August 13, 2021

**Comments regarding the draft rules of procedure of the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) under the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR)**

Dear Members and Secretariat of the Working Group on Individual Communications,

As per CESCR's invitation of written contributions on its draft rules of procedure under the OP-ICESCR, the comments in the present document are synthesized from discussions and consultations with various members of **ESCR-Net – International Network for Economic, Social and Cultural Rights.** Network members involved in these discussions and submitting this present written contribution include the Center for Reproductive Rights (CRR); the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR); Observatori DESC, and the Social Rights Advocacy Centre (SRAC).

The **Center for Reproductive Rights (the Center)**—an international non-profit legal advocacy organization headquartered in New York City, with regional offices in Nairobi, Bogotá, Geneva, and Washington, D.C.—uses the law to advance reproductive freedom as a fundamental human right that all governments are legally obligated to respect, protect, and fulfill. Since its inception 27 years ago, the Center has advocated for the realization of women and girls' human rights on a broad range of issues, including on the right to access sexual and reproductive health services free from coercion, discrimination and violence; on the right to bodily autonomy; preventing and addressing sexual violence; and the eradication of harmful traditional practices.

The **Global Initiative for Economic, Social, and Cultural Rights (GI-ESCR)** is an international non-governmental human rights advocacy organisation that is dedicated to ending social, economic, gender, and climate injustice using a human rights approach. It follows closely the work of the international human rights mechanisms, including their jurisprudence on climate change and human rights.

**Observatori DESC (ESCR observatory) (Spain)** is a human rights organization defending economic, social, and cultural rights through research and advocacy. The Observatory concentrates its efforts on dismantling the devalued perception of social rights - the right to housing, to work, to education, to health, to food - in relation to other fundamental rights, such as civil and political rights and patrimonial rights.

The **Social Rights Advocacy Centre (SRAC)** is a not-for-profit non-governmental organization (NGO) dedicated to relieving poverty and improving access to adequate food, clothing, housing, education, healthcare and other requirements of dignity, equality and security through human rights research, public education and legal advocacy in Canada and around the world in support of economic, social and cultural rights (social rights).

Civil society organizations (CSOs) consider that treaty bodies constitute a fundamental pillar of the international system for the protection of human rights. CSOs face contexts marked by repeated non-compliance by States with international human rights treaties; the lack of will and commitment to comply with decisions of international human rights bodies; serious difficulties in accessing effective judicial protection; and the common absence of measures of protection, reparation and guarantees of non-repetition for the victims of human rights violations.

## Rule 20 – Pilot Views procedure

As the introduction of a Pilot Views procedure under draft Rule 20 is the most major change contemplated by the Committee, different network members have prepared separate full submissions focusing on this topic. For the purposes of the present synthesis, a few key principles that emerged include:

- "Pilot Views" should be renamed "Structural Views" to emphasize the contents and intent behind the procedure.
- Effective access to justice entails guaranteeing the individual examination of Communications' admissibility and

merits, and the establishment, in addition to general structural recommendations, of individualized reparation measures for all victims of human rights violations reviewed by the Committee. Several of the most prominent critiques of the European Court of Human Rights' (ECtHR) Pilot procedure have drawn attention to its prioritisation of judicial efficiency over procedural safeguards that would secure the rights of the individual.[1]

- CESCR should consider other types of compensation (see para 8 of Rule 20) that go beyond financial compensation and include the full range of reparations (i.e. restitution, compensation, rehabilitation, satisfaction and non-recurrence guarantees).
- Structural Views should be dynamic and updated regularly to respond to evolving State conduct that may be omissive, retrogressive, insufficient, inadequate or otherwise violative.
- The Committee should conduct public consultations in formulating its determination of Structural Views.
- Draft Rule 20 could be modified so as to ensure that the Committee selects the Pilot communication with adequate care. This could be achieved through the insertion of a rule that explicitly requires the Committee to consider the depth of its understanding of the underlying violation, how its decision may impact individuals other than the Pilot representative, and whether the Pilot communication raises the legal and factual issues that are implicated by the structural matter at hand.[2]
- Draft Rule 20 may be adapted so as to encourage the Committee to join different applications[3] and create subclasses[4] in situations where applicants that have been affected by the same underlying human rights issue do not belong to a single homogenous group.
- Draft Rule 20 could carve out greater scope for CSOs and national human rights institutions (NHRIs) to participate in various stages of the Pilot Views procedure. These organizations could provide a richer picture of the factual and legal questions raised by the underlying violation in question and expose conflicts or differences between absent applicants.[5]
- Procedural steps requiring the consultation of the relevant State(s) Party should also apply to the author(s), who should be consulted on equal terms and have their opinions taken into account alongside those of the State.
- Rule 20 should expressly reference State duties to comply with Committee Views within the timelines stipulated.
- Rule 20 could contain a specific reference to the Pilot procedure as an 'exceptional' measure and clear criteria for the circumstances under which it will be used. Collectively, these could protect against the risk of excessive recourse to the Pilot procedure.
- Cases received by the Committee should not be closed prior to satisfying the Committee's recommendations and without providing authors and their representatives opportunities to contribute to the process (see additional information related to Rule 22 below).

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[1] See, *inter alia*, Helfer, 'Redesigning the European Court of Human Rights'; Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights'; Fyrnys, 'Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights'; Haider, *The Pilot-Judgement Procedure of the European Court of Human Rights*; Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights'.

[2] In relation to the Pilot Judgement rule of the ECtHR (Rule 61 of the Court), Sainati suggests incorporating the following: *When selecting or approving an application for a pilot judgment, the Court shall first determine whether the application raises questions of law and fact common to the class of similarly affected applicants, and whether the claim asserted by the pilot applicant is typical of the claims of absent or potential future applicants.* Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 197.

[3] Draft Rule 10 (3) already envisages that the Committee may deal with communications jointly, as does Rule 42 of the ECtHR. The European Court is known to have made poor use of this possibility in relation to Pilot Judgements. A specific reference in the Draft Rule 20 may guide the Committee towards this course of action in relation to its Pilot Views.

[4] In relation to the Pilot Judgment Rule of the ECtHR, Sainati suggests incorporating the following: *Where persons in the same situation as the pilot applicant do not belong to one identifiable class, the Court shall select such applications raising distinct claims or issues of law and fact as necessary to create homogenous subclasses.* A similar modification may be made to draft Rule 20.

[5] This has also been raised about the ECtHR's Pilot Judgments. *See* Helfer, 'Redesigning the European Court of Human Rights', 156; Sainati, 'Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights', 198. Gerrards has also suggested that the European Court make more visible use of NGO assistance in order to carefully select appropriate Pilot cases where there is real possibility of an effective solution. Gerards, 'The Pilot Judgment Procedure before the European Court of Human Rights as an Instrument for Dialogue', 24.

## Rule 15(4) - Oral hearings

In 1993, CESCR adopted a procedure to hear oral submissions from civil society organizations representing right claiming communities during reviews of periodic reports. This procedure, referred to by some as an "informal petition procedure," was unique at the time but has since been adopted in some form by all UN human rights treaty monitoring bodies.[6] The importance of open and transparent oral proceedings has been made abundantly clear since that time. It has enabled the Committee and State delegations to hear from civil society organizations bringing significant expertise on the issues under review and has often allowed those who are directly affected by these issues to provide the Committee with a better understanding of their circumstances. Rights holders have either participated directly or, in more recent years, observed proceedings online. The historic advances made by CESCR in recognizing the importance of participation by civil society and rights claimants in the review of ICESCR compliance played a significant role in the recognition of the crucialness of ensuring access to justice for Covenant rights and in the eventual adoption of the Optional Protocol.

Oral hearings in the context of periodic reports have significantly enhanced the efficiency of the Committee's work, allowed the Committee to clarify issues that are complex and facilitated meaningful engagement and follow-up discussions between governments and claimants. For civil society organizations and rights claimants, the ability to directly participate or to observe proceedings rather than rely on formal written submissions alone has significantly enhanced the Committee's impact and respect for the process and its outcomes. Oral hearings are an efficient and effective means for the Committee to better understand circumstances of marginalized groups and systemic issues in particular States, to clarify issues by asking questions and to benefit from the expertise of civil society organizations.

The benefits of oral hearings have been recognized by other bodies adjudicating complaints or communications. Rule 33 of the Rules of the European Social Rights Committee, for example, provides for hearings to be held at the request of one of the parties or on the Committee's initiative. The hearings are public, unless the President decides otherwise, and intervening third parties are also invited to participate. Oral hearings have been critical to the effectiveness, transparency and competence of the Inter-American Court of Human Rights. Cavallaro and Brewer have pointed out that in recent years the Court's hearings have been affected by "procedural reforms that have caused a case-by-case reduction in the days of public hearings held and the number of witnesses heard by the Court. These developments, we suggest, may sometimes reduce the effect of the Court's work."[7]

The benefits of oral hearings and live provision of evidence and arguments from States Party and civil society organisations (CSOs) in the review of periodic reports should be applied and enhanced in proceedings under the OP-ICESCR. As Sandra Liebenberg has noted,

> The historic coming into force of Optional Protocol in 2013 signalled international recognition of the right of individuals and groups to participate in a complaints procedure through which their claims of breaches of these rights can receive a fair hearing. In this context, it also invited renewed attention to adjudicative or quasi-adjudicative review and remedial methods for protecting social rights.[8]

She identifies a commitment to participatory justice as a key component of the Committee's jurisprudence to date,

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[6] Matthew Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights', Netherlands *International Law Review*, Vol. XL, 1993, 389; Bruce Porter, "Claiming Adjudicative Space: Social Rights, Equality and Citizenship" in Margot Young et al, eds, *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) 77.

[7] *See* James L. Caravallo and Stephanie E. Brewer, Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court, 102 American Journal of International Law 768 (2008):
771-772.

[8] Sandra Liebenberg, 'Participatory Justice in Social Rights Adjudication' *Human Rights Law Review*, 2018, 18, 623–649 at 623.

emphasizing in particular the importance of meaningful engagement with affected individuals and communities.

We commend the Committee's commitment to participatory justice and welcome, in this context, the addition of Rule 15(4) to provide for oral submissions by the parties. However, we do not believe that oral submissions should be restricted to "exceptional circumstances" or to cases with admissibility decisions prior to receiving State observations on the merits and would instead suggest that parties, including third parties, be invited to make oral submissions where the Committee believes these would assist its deliberations on either admissibility, merits or follow-up to a communication. Some of the content of the UN Human Rights Committee's Guidelines for oral submissions may be helpful to include in CESCR's Rules of Procedure, such as the reference to the benefit of oral hearings in "cases raising complex issues of fact or domestic law or important questions of interpretation of the Covenant." We would also add that such hearings may be considered appropriate where they may assist the Committee to determine the circumstances and dignity interests at stake and/or the reasonableness or proportionality of the measures adopted by the responding State party.

Oral hearings would strengthen the Committee's evidentiary and legal bases for deliberation. They may also: a) enhance State and CSO engagement; b) uniquely incentivize accountability by requiring marshaling of evidence, sharpening of arguments, presentation, preparation, and live responses to questions; and c) increase transparency and public attention, particularly with respect to the Views follow-up phase, which can be fully public. In these ways, the availability and fullness of oral hearings before international human rights adjudicatory bodies can be a key factor in effectiveness.

## Rule 19 - Repetitive communications

The characteristics that would constitute repetitive communications could be precisely defined, as well as the procedure itself, especially involving the determination of repetitiveness that declares the non-violation of a claimed human right. A communication should be considered repetitive when it concerns the same author(s), facts, and substantive rights claimed. A communication in the process of being evaluated for repetitiveness should receive the same due process, including contact with the author(s) regarding the same. Committee's Views and procedural decisions should be individually tailored to each case, notwithstanding similarities with prior cases.

## Rule 9 – Third-party submissions

It is important that enough information be provided on the Committee's website on the cases under review so as to make it possible for potential third-party intervenors to file relevant and useful requests to intervene. Third party interventions often play an important role in helping develop novel standards, so enough detailed information on the case should be made public so as to enable a potential intervenor to assess whether to file a request and at what stage.

Based on experiences with other UN treaty bodies, it is also important that the Rules of Procedure codify the allowance of and transparent process for third-party submissions, as now stipulated in the Committee's corresponding Guidance.

## Rule 22 – Follow-up to Views and to friendly settlements

Rule 22 should reflect that the author and their representatives have an opportunity to engage with the CESCR Committee on follow-up, incorporating into the Rules the principles animating the Committee's corresponding Working Methods. This is important both with respect to the individual recommendations and the general recommendations made by the Committee to the State Party. It is not sufficient for the Committee to rely on the State Party assessment as to whether the measures have been met in determining whether or not to close a case. Reliance solely on the State Party can be detrimental to the outcome and can lead to the State Party justifying lack of further action based on the Committee's closing of a case. This is particularly true with regards to general measures, such as legislative and policy changes the Committee may recommend in its Views. Such reform can take a considerable amount of time to realize, but it is often these measures that are crucial to prevent future violations from occurring, guaranteeing the human rights protected

under the Convention. We recommend that clear rules be codified articulating the authors and their representative's role in follow-up procedures with regards to both individual and general measures.

## Rule 18 - Discontinuances

Rule 18 on discontinuance remains virtually unchanged from the previous rules of procedure. It states that "The Committee may discontinue the consideration of a communication when the reasons for its submission under the Optional Protocol have become moot, or on other relevant grounds."

Discontinuance decisions currently make up 59% of the total decisions that the Committee has thus far rendered (10 decisions on the merits, 20 inadmissibility decisions and 43 discontinuance decisions).[9] Since 2019, they have evolved into an important element of the Committee's practice, accounting for 41 of the Committee's 54 decisions over this period – more than 75%. Given their importance, draft Rule 18 may be improved by formalising the process and providing more detailed guidance as to the conditions under which discontinuance decisions will be rendered.

For example, whilst these decisions are commonly requested by the author (25), the state (3) or both parties (1), it is also often the case that the Committee regard decides to discontinue communications due to a lack of contact that it has had with an author (14). The length of time after which the Committee will make such a decision has varied significantly: the communication of *A. L. v. Spain* was discontinued just 8 months after it was registered due to insufficient contact with the author, whilst the communication *H.M., R.M. and children v. Spain* was discontinued after 40 months for the same reason. Further detail on how long the Committee should wait before concluding that an author cannot be contacted may ensure greater consistency of practice.

## Rule 1(4) - Limiting communications to official languages

Rule 1 (4) states that "Communications shall be submitted in one of the official languages of the Committee." The introduction of this requirement may create an additional barrier to the submission of complaints against States in which the principal language spoken is not an official Committee language (Arabic, English, French, Russian or Spanish).

The Committee may consider introducing an exception for those who consider themselves unable to submit their communication in one of the official languages of the Committee. For example, it could state that, "If an author considers that they are unable to submit their communication in an official language of the Committee, they should make clear their reasons for not doing so. The Committee may process a case submitted in a non-official language under exceptional circumstances entailing hardship in which a workable language for both the parties and Committee is available."

## Section II – Proceedings under the inquiry procedure of the Optional Protocol

In anticipation of the Committee potentially considering revisions to its rules of procedure regarding the inquiry procedure under the OP-ICESCR, we recommend the individuals or groups of individuals submitting information to CESCR requesting an inquiry be kept duly informed of the status of the proceedings throughout the process and be entitled to engage with the Committee related to the State response, in line with the provisions of the Convention. This would ensure that the Committee is provided with independent information throughout the inquiry procedure.

## Conclusion

Thank you for your time and attention to these comments regarding the important steps the Committee is taking to revise its rules of procedure under the OP-ICESCR. We remain engaged and available for further dialogue.

[9] 'CESCR Jurisprudence', GI-ESCR, accessed 9 August 2021, https://www.gi-escr.org/cescr-jurisprudence.