The analysis of the concluding observations adopted by the two UN Human Rights committees in 2021

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THE ANALYSIS OF THE CONCLUDING OBSERVATIONS ADOPTED BY THE TWO UN HUMAN RIGHTS COMMITTEES IN 2021

In 2021 the Human Rights Committee (HRC) held three sessions and considered the reports of Armenia, Botswana, Germany, Ukraine, Togo, Finland and Kenya. The Committee on economic, social and cultural rights (CESCR) had two sessions and adopted the concluding observations in respect of Finland, Latvia, Azerbaijan, Bolivia, Bosnia and Herzegovina, Kuwait and Nicaragua. Provided the wide scope of the observations the focus will be made on several most interesting issues: business and human rights (I), the right to strike in the jurisprudence of the HRC (II) and the statements of the committees in the context of Covid-19 (III).

I - BUSINESS AND HUMAN RIGHTS

Both committees adopted in 2021 the conclusions on the issue of business and human rights. Already in the review published in 2020, it was noted that the CESCR was pushing the developed states towards implementing in national legislation and practice the UN Guiding Principles on Business and Human Rights adopting a framework that inter alia holds business entities liable for violations of economic, social and cultural rights and enables victims to seek remedies through judicial and non-judicial mechanisms in the State party (Switzerland, Denmark).

This year the HRC adopted the same conclusions in respect of Germany, thus supporting the CESCR in the promotion of the due diligence strategy. It recommended enhancing the effectiveness of existing mechanisms to ensure that all corporations under its jurisdiction respect human rights standards when operating abroad. It also proposed to establish an independent mechanism with the power to investigate human rights abuses committed abroad and take additional steps to remove any barriers to legal, including judicial, remedies for those who have been victims of activities of such corporations operating abroad. Germany was the only country out of six considered in respect of which such comments were adopted.

The approach of the CESCR was wider: three out of seven countries received recommendations about the due diligence framework. The position of this committee was...

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almost similar in respect of developed (Finland) and developing countries (Azerbaijan, Kuwait). These countries should adopt a regulatory framework that requires business entities to exercise human rights due diligence in their business activities at home and abroad and ensure that businesses are held accountable for violations and that victims of such violations have access to effective remedies. Finland was urged to conduct investigations when reports of human rights violations by Finnish companies are brought to its knowledge.

These positions of the committees demonstrate that developing countries are also encouraged to develop a « due diligence » approach and the culture of responsibility for human rights violations committed both under the jurisdiction of the state and abroad. Taking into account the active work at the UN on a « Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises »⁴, the attempts of the human rights committees in this sphere are very precious. The mentioned recommendations enhance the awareness about the problem of business responsibilities for human rights violations committed abroad. It also, in a way, « prepares the soil » for the further adoption of the new UN treaty dedicated to this problem.

II - THE RIGHT TO STRIKE IN THE JURISPRUDENCE OF THE HRC

An interesting point might be traced in the conclusions of the HRC in respect of Germany. It criticized the country for the blanket ban on public sector workers striking, including schoolteachers. Despite the absence of the right to strike in the text of the Covenant and the jurisprudence⁵ where the HRC did not agree to consider this right under article 22 of the ICCPR, the Committee seems to reconsider its views.

Let’s recall the position of the HRC, formulated in 1986: to interpret article 22 of the Covenant, which grants the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests, the HRC analysed the travaux préparatoires of the Covenant. It stated that the ICCPR was based on the Universal Declaration of Human Rights and the latter does not refer to the right to strike. In the course of the discussions, an amendment to article 27 (later - article 22 of the ICCPR) providing for the inclusion of the right to strike was rejected by 11 votes to 6, with 1 abstention⁶. These findings permitted the HRC to conclude that the right to strike was not included in the scope of article 22.

Since 1986 there were no individual communications concerning the right to strike but in certain recent concluding observations, the HRC considered the issues of the right to strike and urged, for example, Belarus in 2018 to lift the undue limitations on the right to strike⁷. The scholars first noted this shift in 1999 in the Concluding Comment on

⁴ Documents of the Open-ended intergovernmental working group on transnational corporations and other business enterprises concerning human rights: https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx
⁶ Ibid., § 6.3-6.5.
⁷ HRC, Concluding observations on the fifth periodic report of Belarus, 22 November 2018. CCPR/C/BLR/CO/5.
Chile’s periodic report. The adoption of the « Joint Statement on freedom of association, including the right to form and join trade unions » in 2019 is an important milestone of the recognition of the right to strike under the ICCPR. In this document, both the HRC and the CESC affirmed that « the right to strike is the corollary to the effective exercise of the freedom to form and join trade unions » and that both Committees seek to protect the right to strike.

This statement together with the comments of the HRC to the countries about the need to ensure the right to strike is in line with the approach of the ILO bodies and the ECtHR. To remind, neither the ILO Conventions nor the European Convention on Human rights contains the right to strike, despite this fact both ILO bodies and the ECtHR held that it should be guaranteed as a part of the freedom of association. Such a reading of article 22 of the ICCPR is particularly needed when this right is contested by the employer’s representatives at the ILO.

III - STATEMENTS IN THE CONTEXT OF COVID-19

In 2020 human rights bodies attached a lot of attention to the issue of the pandemic. The Compilation of statements by human rights treaty bodies in the context of Covid-19 Geneva was adopted in September 2020. In this document the CESC urged the states to mitigate the adverse impact of Covid-19 responses on the employment and the remuneration of workers, such as unfair dismissals and layoffs, reduced working hours, and underlined the value of the effective participation of trade unions at all levels of decision-making processes.

In the concluding observations adopted in 2021, the CESC partly addressed the problems mentioned in the statement. Thus, it noted with concern that in Nicaragua doctors and other health workers were dismissed for allegedly refusing to obey an order not to provide medical assistance to people affected by social protests and in the context of the Covid-19 pandemic. It recommended to take the necessary measures to ensure that all wrongfully dismissed workers have access to effective judicial remedies, compensation for the harm they suffered and, where appropriate, reinstatement. Bosnia and Herzegovina were recommended to extend the protection of Covenant rights to informal workers and

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9 HRC, CESC, Joint Statement on freedom of association, including the right to form and join trade unions 6 December 2019: https://undocs.org/en/E/C.12/66/5
11 ECtHR, Enerji Yapi-Yol Sen c. Turquie (No. 68959/01), 21 April 2009.
ensure that they are also covered by the socioeconomic response measures taken in the context of the Covid-19 pandemic.

The CESCR noted that Bolivia faced an unemployment crisis due to Covid and recommended to take urgent measures to revive the economy and provide support to jobseekers, particularly those from vulnerable groups. It also recommended to monitor the temporary adjustments to labour legislation implemented in response to the Covid-19 pandemic, to prevent abuses. The same recommendations were adopted in respect of Finland, which was urged to prevent abuse by employers and to ensure that employment contracts that have been temporarily suspended are indeed reinstated as soon as conditions so permit.

Concluding this brief review three most important points should be outlined. Firstly, both committees are encouraging developed and developing states to ensure the human rights due diligence and urge the states to hold businesses accountable for violations, providing effective remedies to the victims. Secondly, the evolution of the HRC’s approach to the right to strike leaves optimism and provided additional support to this human right. Finally, the comments of the CESCR to the states’ activities in the pandemic and the relevant recommendations evidence that the UN human rights committee keeps abreast of the situation. The CESCR recommendations in this field are in certain cases concrete enough to provide the legal support for the protection of the violated right on the national level (for example, for claiming the reinstatement of unfairly dismissed doctors in Nicaragua).