. Simma*, Der Schutz wirtschaftlicher und sozialer Rechte durch die Vereinten Nationen, VRÜ 25 (1992), pp. 382-393.

<sup>2</sup> Adopted in 1966; in force since 1976. Presently 145 States Parties.

Covenant. Consequently, from this perspective, the text of the Covenant does not reflect present-day developments towards globalisation and privatisation. When the Covenant was drafted in the 1950's and 1960's, the state was still the principal actor to rely upon for the realisation of economic, social and cultural rights, and there was optimism about world-wide economic growth and rising levels of welfare also for the developing countries. The Covenant reflects this spirit. All the factors just listed complicate implementation and supervision of the Covenant. In this paper, I will discuss some basic characteristics of the Committee and make some observations on the state reporting procedure as developed by the Committee over the years. I will also deal with the work of the Committee relating to the clarification of treaty standards. Finally, I will discuss a number of arguments in favour of a complaints procedure in the form of an Optional Protocol to the Covenant as a future instrument to strengthen international supervision.

## **II. The Examination of State Reports by the CESCR**

### *1. The Committee*

The United Nations Committee on Economic, Social and Cultural Rights was established in 1985 by a decision of the Economic and Social Council (ECOSOC) of the UN.<sup>3</sup> Therefore, the Committee is not a body established by treaty, as the Human Rights Committee is<sup>4</sup>, but it is a subsidiary body of ECOSOC. The CESCR held its first session in 1987. Due to the fact that the Committee is a subsidiary body of ECOSOC, it has not been hampered by the constraints of a treaty text which would have limited its possibilities to deal with state reports and grant access to non-governmental organisations. As a result, it has been able to develop its working methods quickly and flexibly.<sup>5</sup> The Committee is composed of 18 experts in the field of economic, social and cultural rights who serve in their personal capacity and have an independent status which means that they are under no instruction of the governments which nominated them. Members are elected by ECOSOC from the States Parties. There is a geographical diversity of Committee members, coming from all parts of the world. The Committee meets twice a year in Geneva for a three week session. Its mandate is to examine state reports which governments are under an obligation to submit periodically to ECOSOC.<sup>6</sup>

<sup>3</sup> ECOSOC Decision 1985/17.

<sup>4</sup> The body which supervises the observance of the International Covenant on Civil and Political Rights by States Parties. See Article 28 ICCPR.

<sup>5</sup> For an overview of the present working methods of the Committee see the latest annual report, UN Doc. E/2002/22.

<sup>6</sup> See Articles 16 and 17 of the Covenant.

## 2. *The dialogue between the Committee and the State Party*

When considering a state report, the Committee is entering in a dialogue with representatives of a government. On the basis of the state report, which has already been submitted earlier, the Committee poses questions to the governmental representatives about the level of implementation of the treaty standards in the country concerned, the progress made and the factors and difficulties encountered. Government officials which are present at the session are supposed to answer these questions in a way which gives insight about the implementation of economic, social and cultural rights in that country. This dialogue has been characterized as "constructive"<sup>7</sup>, because of its supposed mutually beneficial nature: on the one hand it helps the Committee to understand better the nature of problems which negatively influence the implementation of treaty standards in a large group of states, on the other hand, the comments made by the Committee may help governments to implement better the treaty standards. The discussions between a treaty supervisory body and a government have also been characterized as a "direct dialogue".<sup>8</sup> This qualification reflects more the fact that the consideration of a state report is part of a process of a government's international accountability for the realization of human rights before an international supervisory body which presents a judgment about the performance of the government concerned. In the past, members of the Committee have stressed that the Committee is not a court and does not condemn states for not complying with their treaty obligations. However, the practice of the Committee over the last ten years has changed to a certain extent. The Committee has developed its mandate in ways that point more towards the taking up of a quasi-judicial role. It has stressed its authority as the central supervisory body to interpret the Covenant provisions. In addition, it has begun to receive information from non-governmental organisations prior to the consideration of state reports. Finally, it has adopted the practice of making "concluding observations" based on the consideration of a specific state report. These concluding observations contain a part on positive aspects with respect to the implementation of economic, social and cultural rights in the state concerned, a part on issues of concern, and a final part on suggestions and recommendations which aim at a better implementation on treaty standards. In a number of cases, the CESCR has made comments, as part of the concluding observations, as to whether or not the state concerned had acted in accordance with its treaty obligations. By doing so, the Committee has actually characterized specific situations as "violations" of state obligations, although avoiding this term in the concluding observations.<sup>9</sup>

<sup>7</sup> *Ph. Alston*, *The International Covenant on Economic, Social and Cultural Rights*, in: *Manual on Human Rights Reporting*, United Nations, Geneva, 2nd ed., 1997, pp. 65-170, at p. 160.

<sup>8</sup> This qualification has been used by Fausto Pocar, former Chairperson of the Human Rights Committee.

<sup>9</sup> See, for example, UN Doc. E/C.12/1994/15 on the Dominican Republic and UN Doc. E/C.12/1/Add.23 on Nigeria.

### 3. *Non-reporting States and overdue reports*

The obligation to report is a legal obligation which rests upon states. There is a number of states, however, which have not so far submitted a single state report since becoming a Party to the Covenant. Other states are significantly overdue in submitting their report. This is a very unsatisfactory situation which has been unacceptable for the Committee, because it bears the risk of undermining the whole idea of international accountability for human rights implementation. Therefore, the Committee began the practice of discussing the situation of economic, social and cultural rights in such countries without having a report at its disposal. It will then base its examination and observations on alternative sources of information drawn from NGO's, the press and from other UN (specialised) agencies.<sup>10</sup>

### 4. *Follow-up procedure*

The Committee has also adopted a procedure to follow up the way in which governments give effect to the concluding observations.<sup>11</sup> States should provide additional, detailed information about specific issues identified in the concluding observations, in particular if there is a pressing reason to do so, for example, in case of future forced evictions, or a dangerous health situation due to pollution by industrial plants. In this manner the Committee keeps a finger to the pulse and the country under a kind of permanent supervision. In exceptional cases, the Committee may even ask the government concerned to accept a mission composed of Committee members to study a situation on site.<sup>12</sup> The success of the follow-up procedure depends, of course, on the willingness of the government concerned to co-operate with the Committee, which means, the willingness to provide additional information before a specific dead-line set by the Committee, or to receive a mission of Committee members.<sup>13</sup>

<sup>10</sup> See CESCR, Report on the twenty-second, twenty-third and twenty-fourth sessions (2000), UN Doc. E/2001/22, paras. 47-49.

<sup>11</sup> See UN Doc. E/2001/22, paras. 43-46.

<sup>12</sup> Missions of the Committee have been conducted to the Dominican Republic, Panama and The Philippines.

<sup>13</sup> See on this follow-up procedure, *F. Coomans*, Follow-Up Action to State Reporting on Human Rights: Procedure and Practice of the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights, in: *F. Coomans et al.* (eds.), *Rendering Justice to the Vulnerable*, Kluwer Law International, The Hague, 2000, pp. 83-98.

### III. NGO Participation in the Work of the Committee

There are several ways in which NGO's may participate in the work of the Committee. Usually, their role is linked to the state reporting process. They may be involved during three stages: before, during and after the examination of a state report by the Committee.

#### 1. Preparatory stage

Once the report of a state has been submitted to ECOSOC, there are ample opportunities for NGO's to submit alternative information to the Committee. NGO's may produce so-called 'parallel' or 'shadow' reports to the official governmental report as a means to complement, correct, comment and criticize the official position and information provided by the state. There is a growing practice in a number of states, especially developing countries, to establish a coalition of NGO's that work together to compile relevant information and draft a joint shadow report which covers a number of thematic issues about the implementation of the rights listed in the Covenant.<sup>14</sup> A state report on the implementation of the Covenant deals with issues which may be approached from a human rights perspective, but also from a development perspective. Therefore, there is good reason to bring together human rights NGO's and development NGO's and try to integrate information in a shadow report from 'a human rights approach to development' perspective.<sup>15</sup> Shadow reports may cover the whole range of Covenant rights or just one or two articles/issues depending on the expertise and experience of the NGO's involved and the amount of reliable, alternative information available. It may be useful for national NGO's to ask for the support from the international offices of International Non-governmental Organisations to help scrutinise governmental policies and write the report.<sup>16</sup>

This NGO information may be presented orally to the Committee during a meeting of the pre-sessional working group of the Committee which meets six months before the consid-

<sup>14</sup> Information on the situation of economic, social and cultural rights in Mexico, prepared by a coalition of NGO's, see UN Doc. E/C.12/1999/NGO/3.

<sup>15</sup> See *M. Brouwer*, Making ESCR meaningful to people, paper presented at the SIM Conference Following Up the Good Work, Utrecht, 28-29 September 2001. In her paper, Brouwer discusses interesting examples of NGO cooperation and rights based approaches to development issues from Mexico and Colombia.

<sup>16</sup> See for examples concerning children's rights *C. Price Cohen*, The United Nations Convention on the Rights of the Child: Involvement of NGO's, in: *Th. Van Boven et al.* (eds.), *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors*, Netherlands Institute of Human Rights, Utrecht, SIM Special no. 19, pp. 169-184, at p. 182. See also the 1999 Parallel Report on Violations of the Human Right to Education in Cameroon, prepared with the help of World University Service-International (on file with the author).

eration of the state report by the plenary Committee. The purpose of this pre-sessional meeting is to prepare the consideration of the state report and for that purpose there is a country rapporteur who is in charge of drafting a list of questions or issues to be sent to the government which should be addressed by the governmental representatives during the examination of the state report. Written NGO information may also be sent to the secretariat of the Committee or to the country rapporteur before the meeting of the pre-sessional working or at a later stage, prior to the consideration of the state report. The alternative information submitted by NGO's in their shadow reports and explained orally may be very useful for the Committee to complement the governmental information which usually gives a rather rosy and often selective picture of the situation of economic, social and cultural rights.

## 2. *Committee stage*

It is also possible for NGO's to present oral information to the Committee on the first day of each session. This oral statement may deal with questions such as the opinion of the NGO about the government report, indicate whether or not there has been any domestic government/NGO consultation or cooperation through the reporting process, discuss the main critical points of the parallel report or propose solutions to the problems encountered in the implementation of the Covenant.<sup>17</sup> Sessions of the Committee where government reports are being discussed are public, so NGO's may observe the dialogue between the Committee members and the government representatives, but they are not allowed to intervene.

## 3. *Follow-up stage*

The final stage of NGO participation concerns the period after the examination of the state report and the adoption of concluding observations by the Committee. This stage is crucial, because it deals with the follow-up given to the Committee's suggestions and recommendations by the government. This stage is important for a NGO, because it may act as a kind of watch-dog to monitor the government's performance in implementing the Committee's recommendations. NGO's may ask the government to publish the concluding observations of the Committee in order to inform the public at large and raise awareness, and/or

<sup>17</sup> Detailed guidelines for the involvement of NGO's in the work of the Committee have been published in the report of the Committee on its 2000 sessions, reproduced in U.N. Doc. E/2001/22, Annex V. See para. 23 of this Annex. For a detailed checklist for NGO participation in the work of the CESCR, see A. *McChesney*, *Promoting and Defending Economic, Social & Cultural Rights – A Handbook*, American Association for the Advancement of Science, Washington, D.C., 2000, pp. 167-177.

disseminate the concluding observations themselves. They may translate the concluding observations into local languages and into more concrete terms and policy goals which can be monitored by the NGO's. Another strategy for NGO's is to organise a follow-up meeting with representatives of the government, members of parliament and NGO's to discuss the implications of the concluding observations. It may even be useful to invite the Committee's Country Rapporteur to attend this follow-up meeting at the national level and to explain the meaning of the concluding observations. NGO's may lobby with members of parliament for a discussion of the concluding observations in parliament. NGO's may also report back to the Committee on a regular basis about the accomplishments of a government in the field of implementation.<sup>18</sup> This information may accordingly be useful in the process of the preparation of the consideration of the next periodic state report.

Rounding up, it may be said that the Committee has created several ways to involve civil society in the reporting process in order to prevent the process from becoming too much diplomatic and government-oriented without a link to the situation and experiences of ordinary people and all-day reality. Therefore, access for NGO's to the Committee is relatively easy and the threshold is rather low. Whether NGO's use this procedure depends on their knowledge about the Covenant reporting procedure, the level of awareness of the Covenant rights with NGO's at the domestic level and their ability to collect and present alternative information working from a "rights-based approach".

#### **IV. Clarification of Treaty Standards**

##### *1. General Comments*

Since its establishment in 1987, the Committee has tried to shed more light on the meaning of the standards listed in the Covenant in terms of rights for individuals and obligations for states. This is important, because clarification is essential for assessing state performance in the field of economic, social and cultural rights. For that purpose, the Committee has begun to draft and adopt so-called 'General Comments'. These are authoritative interpretations by the Committee of Covenant provisions based on the experience gained from the examination of state reports, Days of General Discussion on thematic issues and developments on economic, social and cultural rights in the framework of the United Nations. So far, the Committee has adopted 14 General Comments. The majority of them deal with the normative content of rights, the specification of state obligations and present examples of violations of rights. It is interesting to note that General Comments often reflect developments in academic debates about human rights, as well as involvement and contributions of NGO's in the field of specific rights, such as the right to adequate housing and the right to food.

<sup>18</sup> U.N. Doc. E/2001/22, Annex V, para. 27.

For example, the general comment on the right to adequate housing and the one on forced evictions<sup>19</sup> were inspired by contributions from NGO's such as the Centre for Housing Rights and Evictions (COHRE), while the comment on the right to food reflects much input from FoodFirst International Action Network (FIAN).<sup>20</sup> These Comments are also important, because they may serve as a semi-legal sources to deal with individual complaints by the Committee, once this procedure has been adopted.

By way of illustration, I will deal hereafter briefly with two crucial General Comments, one on the nature of State's Parties obligations under the Covenant (Article 2(1)) and the other one on the right to adequate food (Article 11(1)).

## 2. *General Comment No. 3 on the Nature of States Parties Obligations*

This comment gives an interpretation of Article 2(1) of the Covenant, the treaty's key provision. Article 2(1) reads as follows:

'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, *to the maximum of its available resources*, with a view to *achieving progressively the full realisation* of the rights recognised in the present Covenant *by all appropriate means*, including particularly the adoption of legislative measures.'<sup>21</sup>

General Comment no. 3, on the nature of States Parties obligations, was adopted in 1990.<sup>22</sup> The drafting of this comment was inspired by the so-called "Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights", adopted during an expert seminar held in Maastricht (The Netherlands) in 1986.<sup>23</sup> These Principles already give an authoritative interpretation of the key issues of Article 2(1), suggested by experts in the field of international law and human rights law. In General Comment no. 3, the Committee explains that, although the full realisation of the treaty rights may be achieved progressively, states have a legal obligation to take steps towards realisation within a reasonably short time after the Covenant's entry into force for the states concerned. In addition, Article 2(1) imposes an obligation on states to move as expeditiously and effectively as possible towards full realisation of the rights. From the perspec-

<sup>19</sup> General Comments no. 4 (1991) on the right to adequate housing and no. 7 (1997) on forced evictions.

<sup>20</sup> General Comment no. 12 (1999) on the right to adequate food.

<sup>21</sup> I have emphasised the key clauses of this provision.

<sup>22</sup> General comments of the Committee can be found at the UN Treaty Bodies Database, <http://www.unhchr.ch/tbs/>

<sup>23</sup> The Limburg Principles have been published in UN Doc. E/CN.4/1987/17, Annex and in the Human Rights Quarterly, Vol. 9 (1987), p. 122-135.



tive of progressive realisation, deliberately retrogressive measures are problematic and, in the opinion of the Committee, would require a very careful consideration and a complete justification in light of the total package of rights provided for and the requirement to use the maximum available resources.<sup>24</sup> In the view of the Committee, states have certain minimum core obligations to ensure, at the very least, minimum essential levels of each of the rights. If that would not be the case, the Covenant would lose its meaning as an instrument for the protection of human rights. The Committee is rather strict in this respect: if in a state a significant number of people is deprived of essential foodstuffs, essential primary health care, or of basic shelter or the most basic forms of education, such a state is failing to discharge its obligations under the Covenant. This is diplomatic or veiled language to indicate that a violation of rights has occurred. In case a state has to cope with inadequate resources, the obligation remains for the state to ensure, as a matter of priority, those minimum core obligations. In times of economic recession or during a process of financial adjustment, the government must do everything it can to protect the most vulnerable members of society from the negative consequences of this situation on the enjoyment of their social and economic rights.<sup>25</sup> This General Comment is important, because it gives guidance to states about the nature, scope and object of their obligations under the Covenant. It should be used by governments as a kind of touch-stone for legislation and policy in the field of economic, social and cultural rights.

### 3. *Progressive realisation and violations*

Still, measuring and monitoring the progressive realisation of economic, social and cultural rights is a complicated issue. For example, with respect to the clause "the maximum of available resources", it has been argued by one commentator that "[I]t is a difficult phrase – two warring adjectives describing an undefined noun. 'Maximum' stands for idealism; 'available' stands for reality. 'Maximum' is the sword of human rights rhetoric; 'available' is the wiggle room for the state".<sup>26</sup> So far, it has been impossible to develop a comprehensive method for analyzing and assessing resource availability and usage. In response, it has been suggested by Audrey Chapman to change the approach for evaluating compliance with the standards of the Covenant.<sup>27</sup> In addition to measuring progressive realisation, she has proposed to identify violations of economic, social and cultural rights as a comple-

<sup>24</sup> General Comment no. 3, para. 9.

<sup>25</sup> General Comment no. 3, para. 10-12.

<sup>26</sup> R.E. Robertson, *Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights*, in: *Human Rights Quarterly*, Vol. 16 (1994) at p. 694.

<sup>27</sup> A.R. Chapman, *A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights*, in: *Human Rights Quarterly*, Vol. 18 (1996), pp. 23-66.

mentary approach. Linking up with the Limburg Principles, which already contain a section on violations<sup>28</sup>, and General Comment no. 3, she suggests to distinguish between three types of violations: violations resulting from actions and policies on the part of governments; violations related to patterns of discrimination; and violations related to a state's failure to fulfil the minimum core obligations resulting from specific rights.<sup>29</sup> This idea was taken up by the Centre for Human Rights of Maastricht University, which hosted an expert meeting in January 1997 to explore this proposal. The result of this seminar was the adoption of the so-called Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.<sup>30</sup> These Guidelines depart from the *acquis* of the Limburg Principles and General Comment no. 3 and distinguish between violations through acts of commission and violations through acts of omission. In other words, violations can either occur through the direct action of states or other entities insufficiently regulated by the state, or through the omission or failure of states to take the necessary measures stemming from legal obligations. The Guidelines present a number of examples of both categories.<sup>31</sup> Both the Limburg Principles and the Maastricht Guidelines were meant to support the work of the Committee and to strengthen implementation and supervision of the Covenant.

#### 4. *General Comment no. 12 on the right to adequate food*

The General Comments on the right to food, education and health, adopted by the Committee in 1999 and 2000, reflect to a certain extent the conceptual developments discussed above, plus some other ideas which originated in academic thinking and NGO contributions about economic, social and cultural rights. This can be seen from General Comment no. 12 on the right to adequate food.<sup>32</sup> This lengthy comment deals with several aspects of Article 11 of the Covenant, such as its normative content, obligations and violations, implementation at the national level and international obligations of States Parties and international organisations. As far as the normative content of the right is concerned, the Committee is of the view that the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. This broad interpretation not only refers to the nutritional aspect of food as a means to stay alive, but also to the economic activity of food production for subsistence and make a living.

<sup>28</sup> Limburg Principles, Part I D (paras. 70-73).

<sup>29</sup> Chapman, at p. 43.

<sup>30</sup> Published in the Human Rights Quarterly, Vol. 20 (1998), pp. 691-705.

<sup>31</sup> See Guidelines no. 14 and 15.

<sup>32</sup> Adopted in May 1999, UN Doc. E/C.12/1999/5.

## 5. *Core content*

Next, the Committee identifies the so-called ‘core content’ of the right to adequate food. This concept needs some explanation. As has been outlined above, General Comment no. 3 uses the notion of “minimum core obligations to ensure the satisfaction of, at the very least, minimum essential levels of each of the [Covenant] rights”. One may argue that core obligations emerge from the core content (or minimum essential level) of each separate right. In other words, the core content of a right is its essence, that is, those essential elements without which a right loses its substantive significance as a human right.<sup>33</sup> This concept is useful for two reasons. The first reason is the need to clarify the normative content of economic, social and cultural rights: what does a specific right really embody? The second reason is the need to make the concept of violations of economic, social and cultural rights more concrete. Non-observance of the core content of a right would then amount to a violation of the right concerned. The Committee in its General Comment on the right to adequate food then defines the core content of this right. It implies “the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”<sup>34</sup>

## 6. *Identifying obligations and violations*

Departing from Article 2(1) of the Covenant and General Comment no. 3, the Committee then defines the nature of state obligations emanating from the right to adequate food. For that purpose, the Committee uses another concept developed in academic thinking. This is the so-called typology of obligations, or three types of obligations on States Parties meant to specify obligations of states and better identify violations of rights. This typology has been constructed by the former Special Rapporteur on the Right to Food of the UN Commission on Human Rights, Mr. Asbjørn Eide.<sup>35</sup> In its General Comment, the Committee distinguishes between state obligations to respect, to protect, and to fulfil. In addition, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.

<sup>33</sup> Compare Limburg Principles, para. 56. See for a discussion of this concept, *F. Coomans*, The right to education as a human right: an analysis of key aspects, UN Doc. E/C.12/1998/16, paras. 9-16.

<sup>34</sup> General Comment no. 12, para. 8. The Committee further specifies the meaning of the concepts ‘dietary needs’, ‘free from adverse substances’, ‘cultural or consumer acceptability’, ‘availability’ and ‘accessibility’. See paras. 9-13.

<sup>35</sup> See his Final Report, *The Right to Adequate Food as a Human Right*, UN. Doc. E/CN.4/1987/23. For the application of the typology of obligations to the right to education, see *F. Coomans*, *supra* note 33, paras. 25-28 and p. 21.

A few examples may explain how this typology works with respect to the right to food. The obligation to respect existing access to adequate food requires states not to take any measures that result in preventing such access, for example, evicting people from their land. The obligation to protect requires measures by the state to ensure that corporations or individuals do not deprive individuals of their access to adequate food, for example, big landowners chasing small farmers away from their land or large scale plantations occupying land held by small farmers. The obligation to fulfil (facilitate) implies that the state must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, for example, starting a policy and programme on land reform meant to facilitate access to agricultural land for small farmer families. The obligation to fulfil (provide) means that states have an obligation to ensure that right directly, for example by providing food directly whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their own disposal. This obligation is applicable, for example, in cases people die of starvation due to natural disasters or are being displaced due to armed conflict.<sup>36</sup>

In determining what are violations of the right to adequate food, the Committee links up with the language of General Comment no. 3 by saying that a violation occurs when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. Violations may occur through the direct action of the state itself or other entities insufficiently regulated by the state. Examples include the discriminatory denial of access to food to particular individuals or groups, or the prevention of access to humanitarian food aid in internal conflicts or other emergency situations.<sup>37</sup>

## 7. *Benchmarks*

The Committee not only uses the concept of a core content to identify violations, but also asks states to set verifiable *benchmarks* for national and international monitoring state performance. Benchmarks are targets established by governments themselves in relation to the implementation of each of the economic, social and cultural rights. These benchmarks may be quantitative (for example, a specific number of hospital beds per 10.000 inhabitants to be realised within a specific time frame) or qualitative (for example the development of a curriculum for intercultural education for primary schools within a period of three years). Therefore, benchmarks will differ from one state to another, reflecting both the availability of resources and the policy choices and priorities made by governments. In its General Comment on the right to food, the Committee observes that implementation at the national

<sup>36</sup> General Comment no. 12, para. 15.

<sup>37</sup> General Comment no. 12, paras. 17-19.

level "will require the adoption of a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives, and the formulation of policies and corresponding benchmarks".<sup>38</sup>

In my view, these General Comments are of major importance in shedding more light on the content of treaty standards in terms of rights and obligations. They give important guidelines and clues for governments for national policy and legislation with a view to implementation of the rights. They also provide the Committee with criteria for better monitoring and assessing state performance in the field of economic, social and cultural rights. Finally, the general comments are useful for NGO's in holding states accountable for treaty compliance and analysing and monitoring governmental policy in terms of human rights obligations.

## **V. The human rights dimensions of poverty**

Recently, the Committee has taken up the issue of the human rights dimensions of poverty eradication policies. It has published a statement on that subject, the purpose of which is to encourage the integration of human rights into poverty eradication policies by outlining how human rights can empower the poor and enhance anti-poverty strategies.<sup>39</sup> The Committee is of the view that poverty constitutes a denial of human rights. From the perspective of human rights, poverty may be defined "as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights".<sup>40</sup> The Committee then lists a number of essential characteristics of the international human rights framework which should be part of anti-poverty policies and strategies. These include the relevance and interdependence of all human rights for anti-poverty strategies, the application of the principles of non-discrimination and equality in anti-poverty policies, the principle of active and informed participation of those affected by anti-poverty policies, in particularly vulnerable groups, and finally, the principle of accountability for compliance with (core) obligations by the state and other duty-holders, such as international organisations.<sup>41</sup> It is a good example of a human rights approach to

<sup>38</sup> General Comment no. 12, para. 21.

<sup>39</sup> Poverty and the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2001/10, adopted on 4 May 2001, para. 3.

<sup>40</sup> *Idem*, para. 8.

<sup>41</sup> *Idem*, paras. 9-18.

development related issues. This statement of the Committee links up with the strategy initiated by UNDP to integrate human development and human rights.<sup>42</sup>

In May 2001, the Committee organized a day of general discussion on the issue of "Economic, Social and Cultural Rights in the Development Activities of International Institutions". Part of the discussion dealt with the tension between obligations of developing states on the basis of financial agreements with the International Monetary Fund and World Bank to cut social spending in order to reorganise governmental expenses and the state budget on the one hand, and obligations of states under the Covenant to realise progressively social rights on the other hand. Members of the Committee emphasised the need to integrate the human rights dimension into strategies and policies to reorganise the state budget and to make sure that the enjoyment of basic rights of the vulnerable part of the population are being guaranteed. In other words, governments should give priority to their obligations in the Covenant on Economic, Social and Cultural Rights.<sup>43</sup>

## **VI. An Optional Complaints Procedure**

Presently, the Covenant lacks a procedure which offers individuals and groups the possibility to lodge a complaint with the Committee about an alleged violation of a right listed in the Covenant. The Committee has extensively discussed the pro's and con's of such a procedure and has made a proposal for a draft treaty text which is the subject of discussion within the framework of the UN Commission on Human Rights.<sup>44</sup> Such a complaints procedure would greatly strengthen the supervisory role and impact of the Committee. It would give the Committee the opportunity to give its views about such complaints, comparable to the already existing complaints procedure under the Optional Protocol to the International Covenant on Civil and Political Rights. Without going too much into detail,

<sup>42</sup> See UNDP's Human Development Report 2000, Human Rights and Human Development, New York/Oxford, 2000, notably chapter 4.

<sup>43</sup> The report of this discussion is contained in UN Doc. E/C.12/2001/SR.21 and SR.22.

<sup>44</sup> See UN Doc. A/CONF.157/PC.62/Add.5, Annex II and UN Doc. E/CN.4/1997/105. See generally, *F. Coomans / F. van Hoof* (eds.), *The Right to Complain about Economic, Social and Cultural Rights*, Netherlands Institute of Human Rights, Utrecht, SIM Special No. 18, and *K. Arambulo*, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights – Theoretical and Procedural Aspects*, Intersentia-Hart, Antwerp, 1999. See also UN Commission on Human Rights Resolution 2001/30. In this resolution the Commission decided to appoint an independent expert to examine the question of a draft Optional Protocol. Next, Mr. Kotrane (Tunisia) was appointed independent expert. He will submit a preliminary report to the 58th session of the Commission in April 2002. This report will be published as UN document E/CN.4/2002/57 (not yet available at the time of writing this contribution).

this section will discuss the arguments in favour of the establishment of such a complaints procedure in the form of an optional protocol to the Covenant.<sup>45</sup>

1. *Effects of scrutiny at the international level for the application of standards at the national level*

As long as the majority of the provisions of the Covenant are not the subject of any detailed scrutiny at the international level by the Committee, it is not very likely that they will be subject to such scrutiny at the national level by a judicial body either. The main reason is for this is that treaty provisions which are stated in very general terms are not very likely to be applied directly or indirectly by judicial or administrative bodies, because of the lack of clarity about their implications for the domestic legal order. The complaints procedure could fill that gap, because the Committee could give authoritative interpretations of treaty standards. From this perspective, a complaints procedure would help to tackle and rebut arguments about the alleged non-justiciable nature of economic, social and cultural rights.<sup>46</sup>

2. *Limitations of the reporting procedure*

The reporting procedure is not the right mechanism to deal with specific cases and the application of pieces of national legislation in concrete cases. The reporting procedure is suitable to deal with the general situation of the level of realisation of economic, social and cultural rights in a given country. In addition, the success of the reporting system depends on the willingness of the government to submit a report and to take part in the dialogue with the Committee. Even alternative information coming from NGO's usually lacks the detailed and precise nature necessary for an in-depth case analysis. Therefore, the Committee presently does not have an instrument to deal with alleged violations of the Covenant provisions in individual cases. A complaints procedure brings concrete and tangible issues of alleged violations of rights into play for which individuals seek relief. This cannot be done in the framework of the reporting procedure. A particular case would require the complainant to submit detailed and precise information in writing and the government to respond in the same manner. The procedure would force the complainant to draft his or her complaint in precise formulations, framed in terms of rights and obligations under the

<sup>45</sup> This overview is partly based on the analytical paper on an Optional Protocol prepared by the Committee in December 1992, see UN Do. A/CONF.157/PC/62/Add.5, Annex II.

<sup>46</sup> See the report on the UN workshop on the justiciability of economic, social and cultural rights, UN Doc. E/CN.4/2001/62/Add.2.

Covenant. This information would concern the practical significance of a treaty standard in a concrete case, which is impossible under the reporting procedure.



### 3. *Added value of the Committee's views*

The collected views of the Committee in individual cases based on the complaints procedure would be of a much greater value in shedding light on the meaning of the various Covenant rights than either the Committee's general comments or concluding observations. The collected views would constitute a kind of case law. In addition, they would provide authoritative interpretations of key issues, such as: the meaning of progressive realisation versus retrogressive measures; the meaning of availability of resources in a concrete case; the attitude of the government: inability versus lack of political will. A small number of cases would already be sufficient to develop case law about the content, scope and application of the Covenant rights. Although views or findings of the Committee in a concrete case would not be binding upon a State Party, they are powerful legal opinions which cannot be easily neglected by a state. A view of the Committee in a case produces a concrete result in a matter of concern for a person, which is likely also to generate more general interest in society, because of the effects it may have for other, comparable cases.

### 4. *Stimulus for governments*

The mere possibility that complaints might be brought before an international forum may or even should stimulate governments to ensure that effective remedies are available at the national level. A complaints procedure at the international level would also strengthen the recognition of economic, social and cultural rights. It would also stimulate governments to adopt and implement legislative and policy measures to comply with obligations under the Covenant, because in case it does not, there will be a risk of facing one or more complaints.

### 5. *Acknowledgement of the indivisibility of all human rights*

If the principle of the indivisibility, interdependence and interrelatedness of civil and political rights and economic, social and cultural rights, confirmed in the Vienna Declaration and Programme of Action adopted by the Second World Conference on Human Rights in 1993,<sup>47</sup> is to be taken seriously in the work of the UN, it is essential that a complaints procedure be established under the Covenant, thereby redressing the imbalance which presently exists. There already is a complaints procedure under the Covenant on Civil and Political Rights which is open for alleged victims of violations of rights under that treaty.

<sup>47</sup> UN. Doc. A/CONF.157/23, para. 5. Paragraph 5 adds: "The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

## 6. *Clarification of third party responsibility*

Although a state bears the responsibility for realisation or lack of realisation, observance or violation of the ICESCR provisions, a complaints procedure could also help to determine the nature of third party involvement in and responsibility for the violation of economic, social and cultural rights in concrete cases, such as employers, big landowners, transnational corporations, international financial organisations (IMF, World Bank). An example is the conflicting obligations of states through, on the one hand, international human rights obligations and, on the other hand, international financial agreements pressed for by international donors.<sup>48</sup>

## 7. *Stimulus for NGO's*

An Optional Protocol to the Covenant would be of enormous support and stimulus for NGO's working in the field of economic, social and cultural rights. It could strengthen their work for the implementation of economic, social and cultural rights at the domestic level, because lodging a complaint with the Committee then becomes a realistic option for enforcing these rights, and can be used as a tool to exert pressure on governments to observe their treaty obligations that they have taken up voluntarily.

## 8. *Other international complaints procedures already exist*

In the field of economic, social and cultural rights, there are already complaints procedures at the international level which deal with alleged violations of these rights. These include the International Labour Organisation special procedure with respect to the freedom of association in the field of trade union rights and representations under Article 24 of the ILO Constitution submitted by national or international employers' or workers organisations; the UNESCO Complaints Procedure in the field of any of the rights which fall within UNESCO's field of competence, that is education, science and culture;<sup>49</sup> the Collective Complaints Procedure adopted as a Protocol to the European Social Charter in 1995;<sup>50</sup> the Optional Protocol to the UN Convention on the Elimination of All Forms of Discrimination Against Women adopted in 1999.<sup>51</sup> So states have already accepted voluntarily the possibility to denounce alleged violations of economic, social and cultural rights before an inter-

<sup>48</sup> See for an example the situation in Uganda described in the report of the UN Special Rapporteur on the Right to Education, UN. Doc. E/CN.4/2000/6/Add.1, paras. 29-38.

<sup>49</sup> UNESCO Doc. 104 EX/Decision 3.3, adopted in 1978 by the Executive Board of UNESCO.

<sup>50</sup> Entered into force on 1 July 1998.

<sup>51</sup> Not yet in force.

national body of experts. This means that they have also accepted the competence of such an international body to give its views about a complaint.

#### 9. *Strengthening international accountability*

A complaints procedure at the international level would strengthen the accountability of governments before an international body for the manner in which these governments have complied with their obligations under the treaty. These governments will then be under a strong pressure to justify their policies, their acts or their failure to act. Often an individual case reflects a more general pattern of non-observance of treaty obligations in the country concerned. The possibility of international accountability may also raise the pressure upon the government coming from NGO's, commentators and other states to observe the standards which it has voluntarily adopted. An international complaint promotes awareness among the public at large about the way the government is complying with its obligations.

#### 10. *An international complaints procedure as an instrument of last resort*

Usually, a complaint will only reach the international level once domestic legal remedies have been exhausted. So there will be ample opportunity for the state concerned to rectify a situation which is the subject of a complaint. In addition, the complaints procedure envisaged is optional which means that states are free to adhere to it or not. Moreover, the complaints procedure is not directed towards confrontation with the state, but its aim is to solve a case in accordance with the human rights obligations of the state. Part of the procedure is also the possibility to reach a settlement between the parties, facilitated by the Committee.

#### 11. *Remedy for victims*

Finally, and most important, in some cases a complaint at the international level, and the views or findings adopted by the Committee, will lead to a remedy for the victim. This could mean: the stop of the violation; compensation for the harm incurred; a commitment by the government to observe its treaty obligations, for example to take specific policy measures or to amend legislation; the actual enjoyment of a right by the individual(s) who lodged the complaint. The possible outcomes would depend on the willingness of the government concerned to implement the views of the Committee, which are non-binding in legal terms.

## **VII. Concluding Remarks**

It may be concluded that since 1987 the Covenant has gained importance and status, thanks to the combined efforts of the Committee, NGO's and academics. They all contributed to give teeth to the Covenant and to strengthen implementation of rights at the national level and supervision at the international level. The Committee has developed the reporting procedure by holding states accountable through the dialogue, giving access to NGO's and drafting concluding observations which assess the performance of states and contain concrete suggestions for a better implementation. The Committee has also made good progress in clarifying the meaning of the rights listed in the Covenant in terms of their content and state obligations in the General Comments. It has also taken up new issues, such as the human rights dimensions over poverty reduction. This shows that the Committee is willing to deepen its mandate and interpret it in a dynamic way, reflecting changing approaches and views about human rights implementation. It may be said that the Committee has made an important contribution to tackling the problems regarding implementation and supervision mentioned in the introduction of this paper, although it has no authority over other actors than states, such as international financial institutions and corporations. It should be emphasised, however, that the reporting procedure is a rather weak form of international supervision, depending on the willingness of the state to cooperate, usually framed in diplomatic language and manners, and excluding individuals. Also NGO's are not directly involved in the dialogue with the state representatives. Therefore, it is crucial that a complaints procedure be adopted as an optional protocol to the Covenant. Such a procedure would give direct access to individuals and would deal with very specific and detailed claims of non-observance of Covenant obligations by states. Such a procedure would also provide an opportunity for the Committee to test its General Comments in 'real' cases dealing with the situation which individuals face in day-to-day life about alleged violations of their economic, social and cultural rights. Collectively, the views of the Committee would constitute ground-breaking case law which will have its impact far beyond the parties in a case, influencing also the conduct of governments of other states.

## ABSTRACTS

### **The Role of the UN Committee on Economic, Social and Cultural Rights in Strengthening Implementation and Supervision of the International Covenant on Economic, Social and Cultural Rights**

By *Fons Coomans*, Maastricht

This contribution discusses and evaluates the supervisory work of the UN Committee on Economic, Social and Cultural Rights regarding the implementation of the Covenant on Economic, Social and Cultural Rights by States Parties. It deals with the examination of state reports by the Committee, the participation of NGO's in the work of the Committee, the clarification of the normative content of Covenant rights through General Comments, the definition of state obligations and the identification of violations. The article then argues that a further strengthening of the supervisory role of the Committee should be realised by the adoption of a complaints procedure. Such a procedure would give the Committee the power to examine complaints lodged by individuals and groups about alleged violations of economic, social or cultural rights by a State Party. The contribution discusses the arguments in favour of such a procedure and concludes that the opinions of the Committee about complaints would have an important value in addition to the rather weak reporting procedure, because it allows the Committee to test and apply its General Comments in concrete "real cases" dealing with the situation people face in day-to-day life about alleged violations of their economic, social and cultural rights. In such a way, an international case law on the protection of economic, social and cultural rights could be developed.

### **Oil and the Niger Delta People: The Injustice of the Land Use Act**

By *Kaniye S.A. Ebeku*, Port Harcourt, Nigeria / Canterbury, UK

It is now common knowledge that Nigerian economy runs on oil, and this valuable natural resource is only found and exploited in the Niger Delta region of the country. This region, populated by ethnic minorities, is located in the southern part of the country. As is the case with some oil-producing countries, various Nigerian statutory (and constitutional) provi-