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Economic, social and cultural rights and the internet

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Towards an international advocacy strategy for economic, social and cultural rights and the internet

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Introduction

The purpose of this report is to provide an overview of international human rights instruments relevant to advocacy efforts around economic, social and cultural rights (ESCRs) and the internet. While this topic is still relatively new, advocacy at international bodies can be valuable to help develop norms about the promotion and protection of ESCRs in online contexts, and to develop internet policy that advances ESCRs. In addition, international advocacy can be utilised to improve national human rights situations and complement in-country work.

This report will map out the relevant bodies for advancing ESCRs and the internet, explain briefly how they work, why they are relevant to ESCRs and the internet, and how civil society can engage. It will also identify some opportunities for engagement looking towards an advocacy strategy to promote and protect ESCRs in the context of the internet. This report does not aim to provide a comprehensive overview of all international institutions relevant to ESCRs and the internet,[1] but identifies the most relevant in the human rights ecosystem, and those in which there are clear avenues for civil society engagement.

Treaty bodies

As international human rights treaties are the source of international standards on ESCRs, human rights treaty bodies are important institutions both for the development of norms with respect to the internet and for improving national policies that impact on human rights online. Treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties. There are 10 human rights treaty bodies, each of which receives and considers reports submitted by state parties, issues concluding observations/reWcommendations to assist states in implementing their obligations, and develops general comments/recommendations interpreting provisions of their respective treaties both substantively and procedurally. Some treaty bodies have additional functions, such as to receive individual complaints and conduct inquiries.

The most relevant treaty body for ESCRs and the internet is the Committee on Economic, Social and Cultural Rights (CESCR), which monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2] This body, made up of 18 independent experts, meets twice a year for three weeks at a time to review the compliance of the 164 states that have ratified the treaty.[3] States party to the ICESCR are required to submit an initial report two years after ratifying the treaty and submit periodic reports every five years. The Committee may consider individual communications alleging violations of the ICESCR by states party to the Optional Protocol to the ICESCR. In addition, upon receipt of reliable information on serious, grave or systematic violations of the convention by a state party, the Committee may initiate inquiries. The Committee also issues public statements or letters from time to time to address developments that threaten to undermine the enjoyment of rights set out in the ICESCR.

Why are they relevant for the internet and ESCRs?

Treaty bodies are relevant to the internet and ESCRs because when they review state parties' compliance with the relevant treaty, they may consider how the state's policies with respect to the internet relate to its protection of the rights enshrined

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1   For a comprehensive overview on international mechanisms relating to ESCRs, see: www.cesr.org/article.php?id=274

2   Other relevant treaties include the International Covenant on Civil and Political Rights (Articles 8 and 27), the Convention on the Rights of the Child (Articles 13: 1, 24 and 27), the Convention on the Rights of Persons with Disabilities (Articles 25, 27, 28 and 30, among others), and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Articles 25, 28, 30, 31 and 43).

3   indicators.ohchr.org

in the treaty and make recommendations in their concluding observations. For example, in its concluding observations for its 2006 review of Libya, the CESCR urged the Libyan government "to respect and protect freedom of information and expression in the State party, including on the Internet, to enable all persons under its jurisdiction to take part in cultural life and enjoy the benefits of scientific progress and its applications."[4]

As noted above, general comments are another way in which the Committee can weigh in on the relevance of the internet to ESCRs. In General Comment 21 on the "[r]ight of everyone to take part in cultural life", the Committee elaborates on the definition of "cultural life" in the ICESCR to include methods of production or technology and non-verbal communication. In addition, it clarifies that "[e]veryone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication" and notes that the internet is a form of communication media that minorities have the right to in order to exercise their right to cultural diversity and manifest their cultural identity and membership.[5]

How can civil society engage?

Civil society can engage in treaty bodies in a number of ways, in particular in countries where the government has ratified the treaty. For example, some governments invite NGOs to participate in national consultations preceding the drafting of the state report. Even if the government does not hold consultations, NGOs and other stakeholders can submit their own reports to treaty bodies, with their own views and assessments on the implementation of the relevant treaty. These reports are important tools to inform the work of the Committee, and help Committee members to achieve a more comprehensive picture of the human rights situation in the country. NGOs can also submit written information to assist the Committee in drawing up the list of issues for each state, which together with the state report, forms the basis for the dialogue between the experts of the treaty body. For the CESCR, the deadline for submitting

information is 1.5 months before the Committee's session when the state is under review, or two months before the pre-sessional working group for the list of issues.[6]

Civil society can in some cases contribute to the development of a general comment. Some treaty bodies convene "days of general discussion" to examine a particular theme or issue of concern. Such days of general discussion are usually open to the public as well as external participants such as UN organisations, state delegations, NGOs, and experts. The CESCR has held a series of days of general discussion since 1992, many of which have resulted in general comments. For example, in 2010 it held a day of general discussion on the right to sexual and reproductive health, which led to the issuing of a General Comment on the right to sexual and reproductive health in March 2016.

Opportunities for engagement

The most straightforward way for civil society to get treaty bodies to take on the internet dimensions of their mandates is to engage in reviews of their government before the Committee.[7] Specifically, it is important to raise ways that internet policy or regulation is threatening the enjoyment of ESCRs, or is limiting the state's responsibility to progressively realise ESCRs, in shadow reports – for example, through lack of regulation of the private sector. This is an opportunity for civil society to provide information on specific laws and policies at the national level, and importantly to pose questions for the Committee members to include on their list of issues for the state to respond to when it is reviewed before the Committee. Engagement at this early stage sets the stage for the Committee to make concluding observations on internet policy.

Additionally, as the Committee develops new general comments to elaborate on and update its interpretation of various articles of the treaty, there may be opportunities for input to consider the impact of the internet on the issue at hand. For example, there is currently a draft General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights

4   Committee on Economic, Social and Cultural Rights. (2006). Concluding observations of the Committee on Economic, Social and Cultural Rights – Libyan Arab Jamahiriya (E/C.12/LYB/CO/2). tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fLYB%2fCO%2f2&Lang=en

5   Committee on Economic, Social and Cultural Rights. (2009). General comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights) (E/C.12/GC/21). tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f21&Lang=en

6   For more information on how to participate in sessions of the treaty bodies, and in-depth information on how the different treaty bodies work, see Collister, H., Helm, T., Patel, P., & Starrenburg, O. (2015). A Simple Guide to the UN Treaty Bodies. International Service for Human Rights. www.ishr.ch/sites/default/files/documents/ishr_simpleguide_eng_final_final_dec15.pdf

7   For a list of upcoming sessions, see: tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR

in the Context of Business Activities,[8] which is open for written input.[9] While the draft does not address specific industries or sectors, it is important that as the draft evolves it takes into account particular jurisdictional challenges, for example, those that can be raised in the context of the operations of ICT companies. As further analysis is needed into how the enjoyment of several of the articles of the ICESCR are impacted by the internet – for example, the right to education (Article 13), to take part in cultural life and to enjoy the benefits of scientific progress and its applications (Article 15), to work (Article 6), to health (Article 12) and to food (Article 11), among others – should the Committee take up new general comments on these issues, it would be a good opportunity to incorporate the impact of the internet on how these rights are enjoyed in the digital age, and how they contribute to the progressive realisation of ESCRs. A longer-term goal could be for the Committee to develop a general comment examining how the internet impacts on the enjoyment of various articles in the Covenant, and what new challenges it brings.

Human Rights Council

Unlike the treaty bodies, which are made up of independent experts, the Human Rights Council (HRC) is a political body made up of UN Member states (47), which are elected by the UN General Assembly. The Council is the primary UN body responsible for strengthening the promotion and protection of human rights and for addressing situations of human rights violations and making recommendations on them. The body meets three times each year in Geneva for regular sessions and, from time to time, it convenes for special sessions when one third of its members request to hold a special session to address human rights violations and emergencies.

The Council has a number of tools to advance its mandate, including passing resolutions on thematic and country-specific situations; through the work of its Special Procedures, independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective;[10] and its Universal Periodic Review (UPR) mechanism,[11] which uses peer review to assess the human rights situations in all UN member states.[12]

Why is it relevant for the internet and ESCRs?

The HRC has taken great strides towards advancing the principle that human rights apply online. In 2012, the HRC passed its first resolution on "the promotion, protection and enjoyment of human rights on the Internet", which affirmed the fundamental principle that "the same rights people have offline must also be protected online."[13] Since this landmark resolution, the HRC has been passing resolutions on the internet and human rights on a bi-annual basis, which have addressed a broad range of issues which are relevant for ESCRs, including the importance of internet access for the right to education, bridging the gender digital divide, attacks on people for exercising their rights online, ending intentional disruptions to internet access, and improving access to the internet and information and communications technologies (ICTs) for persons with disabilities.

Aside from the internet resolution, the HRC has passed a number of thematic resolutions, some of which have begun to address the internet dimensions of the issues. For example, a resolution on the right to education which is run on an annual basis, in 2016 addressed "the contribution that access to new information and communications technology, including the Internet, plays in facilitating the realization of the right to education and in promoting inclusive quality education." The resolution[14] urged all states to:

[G]ive full effect to the right to education by, inter alia, complying with their obligations to respect, protect and fulfill the right to education by all appropriate means, including by taking measures, such as:

(a) Addressing issues of access, quality and equity in the use of information and communications technology in education, including in order to bridge the digital divide;

8 De Schutter, O., & Kedzia, Z. (2016). General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities (E/C.12/60/R.1). Committee on Economic, Social and Cultural Rights. ohchr.org/Documents/HRBodies/CESCR/Discussions/2017/E-C-12-60-R-1.docx

9 ohchr.org/EN/HRBodies/CESCR/Pages/Discussion2017.aspx

10 ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx

11 Brown, D., & Kumar, S. (2016). Using the Universal Periodic Review for Human Rights Online. London: Global Partners Digital. https://www.apc.org/en/system/files/Using%20the%20universial%20periodic%20brief%20for%20human%20rights%20online.pdf

12 ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

13 Human Rights Council. (2012). The promotion, protection and enjoyment of human rights on the Internet (A/HRC/RES/20/8). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/20/8

14 Human Rights Council. (2016). The right to education (A/HRC/RES/32/22). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/22

(b) Creating an enabling policy environment for drawing on digital technologies that can serve as valuable tools in the delivery of education;

(c) Building the capacity of teachers to use digital technologies while retaining their freedom concerning pedagogical approaches;

(d) Assessing the quality of education, including online or Internet education and certification, including massive open online courses, and taking appropriate remedial or other action to address policies or practices that prevent the enjoyment of the right to education by, inter alia, engaging with existing national human rights mechanisms, parliamentarians and civil society;

(f) Encouraging the availability of educational resources in various languages, including in the implementation of information and communications technology in education.

The Special Procedures have done extensive work on internet rights, beginning with the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, who dedicated his 2011 report to the internet's impact on freedom of expression.[15] David Kaye, La Rue's successor, has built on his work by examining the importance of encryption and anonymity tools for freedom of expression[16] and the role of ICT sector.[17] While La Rue and Kaye approach their reports from the angle of freedom of expression, they are relevant for ESCRs as well. For example, for human rights defenders working in the field of ESCRs, encryption and anonymity tools are critical for those organising online, or just to secure their communications and devices from actors who want to prevent them from engaging in activism, imprison them, or worse.

A number of other Special Procedures who work on ESCRs have begun addressing issues relating to the internet. The Special Rapporteur on the right to education, Kishore Singh, has done so most comprehensively, focusing his final report to the HRC on education in the digital age. Singh took a balanced approach to the issue, recognising both the opportunities and challenges posed by the "Digital Revolution in Education", and emphasised the digital divide both within and between societies in terms of quality, speed, infrastructure and resources such as reliable access to electricity, and device type.[18] The resolution referenced above draws heavily on Singh's report. The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras, also examined internet dimensions of his mandate in a recent report[19] in the context of cyberbullying. Pūras noted that cyberbullying "is associated with a wide range of mental, psychosocial, cognitive, educational and health problems." While the Special Rapporteur emphasised that the right to protection "extends to violence in the digital environment," he did not resort to protectionist or pro-censorship measures. Instead, he warned that "it is neither appropriate nor possible to seek to restrict adolescents' access to the digital environment" as a counter-measure. He recommends "the adoption of holistic strategies aimed at enhancing adolescents' capacities to protect themselves from online harm."

Regarding the UPR process, over 200 recommendations have been accepted by governments regarding their respect for human rights online. While a number of the recommendations relate to expanding access to the internet, which can be an enabler of human rights, most of the recommendations in the more specifically internet-related resolutions focus on civil and political rights.[20] It is worth noting that this follows a broader trend of ESCRs being under-represented in the UPR process.[21]

15   La Rue, F. (2011). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/HRC/17/27). www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

16   Kaye, D. (2015). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/HRC/29/32). www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.doc

17   Kaye, D. (2016). Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (A/HRC/32/38). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/38

18   Singh. K. (2016). Report of the Special Rapporteur on the right to education (A/HRC/32/37). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/37

19   Pūras, D. (2016). Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/32/32). https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/067/53/PDF/G1606753.pdf?OpenElement

20   A notable exception is perhaps a recommendation that Libya received from Bahrain to "Enhance and improve education, in particular by continuing to work towards the improvement of education through information technology." Human Rights Council. (2011). Report of the Working Group on the Universal Periodic Review - Libyan Arab Jamahiriya (A/HRC/16/15). daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/16/15&Lang=E

21   McKernan, L. (2015). Economic, social and cultural rights: Exploding myths and building consensus. Geneva: Universal Rights Group. www.universal-rights.org/blog/economic-social-and-cultural-rights-exploding-myths-and-building-consensus

How can civil society engage?

In order to participate in regular HRC sessions, civil society must either be part of an NGO with ECOSOC consultative status,[22] or have an NGO with consultative status sponsor its accreditation for the session. At regular sessions, accredited NGOs can make oral interventions, organise side events, attend informal negotiations on resolution text, and meet with delegates, UN officials, and others. Aside from the sessions, there are a number of ways to contribute to the HRC's work (whether an NGO is ECOSOC-accredited or not). A number of the Special Procedures have open calls for input for their reports, or do consultations and seminars. Civil society can also submit information to the Special Procedures, which can be used for the basis of a communication from the Special Procedures to governments.[23] Likewise, any civil society organisation can participate in the UPR by submitting a stakeholder report and engaging in national-level coalition building and advocacy. For advocacy in Geneva, however, ECOSOC accreditation is required.

Opportunities for engagement

There is quite a lot of interplay between resolutions and Special Procedures that can be leveraged for advocacy at the HRC. For example, a Special Rapporteur might take a particular interest in an internet-related ESCR issue and develop a report focused on the issue which leads to a resolution including some elements of the report. The example on the right to education mentioned above demonstrates this well. The reverse can happen as well. A state or group of states can include in a resolution, or even a joint statement, a request for the relevant Special Procedure to focus on a specific aspect of their mandate. For example, a group of states, led by Cyprus, made a joint statement supporting the Special Rapporteur in the field of cultural rights Karima Bennoune's indication that she would examine the detrimental impact of the destruction of cultural heritage on the enjoyment of cultural rights. In doing so they lent their support to that initiative and elaborated on some areas the report could cover. As a follow-up, they led a resolution on cultural rights and the protection of cultural heritage, which recognised digital preservation as an effective strategy for the prevention of cultural heritage destruction.

This GISWatch edition – both in its thematic and country reports – identifies a number of topics that could benefit from greater elaboration at the normative level, which is something that both the Special Procedures and resolutions of the HRC could certainly contribute to. An upcoming opportunity for engagement is a report from the High Commissioner on Human Rights on "ways to bridge the gender digital divide from a human rights perspective".[24] Early next year, there will be an open call for input from civil society and others, and thus an opportunity to highlight the intersections between the challenges women face in accessing and utilising the internet and the barriers they face in exercising ESCRs. The gender digital gap is not simply a result of a lack of infrastructure, but relates to lack of education, lack of financial means to pay for access, lack of free time to spend time online, and societal stigma relating to women's use of technology, among others. Taking a slightly longer view, it is worth considering focusing the 2018 HRC resolution on ESCRs.

With respect to the UPR, there is plenty of scope for bringing in ESCR-related internet issues in the upcoming cycle reviews. In fact, the country-focused reports in this GISWatch edition can form the basis for a stakeholder submission.[25]

Other relevant institutions

While this report focuses on the relevant international human rights mechanisms, it is worth noting that there are regional human rights mechanisms that can be engaged around ESCRs and the internet, as well as other international agencies that are relevant in this area. For example, the African Commission on Human and Peoples' Rights, which, like treaty bodies, is composed of independent experts, has a Working Group on Economic, Social and Cultural Rights,[26] which could certainly explore the impact of the internet on ESCRs in Africa. In the Americas, the Inter-American Commission on Human Rights operates as the regional human rights

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22 ECOSOC consultative status indicates that the UN's Economic and Social Council (ECOSOC) has granted an NGO certain status, rights and obligations to engage with the UN. csonet.org/index.php?menu=30

23 There are different types of communications. For example, letters of allegation for past human rights violations; urgent appeals for ongoing or potential human rights violations; and concerns relating to bills, legislation, policies or practices that do not comply with international human rights law and standards. For more information see: https://spsubmission.ohchr.org

24 Human Rights Council. (2016). The promotion, protection and enjoyment of human rights on the Internet (A/HRC/RES/32/13). ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/13

25 For information on how the UPR can be used to advance internet rights, see: Brown, D., & Kumar, S. (2016). Op. cit. For the calendar of upcoming reviews, see: www.ohchr.org/Documents/HRBodies/UPR/Calendar3rdCycle.doc

26 www.achpr.org/mechanisms/escr

body, also composed of independent experts. In 2014, the Commission established a Special Rapporteur on Economic, Social and Cultural Rights; however, to date this position remains unfilled. In the meantime, the Unit on Economic, Social and Cultural Rights is responsible for strengthening the IACHR's work on ESCRs.

Though beyond the scope of this report, there are a number of international organisations and specialised agencies of the UN that are doing work around trade, labour, culture, telecommunications and intellectual property, which can impact on how ESCRs are enjoyed online, such as the World Intellectual Property Organization, United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organization, the International Telecommunication Union, and the World Trade Organization, among others. As Avri Doria's report in this edition of GISWatch shows, internet technical bodies also impact the exercise of human rights online.

Conclusion

As a relatively new field, engaging in advocacy at international human rights spaces can be valuable for advancing norms and awareness around ESCRs and the internet. Engaging at treaty bodies requires a long view, as just a few states are under review at each session, and not all states are party to all the human rights treaties. Likewise, general comments take multiple years to develop. Advocacy opportunities at the HRC tend to be more fluid; however, as an intergovernmental body it is a highly politicised space whose outcomes hold less legal weight with governments than treaty bodies. International advocacy has the greatest impact when it complements domestic efforts, so engaging bodies like the HRC can be a useful strategy for civil society to leverage their governments' positions at the international level to improve internet policy and regulation at home.

Economic, social and cultural rights and the internet

The 45 country reports gathered here illustrate the link between the internet and economic, social and cultural rights (ESCRs). Some of the topics will be familiar to information and communications technology for development (ICT4D) activists: the right to health, education and culture; the socioeconomic empowerment of women using the internet; the inclusion of rural and indigenous communities in the information society; and the use of ICT to combat the marginalisation of local languages. Others deal with relatively new areas of exploration, such as using 3D printing technology to preserve cultural heritage, creating participatory community networks to capture an "inventory of things" that enables socioeconomic rights, crowdfunding rights, or the negative impact of algorithms on calculating social benefits. Workers' rights receive some attention, as does the use of the internet during natural disasters.

Ten thematic reports frame the country reports. These deal both with overarching concerns when it comes to ESCRs and the internet – such as institutional frameworks and policy considerations – as well as more specific issues that impact on our rights: the legal justification for online education resources, the plight of migrant domestic workers, the use of digital databases to protect traditional knowledge from biopiracy, digital archiving, and the impact of multilateral trade deals on the international human rights framework.

The reports highlight the institutional and country-level possibilities and challenges that civil society faces in using the internet to enable ESCRs. They also suggest that in a number of instances, individuals, groups and communities are using the internet to enact their socioeconomic and cultural rights in the face of disinterest, inaction or censure by the state.

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