

Treaty Body Strengthening – Dublin Follow Up

1. Here are a few comments on the Dublin Process. As you know, it was decided to use the terminology “*strengthening*” rather than “*reforms*”, in order to cut off discussion about real reforms, such as the creation of a “*single unified treaty body*”, for which I had argued since the Berlin meeting of 2010. The concept paper, as proposed by the OHCHR, had been rejected for various reasons, not least for the fact that it had been developed without much prior consultations, and it found resounding rejection by many treaty body members, for various reasons, the most important being that treaty specifics might get lost, or under-represented. The current Dublin II process is the attempt to make corrections to the existing system without necessitating treaty changes.

2. The suggestion to introduce “**list of issues prior to reporting (LOIPR)**” sounds good at first sight, but may have drawbacks. The Dublin meeting reached consensus to await reports of experiences with this new procedure from treaty bodies that have started with it already, before the other treaty bodies decide upon it. For “**Follow Ups**” this is probably a very good idea, but whether to draw up a list of issues without having the state report as a basis is a good idea, I have some doubts. However, the role of NGOs would probably be enhanced by this process.

3. The issue of **page limitations** was extensively discussed, but it was felt that there must be exceptions, for example, when a revolution or fundamental changes of the constitution have occurred.

4. There was much support for the suggestion that a **Calendar** should be prepared by the OHCHR, reflecting the reporting cycles and enabling a proper correlation with the UPR. The idea seems good, but presupposes that all member states report regularly, which is not the case.

The solution proposed that in such cases the monitoring will be done in the absence of the SP, may not be such a workable solution, because many states, particularly those that have many problems with human rights, may then just not report at all, and in their comments on such **non-reporting concluding observations** (Cobs) just allege that the treaty bodies had not adequately reflected the specifics of that state party. Moreover, from the few non-reporting procedures that CESCR has engaged in, it appears that getting the necessary facts is not an easy matter as regards many states, at least much more difficult than in the

normal procedure. For this reason, CESCR has only rarely resorted to the non-reporting procedure, and then probably only to serve as a warning signal to many other states in a similar position. The announcement (after three warning letters) that the Committee would resort to the non-reporting procedure, if the state party did not provide the overdue report within 12 to 18 months, in some cases has led to the situation that reports did, after all, come.

The great disadvantage of the non-reporting procedure is that a proper dialogue cannot take place with the state party, and no “constructive dialogue” possibility then exists. The motivation for the state party to implement the COBs on a broad front at the national level thus may be lacking. As the state party did not participate in the proceedings, there is a strong likelihood that the COBs may be totally ignored. On the other hand, non-reporting states can hide behind the veil of inaction for decades, if nothing is done by the treaty body. So a real dilemma exists.

Furthermore, the secretariat of the committee and the pre-sessional working groups would have an extra workload, for which funds might be insufficient or lacking. So, from my perspective, it looks as though non-reporting procedures can only be dealt with occasionally, unless a full overhaul of the monitoring time for each state report has taken place.

5. The suggestion that the **national civil society organizations** should be involved in the production of the state reports is a good idea, but needs very careful limitations: participation – yes, co-decision – no, as this is solely the responsibility of the state party.

6. The **role of National Human Rights Institutions (NHRIs)** definitely ought to be increased, as it happens with quite a number of them already, and their role in following up on COBs with the government departments, parliament, and also the media should be encouraged.

7. The statements of the government on the COBs, where these are made, and the **media coverage** of the COBs could well be discussed in various fora organized by the NHRIs, for instance brought to the attention of the **Human Rights Committees of Parliament**, and to the **mass media**, by way of **press conferences and lobbying**.

8. The suggestion of the “*strengthening*” document, to better prepare the dialogue with states parties appears to be valuable. Perhaps the **country rapporteur** should establish **contacts with the permanent mission**, in order to indicate the most important issues that are likely to come up

during the dialogue with the state party delegation. It might encourage the state party to send the relevant specialists from the various departments. Experience has shown that even in the case of very large delegations, specialists needed to give specific answers to questions from the CESCR members may not be there.

9. The suggestions to **change the practice of the dialogue format** are presently being considered in the committee, and the working methods are constantly under review. Much will also depend on the entry into force of the **Optional Protocol**, for which only 2 more ratifications are needed. And then CESCR will have to change its working methods considerably – to mention just a few issues: **chamber solution, small working groups with pre-decision competency, and only formal adoption by the plenary** at the end, unless there is a request for full debate.

But these changes will not come from one day to the next. After entry into force, the OP procedure can be adjusted as cases come in, and judging by the experience of the HRCee, and other committees that already have experience in this respect, it will be quite some time before the issue of monitoring congestion might arise.

10. Many of the suggestions made in Dublin, if implemented, will affect the **time available for drawing up general comments and statements**, and also reflection time for the CESCR to carefully analyse its working methods.

11. The suggestion to **hold sessions in the various world regions** is quite an expensive exercise, unless only some CESCR members were to carry out such reviews. States parties that find it difficult to come all the way to Geneva for 1 ½ days (in future 1 day), and also committee members might find that solution attractive. The concentration of most of the treaty body monitoring in Geneva was a clear result of the costs involved and organizational difficulties for OHCHR. The argument that greater proximity would lead to greater implementation effects at the national level I do not find particularly convincing. On the other hand, in the case of **inquiries**, small missions by CESCR members might indeed enhance visibility and better and quicker implementation of CObs.

12. **Prioritizing CObs in periodic reports** seems to be a strengthening measure. The main problem with CObs is not their length, but their content specificity and differentiation. To be included effectively and convincingly in the UPR process, those CObs must be sufficiently detailed and focussed, in order to encourage states to take concrete

implementation measures. CESCR, like the other Committees, has made great efforts to reduce the number of recommendations, and to focus them more. Repetition of recommendations made by other treaty bodies should perhaps be avoided – although there are exceptions: repetition may be called for when the state party has remained totally inactive.

At present, the COBs of many treaty bodies contain too many very general and abstractly formulated recommendations which really obligate the states to very little or nothing. My personal view is that this often happens when there is dispute amongst members about a specific recommendation, and so a formula compromise is agreed, in order to save the consensus decision-making. There seems little merit in insisting on consensus after an overlong discussion, when it is clear that only very few committee members, sometimes only one, take a different view. The Committee practice generally is to either drop the recommendation altogether, or to tone down the recommendation, with the effect that it becomes too vague and general. While the consensus approach should be maintained as much as possible, on occasion, majority decisions seem the only viable and time-saving solution.

13. The discussions on the existing monitoring practices showed clearly that in future more emphasis ought to be placed on the **national application and implementation of the COBs**. All participants at Dublin agreed on this, in principle. But no concrete solutions were offered.

Participants also suggested a more structured introduction of **Follow Ups, greater involvement and consultations of national NGOs and of NHRIs**, before and after submission of the state reports. CESCR has requested the state parties to undertake such steps for quite some time now, and that they should report on those measures in their next periodic report, but so far, with few exceptions, not much has happened.

14. In relation to the **Universal Periodic Review (UPR)** it was said that the COBs ought to be drafted more specifically and more concretely, in order to better influence the UPR process. I totally agree with that request.

15. **Cooperation with regional organizations and Special Procedures** should indeed be improved, but usually there is not enough time available, nor are there sufficient resources for that, except on an ad hoc basis.

16. To **elaborate a questionnaire about Follow Up issues** seems desirable, and should enhance the effectiveness of that procedural measure. Perhaps **written Follow Ups after 1-2 years after the COBs** have been adopted might be useful, and might not congest the session time too much.

17. It seems to be highly desirable to **involve parliaments and parliamentary bodies**, even though the ICESCR only speaks of the state party as such.

18. **Follow Up visits *in situ*** would be sensible, but probably are too costly, unless only 2 or 3 committee members were entrusted with this task.

19. Another issue discussed was the **election period and guarantee of independence and eligibility of committee members and candidates**. As expected, this proved to be a very sensitive issue. The Chairpersons present did not comment on this – despite the fact, or because of the fact, that they are supposed to elaborate a draft on it. In my view the treaty bodies themselves are not the right body to take on this task. Suggestions should instead come from states parties, flanked by a specialist and independent commission of inquiry, with the mandate to suggest criteria of selection, who would, of course, also take into account the views of the treaty bodies.

To limit election periods to a maximum of two terms of office seemed to have the majority of those present, even though no vote was taken. That means that in future newly appointed members would only serve for a maximum of 8 years, ensuring that with over 160 member states a certain rotation would take place, to give more states parties the chance to have one of their nationals on the committee – even though the independence of the members should be in the foreground, and experience and expertise, rather than the state from which they come.

Perhaps members should only be elected for one term of 8 or 10 years, with no re-election possibility, to guarantee absolute independence of candidates. Active office holders, such as serving diplomats, exercising executive functions should not be selected, but there was no unanimity on this question.

For these proposals a working group or an expert committee of the Human Rights Council might be established. To leave this to the treaty bodies would, in my opinion, not be a very good solution, as they would

be judge in their own cause. The proposals made at Sion should be taken into account in this respect.

20. Proposals made in relation to **communications procedures** all seem sensible.

21. The most important issue turned out to be the question of **financing the treaty body monitoring**. Everybody understood that the present inadequate financial situation cannot be remedied with marginal changes in the working methods of the committees, of which there are 10 by now, with over 180 treaty body experts. That big task can only be solved with much more far-reaching real reforms, not “strengthening measures” alone.

22. As we all know, financial means have not been increased adequately over the last few years. Instead, ever new limitations on the actual working conditions of the committees have had to be imposed, as regards translation of documents, allocation of OHCHR staff for working for the committees, for lack of funds. During the next biennium, we were told that a linear cut in resources of 6% had been decided upon, which further hampers the work of the treaty bodies. So, little room seems to exist for further meeting time for CESCR to address the backlog, and with nearly all treaty bodies making additional requests, it seems unlikely that such procedural tasks can be solved in the near future under the prevailing conditions, as the unsuccessful requests for extra meeting time showed.

The division of funds available for treaty bodies, the UPR and special procedures, as well as for country missions and capacity building in states, all leads to severe restrictions when it comes to funding treaty body work. The capacity building efforts by the OHCHR have had, however, visible effects on the quality of the state reports, and for follow ups, to be sure, but in the end, funds for CESCR have not been increased sizeably. We have had assurances, however, from the High Commissioner that great efforts would be made to establish a proper balance between the various human rights functions to be funded.

The treaty bodies, in my opinion, are the crown jewels of the international human rights protection system, as many commentators have pointed out. They should retain a clear priority in the allocation of resources. But that position is not unchallenged.

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