



# ADVOCATING ON GENDER IDENTITY AND GENDER EXPRESSION

## THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The United Nations (UN) human rights mechanisms are becoming increasingly aware of human rights issues surrounding gender identity and gender expression (GIGE), but there is still a long way to go to ensure that the UN's recommendations are useful to human rights defenders on the ground.

This guide aims to help GIGE activists use one specific tool in the UN – *the Committee on Economic, Social and Cultural Rights (CESCR)* – to achieve their national objectives. It gives a brief introduction to CESCR, explains how and when trans rights defenders can advocate before the Committee, identifies positive developments and opportunities for growth, highlights challenges and offers tips to overcome them, and provides links to additional resources.

While CESCR has not dealt with GIGE themes in detail in the past, the Committee offers opportunities to obtain concrete recommendations for States to combat violations of the rights to *health, employment, education, housing, social security, family and water*, amongst others, of trans persons. GIGE activists can use CESCR to highlight a wide variety of human rights violations, such as:

- lack of access to hormonal treatment
- discrimination in sexual and reproductive health services
- criminalisation of sex work (in particular health impacts)
- harassment and violence at work
- school uniform requirements and dress codes
- school drop-out rates
- unfair evictions

Defenders can obtain recommendations on these issues for their particular **country**, bring individual cases that will create jurisprudence to help trans persons **globally**, or even contribute to shaping the Committee's own interpretation of the rights within the Covenant.

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## WHAT IS CESCR?

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) is one of the most important **foundations of international human rights law**. The Covenant, together with the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration on Human

Rights, form the fundamental substance of **universal human rights**. ICESCR is an international treaty that sets out the basic economic, social and cultural rights that all persons should be able to enjoy – without discrimination. These include the right to adequate housing, health, education and employment.

Since it was drafted half a century ago, ICESCR has been ratified by 164 States (only four less than the ICCPR. **See if your country is a signatory:** <http://indicators.ohchr.org/>). However, while ratifying a treaty is a first step in giving effect to human rights obligations, the Covenant would have very little force without a body to monitor whether States are doing what they are meant to. With this in mind, the Committee on Economic, Social and Cultural Rights (CESCR) was established in 1985.

The Committee is made up of 18 independent experts who not only **monitor State compliance**, but also **provide guidance to States** on what their duties are. CESCR meets three times a year for 3 - 4 week 'sessions' during which it performs **country reviews** (examines the situation in particular countries), prepares **General Comments** (authoritative interpretations of particular rights or concepts in the Convention) and makes decisions on **individual communications** (complaints brought by individuals against States for violating the Covenant). All three of these areas offer opportunities for civil society to advocate on GIGE, and ILGA is available to provide assistance throughout the process.

WHAT DOES CESCR DO?

COUNTRY REVIEWS



*A typical country review process*

Countries that have ratified the Covenant have to submit periodic reports to the CESCR **every 5 years**. Civil society can help the Committee find out whether States are meeting their duties by submitting **shadow reports**, highlighting particular problems and responding to State claims. This can be done at two stages:

- 1) After the State submits its country report and before the Committee drafts the **List of Issues** (LOI: questions on specific topics about which the Committee wants more information in a particular country)

- 2) After the State has responded to the LOI and **before the session** where CESCR will review the country's compliance with the Covenant

Information on deadlines and where to send reports can be found in the '**Information note for civil society**' on the webpage for the session at which a country will be reviewed: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR). This document may only be available a couple of months before the session. ILGA also maintains a list of **upcoming deadlines** on its website: <http://ilga.org/what-we-do/united-nations/treaty-bodies/deadlines/>.

- Reports should be short and direct (maximum 10 pages), based on **data and evidence** where possible (include the sources)
- Tailor reports to the specific rights within the Covenant and the LOI, and respond to information in the State report where appropriate
- Try to submit report at the first opportunity (the report for the LOI can be very short, and the report for the session should be more detailed, especially if nothing was sent before)
- If there is only capacity to submit one report, try to provide a detailed one that can be used for both the LOI and the session
- Include specific questions (for the LOI) and/or recommendations (for the session)

#### **During the session**

The State review during the session takes place in Geneva and lasts for **six hours spread over two days** (three hours in the afternoon of the first day and three hours in the morning of the second). The State delegation makes a presentation describing on its compliance with the Covenant, after which individual members of the Committee ask questions related to particular articles and rights in the treaty, as well as specific challenges within the country. The State has the opportunity to respond immediately, the next day, or in writing within 48 hours of the session (published on the webpage for the session). If the State replies and the Committee is not satisfied with the response during the session, it can ask follow-up questions. **Civil society can attend** these sessions, but they are not allowed to participate in the questioning. Different Committee Members are responsible for asking questions related to specific articles of the Covenant, but any Committee Member may raise a question on topics that they are concerned about.

At the end of the 3-4 week session, the Committee will adopt **Concluding Observations** on each country reviewed. This is a document highlighting **positive developments** and **areas of concern**, and **making recommendations** to the State, which the State has a **duty to implement**. The Concluding Observations are published on the session page: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR). In the following sections, you will find more information on what these Concluding Observations can contain and on how they can be used in national advocacy.

It is during the session that advocates can have the biggest impact to ensure that GIGE issues are raised in questions by the Committee and in the Concluding Observations. Advocates are strongly encouraged to attend, if possible. More information on financial support available for travel to Geneva is presented in the section on 'Funding & Assistance'.

There are **four opportunities for civil society to advocate** during the session:

- 1) **Formal briefing**: on Monday morning of the week that the country is being reviewed, advocates can make very brief (usually **2-3 minute**) oral statements to the Committee. The Committee sometimes asks questions regarding the information. Note that this session is public and it is an opportunity to speak for civil society from all four of the countries being reviewed that week
- 2) **Lunchtime briefing**: at lunchtime before the beginning of a country review, civil society from that country can request to hold an **informal briefing session** (approximately **1 hour** long) with the Committee. Activists can explain human rights issues in greater detail and the Committee Members are able to ask questions. Committee Members who plan to ask questions will usually attend this briefing, as well as the '**country rapporteur**' responsible for coordinating the review and the drafting of the Concluding Observations, with the support of the CESCR secretariat
- 3) **Private meetings**: in the mornings, lunchtimes and evenings civil society can try to **meet with individual Committee Members** to encourage them to ask the State questions about specific issues. This is particularly useful if there are many competing human rights issues in a country, where civil society from the country has allowed GIGE issues little space during briefings, or where the Committee Members at the lunchtime briefing did not seem responsive to GIGE topics
- 4) **During the session**: during breaks in the session, advocates may **approach Committee Members** or send them information by email in order to respond to statements by the government delegation or provide more material on a particular issue that has been raised. Civil society can also **send such information within 48 hours** of the end of the review

If you are able to attend the review session, you will have to **register for the event** between six weeks and 10 days before the session to get accreditation (more information on this can be found in the 'Information note for civil society' on the relevant session page: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR)). The **dates of the reviews** are available in the 'Programme of Work', available on the same page.

In order to **organise a lunchtime briefing**, you should contact the CESCR secretariat in OHCHR ([cescr@ohchr.org](mailto:cescr@ohchr.org)) at least three weeks before the session. If this date has passed, you should contact the secretariat, as well as the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR – Lucy McKernan: [lucy@globalinitiative-escr.org](mailto:lucy@globalinitiative-escr.org) or the current 'Geneva Representative': <http://globalinitiative-escr.org/about-us/staff/>) – an organisation that works closely with the Committee – to see if you can participate in a briefing that is already organised.

- Find out what civil society from your country will attend the session so that you can coordinate for briefings and ensure that presentations are not repetitive or too long
- Take advantage of the session to build a relationship with the State delegation so that you can meet again at home
- Contact ILGA to get assistance on how to engage with the Committee in Geneva, in particular **for information on Committee Members open to raising GIGE issues**
- While in Geneva, try to meet with other stakeholders, such as:
  - o **Special Procedures** (list of thematic mandates: [http://spinternet.ohchr.org/\\_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM](http://spinternet.ohchr.org/_Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM), list of country mandates:

<http://spinternet.ohchr.org/Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx>,

- OHCHR staff members dealing with your specific country (contact details of the relevant departments are available on the regional and country pages on the OHCHR website: <http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx>),
- UN Agencies (UNHCR, WHO, UNAIDs, UNICEF, etc),
- Embassies and Permanent Missions (reach out to ILGA for contact details)

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## INDIVIDUAL COMMUNICATIONS

21 countries have ratified the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (OPICESCR – see if your country has signed: <http://indicators.ohchr.org/>), which means that they have agreed that **individuals or organisations can bring a complaint** against them for violating the Covenant. These cases are called **individual communications**, and CESCR considers each case and then presents its '**views**' on the situation.

These views are not legally binding on the particular country, in the sense that they can't be directly relied on in a domestic court to force the government to act. However, by accepting the complaint procedure, States are considered to have also accepted to respect CESCR's findings. The views are authoritative interpretations of the duties of all States who have signed onto the Covenant – not just the country in the case). So **a positive decision on GIGE issues in one country is useful to trans activists globally**. CESCR can make specific recommendations to the State (for example calling for redress for the victim(s)), and the Committee has a follow-up mechanism in place to monitor whether the country has complied.

In the last two years, only a single individual communication on sexual orientation, gender identity and expression or sex characteristics was considered by a Treaty Body. The Committee against Torture found that returning an LGBTI rights defender to Uganda from Canada would breach the Convention against Torture. This finding, in addition to directly benefiting the specific person, demonstrates how useful these mechanisms can be in highlighting a particular situation or government policy. For example, it could be possible to bring a case for **a trans person who has been fired from their job** because of their gender identity and/or expression in a country where there is no anti-discrimination law that will allow them to get compensation.

However, like any (strategic) litigation procedure, it is a **slow process**. It will currently take approximately **1.5 years** from when the complaint was submitted for the Committee to adopt views on the substance (merits) of a particular case. This is because the Committee will call on the Government and the complainant to respond to each other's allegations at various times before reaching its own conclusions. Other organisations can also make '**third party interventions**' (or amicus briefs) to support the complaint. To avoid slowing down CESCR's procedure, these should be submitted at the same time as the original complaint or when the complainant is asked to respond to information provided by the State.

**Admissibility:** To be able to submit an individual communication, a person/organisation must have been the **victim of a violation** of its rights under ICESCR or must have the consent of such a victim (unless it is impossible to obtain consent). In addition, the person/organisation ('**the complainant**') must have

**exhausted all domestic remedies**, i.e. used all possibilities in the domestic legal system to get redress for the violation. However, this is not required if the complainant can prove that the domestic options would take too long or would be ineffective. The complaint must be **sent within one year** of exhausting domestic remedies (unless it can be proven that this was not possible), and the case cannot be in the process of being considered by any other international settlement mechanism at the same time. Finally, the violation must have **occurred after 5 May 2013**, or it must still be continuing after that date.

*Process of consideration of an individual communication:*

1. **Submission:** individual/organisations submit complaint
2. **Interim measures:** at any time, CESCR may ask the State to take certain steps to protect the victim(s) from possible irreparable harm – this does not affect admissibility or views
3. **State response:** Government informed of case and requested by CESCR to provide information
4. **Complainant's response:** complainant may be asked to respond to the government's comments. Steps 3 and 4 may be repeated several times
5. **Admissibility decision:** CESCR decides whether case meets the criteria for it to be considered. This decision can be made at the same time as Step 6
6. **Merits decision:** CESCR adopts its views on whether there has been a breach of the Covenant and whether recommendations should be made to the State. This decision cannot be appealed, and the views are made public on the OHCHR website
7. **State implementation:** the State must report on action it has taken to remedy the violation within 6 months of CESCR publishing its views. The Committee will ask for a response from the complainant, and can request further information from the State

*Submitting a complaint:* Complaints should **briefly and clearly describe** – in Arabic, Chinese, English, French, Russian or Spanish – the events or the violation, giving information **chronologically**, highlighting **which rights** of ICESCR have been violated, how **domestic remedies were exhausted** (or why they have not been), and stating what actions the State should take to **remedy** the situation. If you do not want your name to be mentioned when the views are published publicly, you should state that. The complaint and any supporting documents should be sent to [petitions@ohchr.org](mailto:petitions@ohchr.org), with [cescr@ohchr.org](mailto:cescr@ohchr.org) in copy.

- Try to find out what civil society from your country will attend the session so that you can coordinate with them for briefings to ensure that presentations are not repetitive or too long
- As CESCR is only beginning to use its individual communications procedure, it may be reluctant to handle sensitive areas such as gender identity and gender expression, so it is very important that advocates ensure that they meet all the admissibility requirements
- OHCHR has produced a factsheet giving advice and model complaint templates: <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx#whatinfo>
- The 'Rules of Procedure' document gives detailed information on the complaint procedure: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f49%2f3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f49%2f3&Lang=en)

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## GENERAL COMMENTS

The other main activity of CESCR is the drafting of **General Comments**, which are the Committees' interpretations of a particular right or its application of the Covenant in a particular context (e.g. environment and development). **These interpretations apply to all States** who are signatories to the Covenant (unlike Concluding Observations, which concern a single country).

Depending on the topic, these can be particularly **relevant to trans populations**: for example, CESCR recently released a General Comment on sexual and reproductive health, which discusses SOGIESC issues in some detail. In particular, on GIGE, it states:

*"Laws and policies that indirectly perpetuate coercive medical practices, including incentive- or quota-based contraceptive policies and hormonal therapy, as well as surgery or sterilization requirements for legal recognition of one's gender identity, constitute additional violations of the obligation to respect."*

– General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, para 58:  
[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en)

Civil society has the opportunity to make submissions to CESCR to **suggest areas to be included** or **possible amendments** to each General Comment. Submissions made **before the first draft** should highlight the kinds of topics that the General Comment should raise, explaining clearly why (with data, statistics, and references to UN documents and/or regional documents if possible). Submissions made **on an existing draft** should be brief, focusing on changes/additions to be made to specific paragraphs. General structural or conceptual problems can also be highlighted, but the Committee may be slow to make such substantial changes to the document. Calls for submissions are published in the 'Upcoming Events' section of the Committee's website:

<http://www.ohchr.org/EN/HRBodies/CESCR/Pages/CESCRIndex.aspx>.

- It can be difficult to find out what opportunities there are to participate in the drafting of General Comments. GIGE defenders can contact ILGA for more information
- Activists should bear in mind that all groups will try to be included in General Comments and that only a small space can be devoted to GIGE issues. Submissions should be focused

## WHAT ISSUES HAS CESCR COVERED?

CESCR almost always includes T in its LGBT(I) or SOGI(ESC) references. The Committee's general LGBT(I) recommendations usually call on States to combat discrimination in the enjoyment of all economic, social and cultural rights, including **health care, housing, education, employment and social security**. GIGE defenders can use these general and broad recommendations to advocate on particular needs of trans persons in their countries.

In terms of GIGE specifically, CESCR has stated in its own General Comment on **non-discrimination** that,



*"gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace."*

– General Comment No. 20 (2009): Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), E/C.12/GC/20, para 32:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en)

This opens a wide range of possible areas that the Committee could examine. Yet, CESCR made only one recommendation in 2014 and 2015 that was trans-specific – in its review of Lithuania in 2014:

*"8. The Committee is **concerned at the situation of individuals in the State party who face discrimination** in their enjoyment of the rights guaranteed under the Covenant on the grounds of sexual orientation or **gender identity, including access to health-care services such as gender reassignment surgery**. The Committee also regrets the lack of information on measures taken to combat and prevent discrimination on the basis of sexual orientation, particularly in respect of access to employment, health care and education (arts. 2 and 12).*

*The Committee encourages the State party to take effective measures to ensure that lesbian, gay, bisexual and transgender persons can enjoy their economic, social and cultural rights without discrimination, including access to health care, employment and education, and **that legal recognition of their gender is not dependent on whether or not they have undergone gender reassignment surgery.**"*

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fLTU%2fCO%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fLTU%2fCO%2f2&Lang=en)

More broadly, CESCR frequently discusses **HIV/AIDS** and access to medical treatment for persons living with HIV/AIDS, and the Committee has also highlighted the situation of **sex workers**. For example, in the review of Indonesia in 2014, CESCR expressed concern regarding **"laws and by-laws which discriminate against women and marginalized individuals and groups such as sex workers, and lesbian, gay, bisexual and transgender persons are in force"**. The Committee recommended that Indonesia **"[r]eview and repeal provisions in local laws and by-laws which have been found to be discriminatory against women and marginalized groups."** (available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIDN%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fIDN%2fCO%2f1&Lang=en))

In the 2015 review of Kyrgyzstan, amongst other issues, CESCR noted with concern that **"[d]iscrimination in access to health care persists against lesbian, gay, bisexual, transgender and intersex persons, women involved in prostitution, persons with disabilities, and persons living with HIV/AIDS"**

([http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fKGZ%2fCO%2f2-3&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fKGZ%2fCO%2f2-3&Lang=en)).



The Committee made a number of recommendations, including that Kyrgyzstan *"[m]onitor discrimination in access to health services and ensure that health professionals who hamper anyone's access are duly sanctioned."*

Another important issue is the **terminology** used by CESCR. Use of "transsexuals" by the Committee has largely been replaced by references to "transgender persons." However, in the past two years, CESCR has not used any of the terms for diverse genders that exist in local languages of countries reviewed, such as Fa'afafine in Samoa or Hijra in India. This may reflect a lack of understanding or sensitivity among particular Committee Members responsible for drafting Concluding Observations, but there is also a need to use consistent language throughout the Concluding Observations. Similarly, the Committee, like other UN Treaty Bodies, does not refer to "gender expression". It is likely that CESCR has not yet gained a strong understanding of the importance of including this in addition to "gender identity."

- GIGE advocates can use the text of the Concluding Observations on Lithuania to encourage CESCR to make trans-specific recommendations for their country
- Generic recommendations on discrimination against LGBTI persons can be used to show States that they are required to take action on GIGE issues, such as harassment of trans persons in the workplace
- Where civil society wants their local or national terms to be reflected in the text of CESCR's recommendations, they should make this clear to the Committee, without presuming that CESCR will be experts on the differences between diverse sexualities, genders and bodies
- Rights violations due to gender expression can be raised separately from gender identity

## GAPS & OPPORTUNITIES

In the last two years, the Committee received information on the specific situation of trans persons for approximately a quarter of the countries reviewed, so it is disappointing that CESCR has not examined the issues in detail more often. However, it should be noted that only 0.05% total of all the Concluding Observations for seven UN Treaty Bodies in 2014 and 2015 discussed the particular human rights situation of trans individuals.

In other words, CESCR is not unusual in its approach, but **given the crucial rights that CESCR monitors, advocates should continue to push** the Committee to deal with GIGE in greater depth. There are six areas that are particularly interesting as existing gaps that should be bridged and potential opportunities: *health, education, employment, water and sanitation*.

Advocates can also look at the CESCR review of Uganda in 2015 where, in addition to a general call to *"combat and prevent discrimination and societal stigma"* and to guarantee enjoyment of economic, social rights of LGBTI persons, including *"access to housing, employment, social security, health care and education"* ([http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fUGA%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fUGA%2fCO%2f1&Lang=en)), the Committee examined the rights to housing and health in the context of LGBTI persons. The Committee expressed concern regarding **evictions** that occurred following the passage of the Anti-Homosexuality Act in 2014, and the **denial of healthcare** to LGBTI persons. This shows how the situation of a community can be examined in terms of specific rights, and not just general non-discrimination.

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## HEALTH

Article 12 of ICESCR guarantees *"the right of everyone to the enjoyment of the highest attainable standard of physical and mental health"*. This means that GIGE advocates can raise problems such as:

- access to **hormonal treatment**
- access to **sexual and reproductive health** services
- **abusive preconditions** to gender recognition, such as sterilisation and unwanted surgeries
- failures in **mental health** systems and high suicide rates of trans populations
- criminalisation of **sex work** (in particular health impacts)
- policies on **HIV/AIDS and drugs**

In urging the Committee to examine these issues, human rights defenders can support their reports with the work of the **Special Rapporteur on the right to health**, including the mandate-holders' reports on criminalization of same-sex conduct and sexual orientation, sex work, and HIV transmission (A/HRC/14/20, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/14/20&Lang=E>) and on adolescents (A/HRC/32/32, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/32/32](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/32)), both of which make recommendations relevant to the right to health of trans persons.

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## EMPLOYMENT

Articles 6 and 7 of the Covenant protect the *rights to work and to favourable conditions of work*. In this context, trans rights defenders can highlight:

- discrimination in **access to employment** (including the failure to legally prohibit it)
- discrimination in the **workplace**
- **harassment and violence** at work

In its General Comment on the right to just and favourable conditions of work, the Committee highlights that gender identity should be an explicitly **prohibited ground of discrimination**. It identifies some aspects of the right that are particularly important to LGBTI persons (such as **consultation** and non-discriminatory policies of hiring, promotion and termination), also underlines the need to **define harassment broadly** (*General Comment No. 23 (2016) on the Right to just and favourable conditions of work (article 7)*, E/C.12/GC/23, paras 11, 31, 48, 56 and 65 (a): [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/23&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/23&Lang=en)).

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## EDUCATION

Article 13 of ICESCR details *"the right of everyone to education,"* which can be used by GIGE activists to raise concerns regarding:

- **bullying and violence** in schools
- recognition of and respect for a **student's gender identity and/or expression**
- uniform requirements and **dress codes**
- access to **physical education** classes
- **drop-out** rates
- access to **bathrooms** of choice

Advocates can turn to recommendations made by other UN Treaty Bodies, such as the Human Rights Committee (HRCee) and the Rights of the Child (CRC) when looking at education. For example, CRC's Concluding Observations on Chile in 2015 expressed concern "about the high levels of violence in educational settings, including homophobic and **transphobic bullying**" and recommended that Chile "address all forms of violence against children in educational settings" (CRC/C/CHL/CO/4-5, paras 40-41, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCHL%2fCO%2f4-5&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCHL%2fCO%2f4-5&Lang=en)). In 2014, the HRCee had recommended that Chile "step up its efforts to provide effective protection against violence and discrimination committed on the grounds of people's sexual orientation or gender identity, especially in the education system, and **launch a public awareness campaign to combat social prejudices**" (CCPR/C/CHL/CO/6, para 14, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCHL%2fCO%2f6&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCHL%2fCO%2f6&Lang=en)). The HRCee made even more detailed recommendations on combatting discrimination in schools in its review of Malta in 2014 (CCPR/C/MLT/CO/2, para 10, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMLT%2fCO%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fMLT%2fCO%2f2&Lang=en)).

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## HOUSING AND SANITATION

Article 11 of the Covenant guarantees "*the right of everyone to an adequate standard of living (...), including adequate food, clothing and housing.*" GIGE advocates can rely on this right to highlight:

- discrimination in **access to housing** (including a lack of legal prohibitions)
- **unfair evictions**
- lack of access to **water/sanitation** (e.g. bathrooms)

As highlighted by the Concluding Observations on Uganda (see page 9), CESCR regularly criticises unfair or discriminatory **evictions**. The right to adequate housing could also include situations where trans persons are refused accommodation in **State-funded housing** because of their GIGE or where national laws do not prohibit **discrimination by landlords** on the basis of GIGE.

The Committee is also likely to consider laws seeking to regulate access to public **bathrooms** – like those recently appearing in some states in the United States of America (USA) – as breaching the Covenant, possibly under Article 11, which CESCR has interpreted to include water/sanitation (*General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2002%2f11&Lang=en)). Unfortunately, the USA has not ratified ICESCR.

Advocates can also use the findings in the report on homelessness by the **Special Rapporteur on the right to housing**. For example, she stated that "[t]hose who face discrimination on the grounds of (...) gender identity (...) are more likely to become **homeless** and, once homeless, experience additional discrimination" (A/HRC/31/54, para 39, [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/31/54](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/31/54)).

## TIPS & CHALLENGES

It is crucially important to understand that there is never a guarantee that CESCR will make a recommendation on GIGE. Engaging with the Committee is more of a fine art than a science, but trans advocates can try to improve the odds. Below are some tips and practical challenges that GIGE defenders should be aware of.

In terms of **country reviews**, there is a very high number of variables affecting whether a Committee raises a topic with a State being reviewed, including the type of information submitted, the timing of a submission, participation of advocates at the review session, the relative importance of other human rights issues, and the views of individual Committee Members.

It is important that CESCR be given **detailed information** on the situation of trans persons, accompanied with **concrete recommendations** (or questions, at the LOI stage – see above). This should be framed in terms of violations of each of the **specific rights** in the Covenant, showing how trans persons face challenges distinct from those that the wider LGB community encounter.

Regarding **timing**, CESCR takes a relatively flexible approach to when it needs to receive information in order to raise it with the country (for example, by contrast, if the Human Rights Committee has not raised a topic in its LOI, it is unlikely that the topic will be raised in later sessions). However, the best practice for human rights defenders is to **submit information to shape the LOI**, and then again in time for the session. To reduce the workload, one single submission can cover both occasions, if the report provides concrete information, and proposes both questions for the LOI and recommendations for the Concluding Observations.

The most effective method of obtaining a recommendation on LGBTI persons is to **attend the session** in person, and to present the information to the Committee at formal and informal briefings. Personal testimonies and information coming directly from those working on-the-ground bears great weight with the Committee. And crucially, through their questioning, Committee Members can gain deeper understanding of aspects of GIGE that are unfamiliar to them.

In terms of **challenges**, a major one is the potential **lack of openness** of some Committee Members to GIGE issues – often stemming from unawareness of the issues or trans people (and LGBTI communities more broadly). As mentioned, this can be combatted by participation in the session, and also by reaching out to Committee Members who are open to examining these areas. ILGA and others can help you to get in touch with such Committee Members.

There are a number of practical barriers for trans persons engaging with CESCR, three of which need to be emphasised. The first is **language**. While translation of English and one other UN language (depending on the country being examined) is available during the sessions and the formal briefing, it is not available for the informal lunch settings or private meetings. Other organisations may be able to assist advocates with translation, but whenever possible, an advocate travelling to Geneva should be able to speak English.

Secondly, UN security requires that anyone attending a country session register in advance, and they must register using the **name and gender on their passport**. ILGA is working with the UN to change this requirement, but at the moment it is very difficult to obtain a badge that does not state a person's full legal name.

Thirdly, travelling to and staying in Geneva for a session (for between 3-6 days) is **costly**. As stated above, advocates can have the biggest impact on the outcome of the Concluding Observations if they attend the session, and the section on 'Funding & Assistance' provides details of organisations who may be able to provide financial assistance for engaging such travel. If you are unable to attend, the sessions can (usually) be watched on <http://www.treatybodywebcast.org/>.

## HOW DO YOU USE IT AT HOME?

This guide has focused on how to use CESCRC to deal with GIGE issues, but these efforts must be closely tied to national strategies if success with CESCRC is to be translated into changes on the ground. Here is an example of a national NGO targeting one Treaty Body – the Human Rights Committee – to achieve a trans-related advocacy goal. The experience can help others decide whether to engage with CESCRC.

### CASE STUDY: TRANSGENDER EQUALITY NETWORK IRELAND (TENI)

*Broden Giambrone*

#### 1. Why: What made you decide to engage with the Human Rights Committee (HRCee)?

In terms of the decision to work with the HRCee [which monitors State compliance with the International Covenant on Civil and Political Rights (ICCPR)], there were two major goals. Firstly, it's helpful in national advocacy to have a broad range of arguments to pull from. Ultimately, what is the most likely to sway national legislatures is the "hearts and minds" stories (e.g. getting people to share their personal narrative). However, if you are trying to make an advocacy and legal argument (particularly in terms of human rights), it is really helpful to have UN level jurisprudence reinforcing what you are telling the government. This is particularly true when you have a specific recommendation for your country. In 2008, it was important to get a recommendation because, on the back of cases at the European Court of Human Rights (ECtHR), having the HRCee endorsement meant we could argue that the Government's failure to introduce legislation was a breach of global (not just Europe-based) human rights.

Secondly, the ICCPR speaks generally about civil and political rights that are universally understood (and often nationally recognised). It is very helpful, when talking about sex discrimination and general equality, to be able to point to the ICCPR and say that the UN-level institution which acts as guardian of that Covenant has held that Ireland's failure to introduce gender recognition breaches these universal guarantees.

#### 2. Strategy: How did working with the HRCee fit into your national advocacy strategy?

UN advocacy played a complimentary role. The major focus was trying to convince the Government that legal gender recognition was (a) something they "should" do, and (b) something they were required to do under the Convention. The UN level advocacy was very helpful (1) in keeping up the pressure on the Government and (2) supporting more general arguments about human rights law. In terms of the removing a divorce requirement from the draft gender recognition law in Ireland, it was helpful because the 2014 Concluding Observations contradicted an ECtHR decision that failed to reject such pre-conditions, and suggested that forced divorce is not human rights compliant.

#### 2. Drafting: How did you prepare the shadow report?

TENI sought assistance from a legal expert (Peter Dunne) who supports our work and is well-versed in the language of human rights. Peter did the first draft which was then reviewed by TENI staff. Peter then completed a longer draft which was submitted to the Committee, and which we then submitted to the Oireachtas (Irish Parliament) and also used for the government's public consultation on a proposed gender recognition law in 2013. We didn't have any specific assistance from another group,

but Peter had been writing such reports with OutRight Action International for the previous year, so we had a good idea of the process. We focused a lot on what the Committee had previously said, and tried to bring our narrative within that context.

#### **4. Attending the session: How did you engage with the Committee?**

We did not have the resources to attend and did not engage with the Committee. However, TENI was part of a coalition of 12 organisations that submitted a detailed shadow report on human rights issues in Ireland in advance of the session in 2014. Representatives of the coalition attended the session and raised the issue of legal gender recognition in the formal briefing.

#### **5. Concluding Observations: Were you satisfied with the recommendations?**

The HRCee recommendations were very helpful. Not only did they hammer the government for failing to bring in recognition, but they were also the first UN body to really question the legitimacy of forced divorce, which was a concluding observation that we didn't expect but that was helpful.

#### **6. Impact: How have the HRCee's recommendations helped you achieve your advocacy goals?**

In general, the UN observations have only limited impact for the national advocacy work. But I think that the recommendations from 2008 and 2014 were very helpful. They were clear, direct and easy to measure. And, they were useful in terms of buttressing our human rights arguments with the government. However, it will be interesting to see how useful the recommendations can be in other areas where trans people are specifically concerned. It has been more difficult with other committees to get them to separate out sexual orientation and gender identity, and to meaningfully address the (non-recognition related) concerns of the trans community.

#### **7. Tips: Do you have recommendations for other trans defenders?**

Consider how the UN advocacy work can fit into your overall advocacy strategy. Determine whether UN condemnation will help or hinder your cause. Determine which of the Treaty Bodies will most effectively address your work. Choose two/three core issues to emphasise. Include personal narratives in your report. Seek funding to attend the session. Do your best to publicise recommendations when released.

Before engaging with the Committee, GIGE defenders must set out what their national goals are, and how engaging with CESCR can help them to reach those objectives. Below are a number of questions to ask.

#### **- Will CESCR engagement be a national campaign?**

- A quiet campaign may be more useful where advocates are trying to build close relationships with government ministries in sensitive contexts
- If public, plan for press releases, social media and articles at different stages: when report is submitted, when the LOI are released, when further information is submitted, as the session approaches, during the session, when the Concluding Observations are published, and at what points later in the advocacy strategy

- Use tools at your disposal: OHCHR press release on the session and articles in the news, other civil society campaigns, even if GIGE is not mentioned

- **How will a report be drafted?**

- Check dates
- Ensure there is information and evidence for a report. Use data where available, rely on brief personal testimonies if there is insufficient data
- Confirm that report can be drafted in one of the UN languages (preferably English)
- Contact other civil society representatives to find out what is being done by other organisations for CESC
- Consider forming a coalition
- Reach out to organisations working at the international level who can provide support

- **How to get the most out of the session?**

- Build connections with civil society advocates attending the session
- Network with the government delegation and set up meeting for after the session, which will be useful even if there are no GIGE references in the recommendations

- **How to make the State act?**

- Plan your follow-up strategies, fitting the CESC engagement into national advocacy plans
- Create concrete indicators based on the Concluding Observations to measure whether the government is taking steps to implement the recommendations – engage with the State in this process, if possible
- Build towards next review

- **What if GIGE aren't in the Concluding Observations?**

- Check whether GIGE issues were mentioned in questions during the session (See if the session was recorded (<http://www.treatybodywebcast.org/>) or read the 'Summary records' on the session page: [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/SessionsList.aspx?Treaty=CESCR))
- Check if there are recommendations on non-discrimination, etc, that could be used
- Use fact that a report was submitted to the UN to engage with government actors



## FUNDING, ASSISTANCE AND ADDITIONAL RESOURCES

### FUNDING & ASSISTANCE

There are several organisations working on gender identity and gender expression issue who can provide support with different aspects of advocacy before CESCR. Reach out to them for further information.

#### Capacity-building:

- ARC International
- COC Nederland
- ILGA
- Kaleidoscope Human Rights Foundation: *for Asia and the Pacific*
- Transgender Europe (TGEU): *for Europe*

#### Drafting reports:

- COC Nederland
- ILGA
- Kaleidoscope Human Rights Foundation: *for Asia and the Pacific*
- TGEU: *for Europe*

#### Financial support:

- COC Nederland
- ILGA

#### Advocacy in Geneva:

- ILGA

### ADDITIONAL RESOURCES

- *TGEU and ARC International* – **‘Making the UN work for you: A toolkit on UN advocacy for trans activists’**
  - o A comprehensive guide for activists on engaging GIGE issues in different mechanisms of the UN:  
[http://tgeu.org/wp-content/uploads/2015/10/UN\\_toolkit\\_web.pdf](http://tgeu.org/wp-content/uploads/2015/10/UN_toolkit_web.pdf)
- *Amnesty International* – **‘Holding government to account: a guide to shadow reporting on economic, social and cultural rights’**
  - o An introduction to engaging with CESCR and advice on preparing a shadow report:  
<https://www.amnesty.ie/sites/default/files/page/2014/06/CESCR%20Guide%20to%20Shadow%20Reporting%20-%20FINAL%2020052014.pdf>
- *International Service for Human Rights (ISHR)* – **‘Simple Guide to the UN Treaty Bodies’**
  - o A comprehensive explanation of the Treaty Body system and opportunities for civil society engagement:  
[http://www.ishr.ch/sites/default/files/documents/ishr\\_simpleguide\\_eng\\_final\\_final\\_dec\\_15.pdf](http://www.ishr.ch/sites/default/files/documents/ishr_simpleguide_eng_final_final_dec_15.pdf)

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