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Access to remedy I: Monitoring human rights compliance

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Overview

- Basic principles
 - Domestic implementation
 - International implementation
 - International courts
- The role of UN institutions in implementing human rights
- Relationship between different means of implementation



Why is implementation important?

- Stop ongoing human rights violations
- Remedy violations which already occurred (state responsibility)
 - Reparation
 - Rehabilitation of victims
- Punishing perpetrators (individuals)
 - Domestic law
 - International criminal law
- Prevention of future human rights violations
- Reconciliation and justice



Domestic implementation mechanisms

- Legal framework
 - Implementation as a domestic affair
 - Minimum standards in international human rights law
- Specific duties under international law
 - Duty to allow individuals to invoke human rights at the domestic level (duty to incorporate)
 - Duty to provide a legal remedy for human rights violations
 - Duty to investigate human rights violations, prosecute and punish the perpetrator
 - Duty to compensate and rehabilitate victims
 - Duty to prevent future violations



Specific Duties

(1/3)


- Duty to provide access to (judicial) review and remedies
 - Direct applicability of international human rights OR transformation into domestic law
 - Duty refers to the substance of the right not to the international treaty itself
 - Effective legal remedy ≠ access to court
- Duty to investigate, prosecute and punish
 - Effective investigation, prosecution and punishment of the perpetrators
 - Confirmed by practice of the HR Committee and jurisprudence for cases of torture, violations of right to life, enforced disappearance of persons



Specific Duties

(2/3)

- Duty to provide reparation
 - Compensation and Rehabilitation
 - Examples: Victims of torture, abused children etc.
 - Compensation is owed to persons who have successfully asserted a claim.
 - UN GA Res 60/147 (2005): Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law




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Specific Duties (3/3)

- Duty to prevent
 - Obligation to act in advance
 - Few explicit treaty provisions
 - Of particular relevance in the context of torture (Art. 2 CAT) and discrimination (Art. 2 CEDAW)

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International implementation mechanics

- General international law
 - Customary international law
 - State responsibility
 - Diplomatic protection
- International human rights law

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General international law mechanisms

- Right of diplomatic protection (e.g. Avena and Other Mexican Nationals - Mexico v. United States of America, ICJ Reports 2004, 12 ff., para. 29 ff.).
- Human rights obligations as obligations erga omnes (Barcelona Traction, ICJ Reports 1970, 4 ff, para. 33.)
- Bilateral actions
 - Diplomatic measures, incl. human rights dialogue
 - Technical assistance
 - Unfriendly acts: retorsions
 - Sanctions



Mechanisms in international human rights law

- Institutions
 - International Courts
 - ICJ
 - International Criminal Courts
 - Regional Human Rights Courts (two examples: ECHR, ECOWAS Community Court of Justice)
 - Monitoring Bodies
 - Intergovernmental Bodies
- Procedures
 - Treaty-based
 - Charter-based
 - Criminal procedures
 - Specific procedures for enforcing international humanitarian law



The role of UN institutions in implementing human rights: HRC and CESCR

- Implementation and the Human Rights Committee
 - State reports before the HRC
 - Individual communications before the HRC
- Implementation and the Committee on Economic, Social and Cultural Rights
 - State reports before the ESC Committee
 - Individual communications before the ESC Committee
 - Inter-state communications
 - Inquiry procedure



Human Rights Committee

- Treaty-based mechanisms on the basis of the ICCPR.
- Two key functions:
 - Controls the implementation of the ICCPR by the State Parties
 - Serves as the quasi-judicial body for the examination of individual complaints.
- Exists since 1976.
- Composition: 18 Experts
- Not to be mistaken for the Human Rights Council



Main responsibilities of the HRC

- Examining State Reports
- Considering Individual Communications
- Adopting General Comments



Historical Development

- 1948 Universal Declaration of Human Rights
- 1966 Adoption of the ICCPR and the First Optional Protocol
(introducing individual complaints)
- 1976 Entry into force of the ICCPR
- 1989 Adoption of the Second Optional Protocol (aiming at the
abolition of the death penalty)

Ratification Status (as of 19 April 2013):

- ICCPR: 167 States
- First Optional Protocol: 114 States
- Second Optional Protocol: 74 States



Examining Reports

- First report due one year after ratification of the ICCPR
- Periodic reports every 4-6 years
- Report → List of issues → Constructive dialogue before the Committee
- Shadow reports by NGOs
- Concluding observations



Considering Individual Complaints

- No formal procedure, a simple letter to the office of the High Commissioner for Human Rights is enough
- No fees, no legal representation required
- No personal appearance, no fact-finding missions
- Follow-up monitoring



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Adopting General Comments

- Summary of frequent problems either in the process of examining State Reports or Communications
- Since 1981, 35 General Comments have been adopted
- Legal character very disputed!



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Specifics of the ICESCR

- Article 2(1) ICESCR
 - State obligations are subject to availability of resources
 - Obligations for progressive realization
- Broad and comprehensive catalogue of rights
- Not all rights are directly applicable




Implementation and the Committee on Economic, Social and Cultural Rights (CESCR)

- Committee established under ECOSOC Resolution 1985/17
- 18 independent members (experts)
- Based on ICESCR:
 - State reports
 - Issuance of General Comments (21 to date)
- Based on the Optional Protocol (OP):
 - Individual Communications
 - Only applicable for states that have ratified the OP
 - Entry into force on 5 May 2013 – 3 months after the tenth ratification (Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia, Spain, Uruguay)



State Reports before the CESCR (1/5)

- Legal basis
 - Art. 16 ICESCR: States Parties are required “to submit reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein.”
- Drafting of the reports
 - General reporting guidelines
 - Participation of NGOs
- Submission of the report
 - To the Secretary-General in order to transmit it to the CESCR
 - Additional transmission by the Secretary-General to specialized agencies



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State Reports before the CESCR


(2/5)

➤ Examination of the report

- Report is assigned to the pre-sessional working group
 - Principal purpose of the working group is to identify the focus of the dialogue with states' representatives in advance and
 - To facilitate the work of the CESCR
- List of identified issues drawn up by the working group are given directly to a representative of the state concerned

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State Reports before the CESCR


(3/5)

➤ Session of the CESCR

- Public session (generally three meetings)
- Private session to discuss each set of concluding observations
- Constructive dialogue with representatives of the reporting states
 - Introduction of the report by the representative of the state (replies to the list of issues)
 - CESCR considers the reports and replies
 - Questions by CESCR members and contributions by representatives of specialized agencies

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State Reports before the CESCR


(4/5)

➤ Concluding observations

- Draft, prepared by country rapporteur, discussed in the CESCR
- Agreed structure
 - Introduction
 - Positive aspects
 - Factors and difficulties impeding the implementation of the ICESCR
 - Principal subject of concern
 - Suggestions and recommendations

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State Reports before the CESCR

(5/5)

➤ Concluding observations (cont'd)

- Discussion of the draft by the CESCR, in private session, with a view to adopting it by consensus
- Follow-up
 - CESCR requests the state to inform the Committee in its next periodic report about steps taken to implement the recommendations
 - CESCR may request to provide more information prior to the next periodic report
 - On-site visits by CESCR members to gain further information

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OP ICESCR: Individual Communications (1/2)

- Competence of the CDESCR to receive and consider communications (Art. 1 and 2 OP)
 - Only communications which concern a State Party to the OP
 - By or on behalf of individuals
 - Claiming to be victims of a violation of a ICESCR right
- Procedure
 - Admissibility (Art. 3 and 4 OP), in particular:
 - Exhaustion of domestic remedies
 - Submission within one year after the exhaustion of domestic remedies
 - Subject of the communications must have occurred after the entry into force of the protocol
 - Communication revealing a clear disadvantage



OP ICESCR: Individual Communications (2/2)

- Procedure (cont.)
 - Communication notified to state
 - State can comment within 6 months
 - Competence of the CDESCR
 - Admissibility
 - Merits
 - Interim measures possible to avoid irreparable damage (Art. 5 OP)
 - CDESCR shall act with a view to a friendly settlement (Art. 7 OP)
 - Examination of the communication (Art. 8 OP)
 - After examining the CDESCR shall transmit its views on the communication and recommendations to the parties



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OP ICESCR: Interstate communications (Art. 10 OP)

- Declaration of both parties to accept the competence of the CESCR
- Procedure
 - Bring the matter to the attention of the other state
 - After 6 months without settlement: right to refer matter to the CESCR
 - CESCR shall act with view to friendly settlement
 - Closed meeting when examining communications
 - Closing report to the state parties
 - Follow-up according to Art. 16 and 17 ICESCR