

**THE**  
**INTERNATIONAL COVENANT**  
**ON**  
**ECONOMIC, SOCIAL AND**  
**CULTURAL RIGHTS:**  
**A PERSPECTIVE ON ITS**  
**DEVELOPMENT**

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# **ABSTRACT**

The International Covenant on Economic, Social and Cultural Rights entered currently has 118 States Parties and has been in force for 17 years. Over the past five years, the implementation of the Covenant has come under the supervision of the Committee on Economic, Social and Cultural Rights. Unlike its predecessor, the Sessional Working Group, the Committee has taken its supervisory role seriously such that it has begun to develop both the substance of the Covenant and the implementation procedures.

This study, based principally upon the work of the Committee on Economic, Social and Cultural Rights, discusses a number of aspects in which the substance of the Covenant and its supervision procedures may be seen to have been developed.

Chapter 1 traces the roots of economic, social and cultural rights and outlines their codification in the Universal Declaration of Human Rights, and later the Covenant, following the end of the Second World War. Significant aspects of the drafting process are analysed in detail.

Chapter 2 discusses the nature and scope of the State obligations under the Covenant as regards the implementation of the rights. Particular emphasis is given to the terms of article 2(1) and how they have been interpreted in the work of the Committee.

Chapter 3 analyses, primarily from a theoretical standpoint, the manner and degree to which the terms of the Covenant may be given "direct effect", or in other words, relied upon directly in domestic courts.

Chapters 4 to 8 address particular articles within the Covenant and considers the interpretation given to them by the Committee. Chapter 4 deals with article 2(2) (and to a lesser extent article 3) concerning non-discrimination; Chapter 5 deals with article 6 concerning the right to work; Chapter 6 deals with article 7 regarding the right to just and favourable conditions of work; Chapter 7 deals with article 8 concerning rights related to trade unions; and Chapter 8 deals with article 11 concerning the right to an adequate standard of living and, in particular, the rights to food and housing. In each case, an attempt is made to evaluate the Committee's approach to each article and assess the possibilities for future development.

Chapter 9 addresses the emergence, role and working methods, of the Committee as a human rights supervisory body. Particular consideration is also given to the problems encountered and the Committee's future prospects.

Chapter 10, as the concluding chapter, draws together the observations made in earlier chapters and attempts to make an evaluation of the present and future utility of the Covenant as a mechanism for the promotion and protection of economic, social and cultural rights.



## **PREFACE**

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A.J.I.L.	American Journal of International Law
B.Y.I.L.	British Yearbook of International Law
Bull.H.R.	Bulletin of Human Rights
Bull.Czech.L.	Bulletin of Czechoslovakian Law
Cal.West.I.L.J.	California Western International Law Journal
Can.H.R.Y.	Canadian Human Rights Yearbook
Can.Y.I.L.	Canadian Yearbook of International Law
CEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
C.L.J.	Cambridge Law Journal
Cmd.	United Kingdom Command Papers
C.M.L.R.	Common Market Law Review
Col.H.R.L.R.	Columbia Human Rights Law Review
Colum.J.Trans.L.	Columbia Journal of Transnational Law
Cornell I.L.J.	Cornell International Law Journal
D.R.E.Comm.H.R.	Decisions and Reports of the European Commission of Human Rights
E.C.H.R.	European Convention of Human Rights
ECOSOC	Economic and Social Council
Ed.	Editor
EHRR	European Human Rights Report
ESCOR	Economic and Social Council Official Records
FAO	Food and Agriculture Organisation
GA	General Assembly
GAOR	General Assembly Official Records
G.D.P.	Gross Domestic Product
Ger.Y.I.L.	German Yearbook of International Law
G.N.P.	Gross National Product
Hague Recueil	Recueil des Cours de l'Academie de Droit International
Howard L.J.	Howard Law Journal
HRC	Human Rights Committee
H.R.J.	Human Rights Journal
H.R.L.J.	Human Rights Law Journal
Hum.Rts.Q.	Human Rights Quarterly
IBRD	International Bank of Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
I.C.J.Rev	International Commission of Jurists Review
I.C.L.Q.	International and Comparative Law Quarterly
I.L.C.	International Law Commission
I.L.M.	International Legal Materials
ILO	International Labour Organisation
I.L.R.	Industrial Law Review
IMF	International Monetary Fund
Ind.J.I.L.	Indian Journal of International law
Ind.L.J.	Industrial Law Journal
Ind.R.L.J.	Industrial Relations Law Journal
Iowa L.R.	Iowa law Review



Isr. Y.H.R.	Israel Yearbook on Human Rights
J.I.C.J.	Journal of the International Commission of Jurists
Liv.L.R.	Liverpool Law Review
L.N.O.J.	League of Nations Official Journal
M.L.R.	Modern Law Review
NGO	Non-Governmental Organisation
N.Q.H.R.	Netherlands Quarterly of Human Rights
Neth.I.L.R.	Netherlands International Law Review
Oklahoma L.R.	Osgood Hall Law Journal
P.Q.L.I.	Physical Quality of Life Index
Proc.Am.Soc.I.L.	Proceedings of the American Society of International law
R.B.D.I.	Revue Belge de Droit International
Santa Clara L.R.	Santa Clara Law Review
Scand.Stu.L.	Scandinavian Studies in Law
S.A.Y.I.L.	South African Yearbook of International Law
Stan.J.I.L.	Stanmore Journal of International Law
Tex.I.L.J.	Texas International Law Journal
The Economic Rev.	The Economic Review
U.K.T.S.	United Kingdom Treaty Series
UN	United Nations
UNESCO	United Nations Education, Science and Culture Organisation
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
Uni.H.R.	Universal Human Rights
Uni.Toronto L.J.	University of Toronto Law Journal
U.N.T.S.	United Nations Treaty Series
U.N.	United Nations
U.N.C.I.O.	United Nations Conference on International Organisation
US	United States of America
USSR	United Soviet Socialist Republics
Vand.L.R.	Vanderbilt Law Review
V.J.I.L.	Virginia Journal of International Law
Wisc.L.R.	Wisconsin Law Review
WHO	World Health Organisation
Yale J.I.L.	Yale Journal of International Law
Yrbk.Eur.L.	Yearbook of European Law



## INTRODUCTION

The International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>1</sup> entered into force on 3rd January 1976 following the deposit of the 35th instrument of ratification, and currently has 104 States Parties.<sup>2</sup> The Covenant was originally intended, together with the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup> and the Universal Declaration of Human Rights (UDHR),<sup>4</sup> to form the backbone of the international protection of human rights in the post-war era. However, political controversy greatly protracted the drafting of the Covenant such that it was only completed for signature in 1966.<sup>5</sup> Thereafter, a slow ratification process and an initial "false-start" in the implementation system, meant that the Covenant only began to show signs of life in 1987 when it came under the supervision of the Committee on Economic, Social and Cultural Rights. As with other human rights treaties, the Covenant is a "living instrument" which, in order to fulfil its purpose effectively, requires the nurture of a supervisory body capable and willing to develop both the substance and the procedure of the guarantee. The purpose of this study is to analyze certain of the most pertinent aspects of the Covenant's development with particular emphasis upon the work of the Committee since 1987.

Chapter One outlines the background to the institutionalisation of economic, social and cultural rights in the United Nations (UN) system and aspects of the complex and tortuous drafting process that finally produced the Covenant. An understanding of that process and the issues involved is particularly important in so far as it provides an essential introduction to ideas and controversies that still colour people's perception of the Covenant. A clear understanding of the drafting process is also relevant in that the travaux préparatoires represent a supplementary means of treaty interpretation.

In Chapter Two an analysis is made of the nature and scope of the State obligations laid down within the Covenant with particular emphasis upon the terms of the general obligations clause in article

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<sup>1</sup> 993 U.N.T.S. 3. The text is to be found in Appendix I.

<sup>2</sup> As of 31 Dec.1991, *see*, UN Doc.ST/LEG/SER.E/10, at 122 (1992). A list of States Parties to the Covenant may be found in Appendix II.

<sup>3</sup> 999 U.N.T.S. 171.

<sup>4</sup> GA Resn.217 A (III), (Dec.10 1948), 3 UN GAOR, Resns, Pt.1, at 71 (1948).

<sup>5</sup> GA Resn.2200 (XXI), (Dec.21 1965), 21 GAOR, Resns, Supp.(No.16) at 49 (1966).



2(1). Although the Covenant, like all human rights treaties, outlines a number of individual rights, the principal characteristic of the Covenant is the progressive nature of the State obligations. Whilst that might appear to leave States with considerable discretion as to the method and time-scale of their implementation initiatives, consideration is given to the degree to which the terms of the Covenant are considered to give rise to more precise, immediate obligations.

In Chapter Three, one specific aspect of State implementation is considered, namely the concept of "direct effect". It is generally considered that the most effective means by which the rights in the Covenant can be guaranteed is by the provision of domestic remedies through which the individual may assert his or her rights. This may be achieved by giving the relevant treaty provisions "direct effect" in domestic law. The Chapter attempts to assess the extent to which provisions of the Covenant may be given "direct effect" in light of the commonly used national criteria for determining that possibility.

Chapter Four addresses the questions of non-discrimination and equality as found in the Covenant. These issues are of particular relevance to the economic, social and cultural rights in the Covenant not merely because they appear to give rise to obligations of an immediate nature, but also because a notion of equality lies close to the heart of what might be seen as the welfarist or redistributionalist attributes of the Covenant. An attempt is made to define the precise form of equality to which the Covenant directs itself and the form and nature of State obligations that arise therefrom.

Chapters Five to Eight consider a number of the substantive rights within the Covenant. Chapter Five concerns rights within article 6, Chapter Six the rights in article 7, Chapter Seven the rights in article 8, and Chapter Eight those in article 11. These articles have been selected primarily upon the basis that they are the ones that have been developed most thoroughly by the Committee. Article 11 stands out as having been the subject of the most extensive consideration by the Committee. Articles 6 to 8, on the other hand, whilst they have not been given particular attention, have been amenable to interpretation given the wealth of existing standards developed by the ILO and other bodies in the area.

In each chapter, the first section will deal with the travaux préparatoires of the article concerned. As indicated above, the travaux préparatoires provide an idea of the intended scope and meaning of the provisions and raise a number of issues that are still pertinent today. The second section of each chapter outlines the manner in which the Committee has developed the relevant provisions through its consideration of State reports. In each case an attempt has been made to outline the direction in which the Committee appears to be moving,



assess the appropriateness or sufficiency of its approach and, on occasions, make suggestions as to alternative strategies.

Chapter Nine considers the institutional mechanisms for supervision of the implementation of the Covenant with particular emphasis on the creation, mandate and operation of the Committee on Economic, Social and Cultural Rights. An analysis is made of the theoretical framework of the reporting system and the degree to which its development has altered some of the basic premises upon which it was based. Further, attention is given to the future prospects of the supervision system in particular as regards the possible creation of an Optional Protocol to institute the receipt of individual complaints. Chapter Ten attempts to make a broad evaluation of the existing and potential utility of the Covenant as a human rights guarantee. Consideration is given to the current level of development of the Covenant, the problems facing the Committee and the future prospects.

A number of points should be made about the methodology of this work. First, and most importantly, it is assumed that although the Committee is not empowered to make binding interpretations of the Covenant, its position as the primary supervisory body gives its interpretations considerable legal weight.<sup>6</sup> The Committee is in the position of being a "clearing centre" for the divergent interpretations of the Covenant offered by States parties and is best placed for establishing the common agreement of States as to the interpretation of the Covenant. In addition, the Committee might serve to direct and shape the practice of States in applying the Covenant such that the agreement of States is developed over time.

Secondly, although the most coherent source of information as to the Committee's approach to the interpretation of the articles in the Covenant is its general comments, the limited number of such comments means that other sources of information have to be relied upon. The largest individual source is the comments and questions of the Committee members in the consideration of State reports. Although often contradictory and generalised, such comments sometimes give a clear indication as to the position of a number of the members of the Committee. Indeed even the questions, which by their nature do not presuppose any particular position, do provide an indication as to the concerns of the members of the Committee.

A more useful source is the concluding comments of the Committee. Whilst not prescribing precise standards, the concluding comments occasionally indicate areas in which the Committee as a whole (or sometimes individual members) consider the State to fall

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<sup>6</sup> See *e.g.*, Meron T., Human Rights Law-Making in the United Nations, at 10 (1986).



short of compliance with its obligations under the Covenant. In such cases, the concluding comments do provide a means by which the Committee's position can be determined. Occasionally reference will be made to the Committee's general discussion which provides an opportunity for members of the Committee and other experts to air their views on a particular subject. Whilst not being a direct indication of the position of the Committee as a whole, they may occasionally demonstrate a consensus of opinion on a particular issue.

The final source of information as to the position of the Committee is its reporting guidelines. It is clear that the primary intention of the Committee in drafting the reporting guidelines was to assist States parties to produce adequate reports. However, in detailing what information is to be provided, the Committee has gone some way to define in more detail the scope at least, if not the meaning, of the provisions concerned. It might be argued that the guidelines are not prescriptive in any way; all they stipulate is the type of information that is to be provided. Nevertheless, if the Committee feels that the information requested is relevant to its evaluation of a States performance, then the nature of that information will be a tentative indication of what the Committee considers to be the content of the Covenant's provisions.



## **CHAPTER ONE: THE BACKGROUND TO THE COVENANT**

The International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force on 3rd January 1976, following the deposit of the 35th instrument of ratification. Alongside its "sister Covenant", the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR) it constitutes an integral part of the "International Bill of Rights" which was intended to form the basis of freedom, justice and world peace following the Second World War. The reality, however, as will be shown below, is that the text of the Covenant was only completed in 1966 following a complex, over-lengthy and politically fraught drafting process.

### **I) THE ROOTS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

Much has been written about the roots of human rights generally, and in particular about their derivation from natural law in Western philosophy.<sup>1</sup> Comparatively less has been written about the philosophical background to economic, social and cultural rights.<sup>2</sup> More often than not, the emergence of economic, social and cultural rights is attributed to the growth of socialist ideals in the late nineteenth and early twentieth centuries.<sup>3</sup> This has led certain commentators to describe them as "second generation" rights.<sup>4</sup> It has also prompted some to argue that in so far as they derive from a separate tradition, economic, social and cultural rights are of a qualitatively different nature from civil and political rights.<sup>5</sup>

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<sup>1</sup> See e.g., Lauterpacht H., International Law and Human Rights, 73-126 (1950).

<sup>2</sup> But see, Peces-Barba G., "Reflections on Economic, Social and Cultural Rights", 2 H.R.L.J., 281 (1981).

<sup>3</sup> See, Siegel R., "Socioeconomic Human Rights: Past and Future", 7 Hum.Rts.Q., 255 (1985).

<sup>4</sup> See e.g., Weston B., "Human Rights", 6 Hum.Rts.Q., 257 (1984).

<sup>5</sup> See, Cranston M., "Human Rights Real and Supposed" in Raphael D.(ed), Political Theory and the Rights of Man, 43 (1967). Also cf. Bossuyt M., "La Distinction Juridique entre les Droits Civil et Politique et les droits Economiques, Sociaux et Culturels", 8 H.R.L.J., 783 (1975); Vierdag E., "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights", 9 Neth.I.L.R., 69 (1978).



While it is outside the scope of the present study to deal with such issues in detail, a number of points may be made. First, it is by no means agreed that the natural law tradition did in fact provide a coherent philosophical basis for the modern notion of human rights.<sup>6</sup> Indeed, it is purely speculative to assert that the rights expressed in the Universal Declaration were inspired solely by the philosophy of Hobbes or Locke. Although the idea of "natural rights", like many other concepts, may be posited as a justification for human rights as they exist today<sup>7</sup>, any such justification is not necessarily dependent upon establishing a philosophical pedigree for the rights.

Secondly, to present human rights as a concept that emerged solely from a Western philosophical tradition is to undermine their universal value and subject them to claims of cultural relativity.<sup>8</sup> It has to be accepted that there was probably no common conception of human rights among those States that drafted the UDHR.<sup>9</sup> Finally, even if some

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<sup>6</sup> Some commentators have denied the link between human rights and the ancient and medieval law traditions, *see*, d'Entrèves A., Natural Law: An Introduction to Legal Philosophy, (1970); Berlin I., "Two Concepts of Liberty", in Four Essays on Liberty, 129 (1969). Others have even seen the philosophy of Hobbes and Locke as deficient in this regard, *see*, MacPherson C., "Natural Rights in Hobbes and Locke", in Raphael D.(ed), Political Theory and the Rights of Man, 4 (1967).

<sup>7</sup> *See*, Donnelly J., "Human Rights as Natural Rights", 4 Hum.Rts.Q., 399 (1982). A number of other justifications have been presented, *see generally*, Shestack J., "The Jurisprudence of Human Rights", in Meron T.(ed), Human Rights in International Law, 69 (1984). The following justifications may commonly be found: "Equal Respect", Dworkin R., Taking Rights Seriously, (1977), Benn S., "Human Rights- for Whom and for What?", in Kameneka E. and Tay A.(eds), Human Rights, 59 (1978); "Needs", Lewis J., "On Human Rights", in UNESCO, Human Rights Comments and Interpretations, 54, (1949), Bay C., "Self-Respect as a Human Right: Thoughts on the Dialectics of Wants and Needs in the Struggle for Human Community", 4 Hum.Rts.Q., 53 (1982); "Equality", Vlastos G., "Justice and Equality", in Waldron J.(ed), Theories of Rights, 41 (1984); "Social Justice", Beitz C., "Human Rights and Social Justice", in Brown P. and MacLean D.(eds), Human Rights and US Foreign Policy, 45 (1979).

<sup>8</sup> For issues concerning "cultural relativism" *see*, Howard R., "The Full-Belly Thesis: Should Economic Rights take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa", 4 Hum.Rts.Q., 467 (1983); Donnelly J., "Cultural Relativism and Universal Human Rights", 6 Hum.Rts.Q., 400 (1984); Teson F., "International Human Rights and Cultural Relativism", 25 Virg.J.I.L., 868 (1985); Renteln A., "The Unanswered Challenge of Relativism and the Consequences for Human Rights", 7 Hum.Rts.Q., 514 (1985); Donoho D., "Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards", 27 Stan.J.I.L., 345 (1991).

<sup>9</sup> *See*, Maritain J., "Introduction", in UNESCO Symposium, Human Rights Comments and Interpretations, 9 (1949); Dworkin, *supra*, note 7, at 10. For a detailed analysis of the different approaches to the UDHR *see*, Morsink J., "The Philosophy of the Universal Declaration", 6 Hum.Rts.Q., 309 (1984). This may also apply to the



valid link between the concept of human rights and the natural law tradition may be established, there is no evidence to suggest that there was any strict division in that context between economic and social rights on the one hand, and civil and political rights on the other.<sup>10</sup>

A truly universal conception of human rights has to admit the diversity of philosophical and cultural influences that were involved in the institutionalisation of human rights on the international plane. It is not sufficient then, to explain the recognition of economic, social and cultural rights merely by reference to socialist ideals and the rise of the labour movement in Europe.<sup>11</sup> Equally important influences may have been the traditional communitarian philosophy of the African States or the "fully-fledged" natural rights approach of the Latin American States.

It is apparent that even the earliest formulations of human rights at the international level included certain economic, social and cultural rights. Thus, the minority treaties under the League of Nations provided for the protection of the cultural rights of the inhabitants.<sup>12</sup> Similarly the mandate system covered a whole range of civil, political,

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earlier formulations of the "Rights of Man". As McKeon stated:

"The conception of natural rights... was written into the constitutions of the eighteenth, nineteenth and twentieth centuries, not because men had agreed on a philosophy, but because they had agreed, despite philosophical differences, on the formulation of a solution to a series of moral and political problems".

McKeon R., "The Philosophical Bases and Material Circumstances of the Rights of Man", in UNESCO Symposium, Human Rights Comments and Interpretations, 37 (1949). *See also*, Fields B. and Wolf-Deiter N., "Human Rights as a Wholistic Concept", 14 Hum.Rts.Q., 1 (1992).

<sup>10</sup> *See*, Siegel, *supra*, note 3, at 260-266; Raphael D., "Human Rights Old and New", in Raphael D.(ed), Political Theory and the Rights of Man, 57 (1967).

<sup>11</sup> For the effect of the emerging labour movement *see*, Ghebali V-Y, The International Labour Organisation: A Case Study on the Evolution of UN Specialised Agencies, 1-16 (1989); Follows J, The Antecedents of the International Labour Organisation (1951).

<sup>12</sup> The provisions of the treaties generally provided that: "nationals belonging to minorities shall have an equal right to establish, manage and control, at their own expense, charitable, religious or social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein". Report of the Committee of Three, (6 June 1929), LNOJ, Special Supp.(No.73), at 46-54, (1929).

Azcarate comments that the provision on equality before the law was extensively claimed by minorities to safeguard their economic position. de Azcarate P., League of Nations and National Minorities, An Experiment, 61-66 (1945).



social, economic, and cultural aspects of life in the mandated territories.<sup>13</sup> Indeed even under the Covenant of the League, members undertook to "endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend".<sup>14</sup>

The institutionalisation of economic, social and cultural rights was spurred on by the depression of the 1930s and the war.<sup>15</sup> This was most clearly expressed by Roosevelt in his message to Congress on 6th January 1941 in which he asserted that the aim of peace was to secure four freedoms: freedom of speech and expression, freedom of worship, freedom from want and freedom from fear.<sup>16</sup> Freedom from want he described as "understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world".<sup>17</sup> He later reinforced the importance of social and economic issues within the field of human rights in another message to Congress in 1944, where he commented:

"We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence".<sup>18</sup>

This concern with the social and economic aspects of human rights was continually reiterated up to the adoption of the Universal Declaration.<sup>19</sup>

<sup>13</sup> Cf. Anker P., The Mandates System: Origin- Principles- Application, (1945).

<sup>14</sup> Article 23 Covenant of the League of Nations, 225 CTS 195.

<sup>15</sup> Johnson M., "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights", 9 Hum.Rts.Q., 19, at 21 (1987).

<sup>16</sup> The Public Papers and Addresses of Franklin D. Roosevelt: War and Aid to Democracies, 1940, 284-5 (1941).

<sup>17</sup> The US Secretary of State, Stettinius, later commented that the four freedoms "encompass all other rights and freedoms". Freedom from want, in particular, he saw as encompassing the right to work, the right to social security, and the right to opportunity for advancement. US Dept. of State Bulletin, Vol XII, 928-929 (1945).

<sup>18</sup> Congressional Record, Vol.90, Pt.1, 78 Cong.2nd Sess., at 57 (1944). Roosevelt in this speech enumerated certain rights; among them he mentioned: the right to a useful and remunerative job, the right to earn enough to provide adequate food and clothing, the right to a decent home, and the right to education .

<sup>19</sup> For example the Atlantic Charter principle six. "Great Britain-United States Joint Declaration of the President and the Prime Minister". US Dept. of State Bulletin, Vol.V, No.112, at 125 (1941), in 35 A.J.I.L., Supp. at 191, (1941). Also the American Declaration of the Rights and Duties of Man 1948 contains many references



It was only at this point that the opposition to economic, social and cultural rights, which had previously existed within the US,<sup>20</sup> emerged onto the international plane. It is not difficult to associate this occurrence with the onset of the Cold War.

## **II) DRAFTING OF THE INTERNATIONAL BILL OF RIGHTS<sup>21</sup>**

As suggested, the Second World War proved to be an essential stimulus to the codification of human rights norms on the international plane. It was established early in the war, that the foundations of lasting peace had to be built on respect for human rights. Roosevelt's "four freedoms" were incorporated in the Atlantic Charter of 1941,<sup>22</sup> which in turn was endorsed in principle by the preamble to the Declaration by United Nations.<sup>23</sup> Thus human rights, whilst symbolising the allied powers' struggle against tyranny, became an integral part of their war aims.

By 1945 there was a widespread demand for the institutionalisation of human rights provisions as a mechanism for preventing a reoccurrence of the atrocities and excesses associated with

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48 (PAU 1948).

<sup>20</sup> Opposition in the US was evident in the difficulties encountered in formulating economic and social provisions for the proposed bill of rights in 1942. See, Russell R. A History of the United Nations Charter, 323-328 (1958).

<sup>21</sup> For general outlines of the drafting of the international bill of rights see, Tolley H., The UN Commission on Human Rights, (1987); Lauterpacht, *supra*, note 1, at 273-434; Humphrey J., Human Rights and the United Nations- A Great Adventure, (1984); Green J., United Nations and Human Rights, 664-707, (1956); Sohn L., "A Short History of United Nations Documents on Human Rights", in the 18th Report of the Commission to Study the Organisation of Peace, The United Nations and Human Rights, 59-107 (1968).

<sup>22</sup> *Supra*, note 19. The Atlantic Charter was a declaration of principles "on which they base their hopes for a better future for the world". In fact the sixth principle only refers to freedom from fear and want, however this is considered to be a mere oversight, see Johnson, *supra*, note 15, at 22. Nevertheless Roosevelt's concern with economic issues was reflected in the fifth principle which proposed the "fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement, and social security".

Equally importantly, reference was made to the "right of all peoples to choose the form of government under which they will live". This reflected a continuation of the concern for self-determination championed formerly by President Wilson in 1919. It has since become an issue of great controversy- not least in the formulation of the Covenants on human rights. See *below*, text accompanying notes 154-188.

<sup>23</sup> 36 A.J.I.L., Supp., 191 (1942). It was declared that "complete victory over the enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice". The declaration was initially signed by 21 states, and later by a further 26.



By 1945 there was a widespread demand for the institutionalisation of human rights provisions as a mechanism for preventing a reoccurrence of the atrocities and excesses associated with the war and totalitarian regimes.<sup>24</sup> The United States in particular,<sup>25</sup> had prepared drafts for an international bill of rights earlier in the war.<sup>26</sup> However owing to internal disputes,<sup>27</sup> US plans for international organisation after 1944 left the question of human rights open. Thus the Dumbarton Oaks proposal for the United Nations Charter, only contained a single reference to human rights.<sup>28</sup>

It was primarily a result of the efforts of the Latin American states<sup>29</sup> and non-governmental organisations (NGOs)<sup>30</sup> that human rights provisions are to be found in the UN Charter. Although many proposals were not taken up (such as those for a declaration of human

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<sup>24</sup> To some extent the collapse of the minority regimes under the League of Nations spelt out the need for a more general, and less discriminatory system for preserving human rights.

<sup>25</sup> See, Sohn, *supra*, note 21, at 46-47.

<sup>26</sup> The 1942 Draft included a Bill of Rights, US Dept. of State Postwar Foreign Policy Preparation 1939-45, 115-6 and 483-85 (1949); a draft of 14 Aug. 1943 envisaged a separate "Declaration of Human Rights", *ibid.* at 530. "At its inception" writes Farer, "the United Nations seemed destined to be the engine of human rights". Farer T., "The United Nations and Human Rights: More Than A Whimper Less Than A Roar", 9 Hum.Rts.Q., 553 (1987).

<sup>27</sup> The main dispute centred around the formulation of rights associated with freedom from want, and the right to public education. Sohn, *supra*, note 21, at 46.

<sup>28</sup> Chapter IX, Sect. A(1) stated that among its purposes:  
"the Organisation should facilitate solutions of international, economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms".  
3 UNICIO, at 90 (1945).

<sup>29</sup> The Latin American states had recently adopted its resolution in the Final Act of the American Conference at Chapultepec (the Inter-American Conference on Problems of War and Peace, Mexico City, Feb-March 1945). It requested the Inter-American Juridical Committee to prepare a Declaration of the International Rights and Duties of Man. This was finally completed, a few weeks before the Universal Declaration, at the Bogota Conference in 1948. *Supra*, note 19.

<sup>30</sup> The 42 non-governmental organisations acting as consultants to the American delegation at San Francisco are said to have had considerable impact. See, Humphrey, *supra*, note 21, at 13. Green comments that this was an unprecedented occurrence, *supra*, note 21, at 656, n.16. These efforts were to some extent successful. The inclusion of a reference to human rights in article 1 of the Charter is considered to be "directly attributable" to the efforts of the non-governmental "consultants". See, Humphrey J., "The UN Charter and the Universal Declaration of Human Rights", in Luard E.(ed), The International Protection of Human Rights, 39, at 41 (1957).



rights<sup>31</sup>), the Charter of the United Nations makes explicit references to human rights in its preamble and six articles;<sup>32</sup> there are also a number of indirect references.<sup>33</sup> The exact nature of obligations undertaken by states with regard to the human rights provisions of the Charter is a matter of some controversy,<sup>34</sup> particularly as the rights themselves are nowhere defined. However there is no doubting the importance of the

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<sup>31</sup> Proposals were for a Declaration in the Preamble (South Africa, 1 UNCIO, at 425; and 3 UNCIO, at 474-6), for a Bill of Rights in the body of the Charter (Panama, 1 UNCIO, at 560; and 3 UNCIO, at 265-69), and a "Charter of Mankind" containing a declaration of rights with a system of supervision (Uruguay, 3 UNCIO, at 34-5). Similar proposals were made by Mexico (3 UNCIO, at 60-64), Cuba (3 UNCIO, at 500-502) and Ecuador (3 UNCIO, at 400). *See*, Sohn, *supra*, note 21, at 48-56. However, such proposals were not taken up because it was thought they required more detailed consideration than was possible in the situation.

<sup>32</sup> UN Charter, articles 1, 13, 55(c), 56, 62(2), 68.

<sup>33</sup> For example the implicit obligations undertaken with regard to trust territories (article 87), and non-self-governing territories (article 73). Moreover all references to the purposes of the organisation can be read to allude to human rights in the light of article 1.

<sup>34</sup> On the one hand it is asserted that the Charter "does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects", Kelsen H., The Law of the United Nations, 29 (1951). *See also*, Hudson M., "Integrity of International Instruments" 42 A.J.I.L., 105 (1948), and Kunz J. "The United Nations Declaration of Human Rights" 43 A.J.I.L., 316 (1949).

On the other hand Lauterpacht has commented that "members of the United Nations are under a legal obligation to act in accordance with these purposes. It is their legal duty to respect and observe fundamental human rights and freedoms", *supra*, note 1, at 147. *See also* Sohn L., "The Human Rights Law of the Charter", Tex.I.L.J., 129 (1977); Schwelb argues that Lauterpacht's interpretation has been validated by subsequent practice: Schwelb E., "The International Court of Justice and the Human Rights Clauses of the Charter" 66 A.J.I.L., 372 (1972). Moreover Henkin maintains that the injunction in article 2(7) of the UN Charter against interference in the domestic concerns of a state is no longer valid as regards human rights: Henkin L., "Introduction", in Henkin L.(ed), International Bill of Rights, 1, at 6 (1982).

However it would seem that the actual protection of human rights is beyond the powers of the United Nations under the Charter. A Panamanian suggestion to insert a reference to the protection of human rights in the purposes of the organisation was widely opposed, 6 UNCIO, 324-325. Subcommittee 1/1/A held in its report that "assuring or protecting such fundamental rights is primarily the concern of each state", 6 UNCIO, at 705. Schwarzenberger concludes therefore that:

"a clear distinction is drawn between the promotion and encouragement of respect for human rights, and the actual protection of these rights. The one is entrusted to the United Nations. The other remains in the prerogative of each member state".

Schwarzenberger G., Power Politics- A Study of World Society, at 462 (3rd ed.1964).



provisions in establishing human rights as a matter of prime importance in the post-war era.<sup>35</sup>

Article 68 of the Charter, included at the insistence of the US under NGO pressure, provides expressly for the establishment of a Commission "for the promotion of human rights". It was "generally understood"<sup>36</sup> that the new Commission would draft an international bill of rights as was mentioned by Truman in his closing speech at the San Francisco Conference.<sup>37</sup> This presaged the drafting of the UDHR and the two Covenants on human rights.

In 1946 the Preparatory Commission of the UN recommended that the Economic and Social Council (ECOSOC) should establish a Commission on Human Rights and should direct it *inter alia* to formulate an "International Bill of Rights".<sup>38</sup> This decision was approved by the General Assembly in January 1946.<sup>39</sup> ECOSOC established the mandate for the future Commission on Human Rights which was directed towards submitting proposals, recommendations and reports to ECOSOC regarding an international bill of rights.<sup>40</sup> By way of referring to a proposal to the Commission on Human Rights, the Assembly confirmed ECOSOC's decision.<sup>41</sup>

The Commission on Human Rights met for its first session in January 1947.<sup>42</sup> Its composition included the five permanent members of the Security Council and was also attended by the ILO, UNESCO and various NGOs. The initial discussion, centred upon the need to define the form of the bill of rights. Suggestions were made as to a General

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<sup>35</sup> There is some support for the view that the UN Charter is a form of constitution of the new world order. See, McDonald R., "The United Nations Charter: Constitution or Contract", in McDonald R. and Johnstone D.(eds), The Structure and Process of International Law, 889 (1983).

<sup>36</sup> Humphrey, *supra*, note 30, at 41.

<sup>37</sup> US Dept. of State Bulletin, Vol.XIII, No.314, at 5 (1945).

<sup>38</sup> Report of the Preparatory Commission, 28, (1946).

<sup>39</sup> GA Resn.7(1), (Feb.12 1946), 1 UN GAOR, Pt.1, Resns, at 12 (1946).

<sup>40</sup> ECOSOC Resn.5(1), (Feb.16 1946), 1 UN ESCOR, Annex 8, at 163 (1946). Other matters with which it had to deal were the protection of minorities, the prevention of discrimination, and international declarations or conventions on civil liberties, the status of women and freedom of information.

<sup>41</sup> GA Resn.43(1), (Dec.11 1946), 1 UN GAOR, Resns, Pt.2, at 68 (1946). Humphrey comments that it was from this decision that the Commission essentially derived its mandate to draft the international bill of rights. Humphrey, *supra*, note 21, at 17.

<sup>42</sup> UN Doc.E/259, 4 UN ESCOR, Supp.(No.3), (1947).



Assembly Resolution, a multilateral Convention, and a Charter amendment.<sup>43</sup> A drafting committee was appointed to formulate a preliminary draft of the international bill of human rights for examination at its second session.<sup>44</sup>

In June 1947 the drafting committee met to review a secretariat outline of 48 articles.<sup>45</sup> Total agreement was not possible at this stage however, largely due to dispute as to whether the Bill should take the form of a binding convention or a mere declaration of principles.<sup>46</sup> The drafting Committee therefore prepared a draft declaration and a draft convention.<sup>47</sup> These it submitted, together with a Secretariat memorandum on the question of implementation,<sup>48</sup> to the Commission.

It was decided at the Commission's second session in December 1947,<sup>49</sup> that three documents should be prepared: a non-binding declaration of a general nature, a convention of more limited scope, and finally a document of methods of implementation (or what might be called "supervision"). The term "International Bill of Rights" was to

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<sup>43</sup> Humphrey, *supra*, note 21, at 26.

<sup>44</sup> Initially the drafting committee was to have only three members of the Commission: Mrs Roosevelt (Chairperson), Charles Malik (Lebanon) and Chang (China). This was challenged in ECOSOC by the USSR, and the Committee was expanded to eight members. Additional representatives from UK, USSR, France, Australia, and Chile thereafter attended the drafting committee.

<sup>45</sup> UN Doc.E/CN.4/AC.1/3, (1947). This was compiled by Humphrey from a number of proposals submitted by individuals (such as Lauterpacht H. and Wells H.G.) and by NGOs (particularly the American Law Institute). The draft included economic, social and cultural rights as well as the basic civil and political rights. Humphrey describes his approach as a combination of "humanitarian liberalism with social democracy".

The drafting committee also had before it a draft convention on civil and political rights submitted by the United Kingdom, UN Doc.E/CN.4/21, Annex B/R.25 (1947). The committee concentrated however on the Secretariat outline.

<sup>46</sup> The UK on the one hand preferred the idea of a binding instrument. On the other hand the US (perhaps because of the need for Senate approval) preferred a declaration that would contain goals and aspirations rather than legally binding commitments.

The divergence of opinion was not as great as it seems, as those who preferred a Declaration agreed that it should be followed by a Convention. Equally it was thought that if a Convention was adopted, a more general declaration might be formulated to accompany it.

<sup>47</sup> UN Doc.E/CN.4/21, *supra*, note 45, annexes F and G. The draft was rearranged to an extent by Rene Cassin before referral to the Commission.

<sup>48</sup> *Ibid*, Annex H.

<sup>49</sup> UN Doc.E/600, 6 UN ESCOR, Supp.(No.1), (1948).



apply to all three documents.<sup>50</sup> The Commission established three working groups to work on the drafts.<sup>51</sup> On the basis of the working group reports the Commission drafted a declaration and a convention. These drafts, together with the report on methods of implementation, were circulated to governments for their comments. ECOSOC created a special Human Rights Committee to review the drafts but unfortunately had no time to do so.

#### A) THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

The Commission met for its third session in May 1948.<sup>52</sup> It gave priority to the preparation of the Declaration, and after considering the replies of governments,<sup>53</sup> adopted it by 12 votes to none with four abstentions.<sup>54</sup> The Declaration was then referred to ECOSOC<sup>55</sup> and from there to the General Assembly Third Committee. After 81 meetings in which it dealt with 168 proposed amendments, the Third Committee adopted the Universal Declaration on Human Rights,<sup>56</sup> followed by the General Assembly on 10th December 1948.<sup>57</sup>

The Universal Declaration consists of 30 articles covering civil, political and economic, social and cultural rights. The inclusion of the latter in the Declaration has not prevented criticism of its philosophy as primarily "western" and "liberal", with a preference for civil and political rights.<sup>58</sup> Yet given that the Declaration was agreed upon

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<sup>50</sup> *Ibid*, para.18.

<sup>51</sup> The reports of the working groups are contained in UN Docs. E/CN.4/57 (Declaration), E/CN.4/56 (Convention), E/CN.4/53 (Methods of Implementation), in UN Doc.E/600, Annexes A-C, *ibid*.

<sup>52</sup> UN Doc.E/800, 7 UN ESCOR, Supp.(No.2), (1948).

<sup>53</sup> This was in fact done by the Drafting Committee at its second session (3 to 21 May 1948) which produced revised drafts of the declaration and convention. UN Doc.E/CN.4/95, Annexes A and B, (1948).

<sup>54</sup> UN Doc.E/800, *supra*, note 52, Annex A. The abstentions consisted of the eastern bloc states (Byelorussia, Ukraine, USSR and Yugoslavia).

<sup>55</sup> ECOSOC made no substantive changes to the Declaration.

<sup>56</sup> By 29 votes to 0 with 7 abstentions. 3 UN GAOR, C.3, Pt.1, 879-881, (1948).

<sup>57</sup> GA Resn.217 A (III), (Dec.10 1948), 3 UN GAOR, Resns, Pt.1, at 71 (1948). It was adopted by 48 votes to 0 with 8 abstentions (Byelorussia, Czechoslovakia, Poland, USSR, Saudi Arabia, Ukraine, S.Africa, and Yugoslavia).

<sup>58</sup> There was seemingly an intention to maintain a distinction between the civil and political rights which form the first twenty articles, and economic, social and cultural rights which lie at the end. This was apparent in the rejection of a joint amendment to article 3, to include a reference to social and economic security. Similarly



during the time of the Cold War it is to be seen as something of an achievement.<sup>59</sup>

The main group of abstentions came from the then socialist states of central and eastern Europe. The USSR recorded its opposition in the records of the Commission's third session.<sup>60</sup> It complained that the declaration did not contain sufficient references to democracy and anti-fascism; that it did not guarantee the implementation of the rights; and that it did not enumerate the duties of the individual to the state.<sup>61</sup>

South Africa abstained because it felt that even though the declaration was not *prima facie* binding, it might be interpreted as "an authoritative definition of fundamental rights and freedoms which had been left undefined by the Charter". There was indeed some indication that States wished to endow the Universal Declaration with a status higher than that of a mere declaration of principles. For example, the French delegate declared that the UDHR represented "general principles of law" implying therefore that it would be enforceable by the International Court of Justice (ICJ). The US however made clear that it considered the declaration to be purely of a hortatory character.<sup>62</sup> Such

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the discussion on the form of article 1 suggests that much emphasis was placed on an eighteenth century concept of human rights. See, Morsink, *supra*, note 9; Dowrick F., "Introduction", in Human Rights- Problems, Perspectives and Texts, 1 (1979).

<sup>59</sup> Tolley notes that there were three ideological forces in competition. First the Western States preferring a minimum list of strictly enforceable civil and political rights. Secondly the Eastern Bloc states championed economic, social and cultural rights with state implementation and concomitant duties. Lastly, the Latin American states, having recently completed their Bogota Declaration, wished to incorporate a maximum catalogue of rights including the economic, social and cultural components. Tolley, *supra*, note 21, at 21-22. However Humphrey comments in this respect:

"The legislative history of the Declaration shows that, while there was deep disagreement on how they [the provisions] should be implemented, there was substantial agreement on the stated objectives".

Humphrey, *supra*, note 21, at 74.

<sup>60</sup> UN Doc.E/800, *supra*, note 54.

<sup>61</sup> This position was with the socialist concept of human rights. According to that philosophy, the emphasis is placed upon the individual as a citizen within a community. Thus individuals are deemed to have duties to the state as much as they have rights. As the individual is considered to have no status in international law, the implementation process is primarily a national one. It seems therefore, that in complaining about the absence of an implementation process, the soviet representative did not envisage an international system but merely that specific state action should be outlined. See, Przetacznik F., "The Socialist Concept of Human Rights: Its Philosophical Background and Political Justification", 13 R.B.D.I., 238 (1977).

<sup>62</sup> The representative of the US in her statement to the General Assembly commented:

"It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a



disagreements about the status of the Universal Declaration have persisted.<sup>63</sup>

Two provisions in the UDHR were explicitly excluded from the final draft. The first was the right to petition the state or the United Nations.<sup>64</sup> It was thought that this preempted the discussion on implementation, and the Commission was thus asked to consider the matter further.<sup>65</sup> The second was an article referring to the rights of ethnic, linguistic and religious minorities. Again the Assembly requested the Commission and the Subcommittee to make a thorough study on the question.<sup>66</sup>

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declaration of basic principles of human rights and freedoms. to be stamped with the approval of the General Assembly by a formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations".

US Dept. of State Bulletin, Vol.XIX, at 751 (1948).

<sup>63</sup> Although General Assembly Resolutions are traditionally considered to have no direct legal force, there has been a tendency to confer some weight upon their status. *See e.g.*, Falk R., "The Quasi-Legislative Competence of the General Assembly", 60 A.J.I.L., 782 (1966). This is most apparent in the intersection between General Assembly resolutions and customary international law. *See*, Sloan B., "General Assembly Resolutions Revisited", 58 B.Y.I.L., 39 (1987); Akehurst M., "Custom as a source of international law", 46 B.Y.I.L., 4 (1972-3); Higgins R., "The United Nations and Lawmaking: The Political Organs", 64 Proc.Am.Soc.I.L., 38 (1970); Bin Cheng, "Instant International Customary Law", 5 Ind.J.I.L., 23 (1965). This has to some extent been generated by decisions of the ICJ: Western Sahara Case (1975) ICJ Rep., para.53, and Nicaragua Case (1986) ICJ Rep., paras.183-209.

With regard to the Universal Declaration specifically, it has often been cited as an authoritative interpretation of the UN Charter. *See* for example the Declaration on the Elimination of All Forms of Racial Discrimination Article 11, GA Resn.1904 (XVIII), (Nov.20 1963). It has also been affirmed on its own to establish obligations as in Article 2 of the Proclamation of Teheran (Final Act of the International Conference on Human Rights, Teheran, 22 April-13 May, 1968. A/Conf.32/41 at 4). *See generally* Humphrey J., "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character", in Ramcharan B.(ed), Human Rights Thirty Years After the Universal Declaration, (1979); Green, *supra*, note 21, 666-677; Sohn, *supra*, note 21, at 59-73; Tolley, *supra*, note 21, at 19-24; Alston P., "The Universal Declaration at 35", 31 I.C.J.Rev., 60 (1983); Lauterpacht, *supra*, note 1, 394-434.

<sup>64</sup> UN Doc.A/C.3/ 3 UN GAOR, Pt.1, Annex 1 (1948). The French proposal stated that:

"Everyone has the right, either individually, or in association with others, to petition or to communicate with the public authorities of the State of which he is a national or in which he resides. He also has the right to petition or to communicate with the competent organs of the United Nations in matters relating to human rights."

<sup>65</sup> The preamble of the resolution stated that: "the right of petition is an essential human right, as is recognized in the Constitutions of a great number of countries." GA Resn. 217B (III), *supra*, note 57.

<sup>66</sup> GA Resn.217 C (III), *ibid.*



## B) THE COVENANTS ON HUMAN RIGHTS<sup>67</sup>

In 1948, the Commission on Human Rights was requested by the General Assembly to give priority to the preparation of a draft Covenant on human rights and measures of implementation.<sup>68</sup> At its fifth session<sup>69</sup> (9th May to 20th June) the Commission began to examine a draft Covenant which at this stage, contained only civil and political rights. It decided to transmit the draft Covenant, together with a number of proposed additional articles (including certain economic, social and cultural rights) and a questionnaire on implementation, to states for their comments.<sup>70</sup>

At its sixth session<sup>71</sup> in 1950 the Commission continued with its consideration of the draft Covenant, but decided to begin drafting a separate Covenant on economic, social and cultural rights at its next session in 1951. However, having been requested to make a number of policy decisions, the General Assembly declared *inter alia* that only a single Covenant should be drafted which would include both civil and political, and economic, social and cultural rights.<sup>72</sup> The decisions of the Assembly were accordingly discussed by ECOSOC which then transferred them to the Commission and invited the specialised agencies to participate in the Commission's work regarding economic, social and cultural rights.<sup>73</sup>

At its seventh session in 1951,<sup>74</sup> the Commission held a lengthy discussion spanning six meetings on the question of including articles on economic, social and cultural rights.<sup>75</sup> Various draft proposals were considered leading to the adoption of 14 articles on economic, social and cultural rights. In addition, it adopted a number of articles

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<sup>67</sup> See generally, UN Doc.A/2929, 10 UN GAOR, Annexes, (Ag.Item 28), Pt.II, (1955).

<sup>68</sup> GA Resn.217 E (III), *supra*, note 57; ECOSOC Resn.191 (VIII), (Feb.9 1949), 8 UN ESCOR, Resns, Supp.(No.1), at 7 (1949).

<sup>69</sup> UN Doc.E/1371, 9 UN ESCOR, Supp.(No.10), (1949).

<sup>70</sup> *Ibid.* Annex 1.

<sup>71</sup> UN Doc.E/1681, 11 UN ESCOR, Supp.(No.5), (1950).

<sup>72</sup> GA Resn.421 (V), Sect.E, (Dec.4 1950), 5 UN GAOR, Resns, Supp.(No.20), at 42 (1950).

<sup>73</sup> ECOSOC Resn.349 (XII), (Feb.25 1951), 12 ESCOR, Resns, Supp.(No.1), at 8 (1951).

<sup>74</sup> UN Doc.E/1992, 13 UN ESCOR, Supp.(No.9), (1952).

<sup>75</sup> The discussion was conducted during the Commission's 203 to 208 meetings.



providing for a system of State reporting to be included in part V of the draft Covenant.

In the following year however, the General Assembly's Third Committee conducted an extended debate on the draft Covenant.<sup>76</sup> After deciding not to take on the drafting of the Covenant itself,<sup>77</sup> the Third Committee adopted a joint amendment<sup>78</sup> directing the Commission to draft two separate Covenants. The General Assembly, in a complete reversal of its original position, reaffirmed the Third Committee's amendment in Resolution 543 (VI).<sup>79</sup> On the basis of that decision the Commission was therefore asked to revise the draft articles on economic, social and cultural rights, taking into consideration the views of governments, NGO's and the specialised agencies.<sup>80</sup>

In accordance with the decision of the General Assembly, the Commission spent most of its eighth session<sup>81</sup> drafting two separate Covenants. It produced a draft article on self-determination but was however unable to consider the questions of implementation, reservations or a federal state clause. Similarly, at its ninth session,<sup>82</sup> the Commission only had time to consider certain articles on civil and political rights. It was unable to discuss new additional articles, such as that concerning the right to property, for inclusion in the draft Covenant on Economic, Social and Cultural Rights. However, the Commission did conclude its consideration of the Covenant at its tenth session in 1954<sup>83</sup> following the redrafting of the articles on periodic reporting and the adoption of a federal-state clause. It was noted that the

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<sup>76</sup> UN Docs.A/C.3/SR.358-372, 387-411, 6 UN GAOR, C.3, (358-372 and 387-411 mtgs.), (1952).

<sup>77</sup> See the report of the Committee. UN Doc.A/C.3/559, 6 UN GAOR, C.3, Annexes, (Ag.Item 29), at 4 (1951).

<sup>78</sup> Joint amendment proposed by Belgium, India, Lebanon and the USA: UN Doc.A/C.3/L.184/Rev.1, (1951).

<sup>79</sup> The majority in this decision was relatively small: 29 votes to 25 with 4 abstentions. GA Resn.543 (VI), (Feb.5, 1952), 6 UN GAOR, Resns, Supp.(No.20), at 36 (1952).

<sup>80</sup> GA Resn.544 (VI), (Feb.5 1952), 6 UN GAOR, Resns, Supp.(No.20), at 36 (1952).

<sup>81</sup> UN Doc.E/2250, 13 UN ESCOR, Supp.(No.4), (1952).

<sup>82</sup> The ninth session of the Commission was held from 7 April to 30 May 1953. UN Doc.E/2447, 16 UN ESCOR, Supp.(No.8), (1953).

<sup>83</sup> UN Doc.E/2573, 18 UN ESCOR, Supp.(No.7), (1954).



draft Covenants as completed by the Commission,<sup>84</sup> "represented a broad compromise between differing political, economic, and cultural opinions and, while not ideal, should be regarded as fairly satisfactory".<sup>85</sup>

The draft Covenants were duly referred to the General Assembly for consideration at its ninth session.<sup>86</sup> After a general discussion, the Assembly requested further observations from States, Specialised Agencies and non-governmental organisations, and resolved that the Third Committee should discuss the drafts article by article "with a view to their adoption at the earliest possible date".<sup>87</sup>

The Third Committee began its discussion of the draft Covenants by considering the Preambles and article 1 of each Covenant at the Assembly's tenth session.<sup>88</sup> The Committee continued by discussing article 2 of the draft Covenant on Economic, Social and Cultural rights, but resolved to postpone the adoption of that article until the other rights in Part III of the Covenant had been discussed. At the General Assembly's eleventh session<sup>89</sup> the Third Committee accordingly addressed itself to the substantive articles in Part III of the Covenant. It completed its consideration of those articles at the twelfth session.<sup>90</sup> The Committee then spent the next four sessions discussing the correlative provisions (articles 6-26) of the draft Covenant on Civil and Political Rights.<sup>91</sup>

It was not until the General Assembly's seventeenth session that the Third Committee resumed its consideration of the draft Covenant on

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<sup>84</sup> The final version of the Commission's draft Covenants is to be found in UN Doc.E/2447, *supra*, note 82, Annex 1.

<sup>85</sup> UN Doc.A/2808 and Corr.1, 9 UN GAOR, C.3, Annexes, (Ag.Item 28), at 10, para.30 (1954).

<sup>86</sup> UN Docs.A/C.3/SR.557-586, 9 UN GAOR, C.3, (557-586 mtgs.), (1954).

<sup>87</sup> GA Resn.833 (IX) Sect.4, (Dec.4 1954), 9 UN GAOR, Resns, Supp.(No.21), at 20 (1954).

<sup>88</sup> UN Doc.A/3077, 10 UN GAOR, C.3, Annexes, (Ag.Item 28), 30-40 (1955).

<sup>89</sup> UN Doc.A/3525, 11 UN GAOR, C.3., Annexes, (Ag.Item 31), 2-22 (1956).

<sup>90</sup> UN Doc.A/3764, 12 UN GAOR, C.3, Annexes, (Ag.Item 33), 1-15 (1957).

<sup>91</sup> UN Doc.A/4045, 13 UN GAOR, C.3, Annexes, (Ag.Item 32), (1958); UN Doc.A/4299, 14 UN GAOR, C.3, Annexes, (Ag.Item 34), (1959); UN Doc.A/4625, 15 UN GAOR, C.3, Annexes, (Ag.Item 34), (1960-61); UN Doc.A/5000, 16 UN GAOR, C.3, Annexes, (Ag.Item 35), (1961-62).



Economic, Social and Cultural Rights.<sup>92</sup> After considerable discussion on the nature of the obligations incumbent upon the States Parties with regard to economic, social and cultural rights, article two was finally adopted.<sup>93</sup> Articles three to five followed; all being adopted unanimously, without amendment, and with minimal discussion.<sup>94</sup> The main body of the Covenant on Economic, Social and Cultural Rights was thus completed in 1962.<sup>95</sup> However, the Third Committee continued to discuss the measures of implementation at its next session<sup>96</sup> and again in 1966. During that time, it also reviewed the final clauses, found in Part V of the draft Covenant<sup>97</sup> and considered a late amendment to article 11. The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Optional Protocol were all adopted and opened for signature by the General Assembly on 16th December 1966.<sup>98</sup> The adoption of the Covenants witnessed the completion of the International Bill of Human Rights.

### III) ISSUES IN THE DRAFTING PROCESS

#### A) THE INCLUSION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS<sup>99</sup>

The initial draft Covenant, as discussed by the Commission at its fifth session, contained no mention of economic, social or cultural

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<sup>92</sup> UN Doc.A/5365, 17 UN GAOR, C.3, Annexes, (Ag.Item 43), 6-17 (1962).

<sup>93</sup> *Ibid* at 13. Article two was adopted by 51 votes to four with 33 abstentions. An indication of the controversy is demonstrated by the fact that article two paragraph three was adopted by the narrow margin of 41 votes to 38 with 12 abstentions.

<sup>94</sup> *Ibid*.

<sup>95</sup> For the draft Covenant on Economic, Social and Cultural Rights as adopted at this stage *see*, UN Doc.A/5929 Annex, 20 UN GAOR, C.3, Annexes, (Ag.Item 65), 4-7 (1966).

<sup>96</sup> UN Doc.A/5655, 18 UN GAOR, C.3, Annexes, (Ag.Item 48), 14-25 (1963).

<sup>97</sup> *Ibid*.

<sup>98</sup> GA Resn.2200 (XL), (Dec.16 1966), 21 UN GAOR, Resns, Supp.(No.16), at 49 (1966). On the drafting of the ICCPR *see*, McGoldrick D., The Human Rights Committee, 3-43 (1991).

<sup>99</sup> *See generally*, Green, *supra*, note 21, at 679-682; Jhabvala F., "On Human Rights and the Socio-Economic Context", 31 Neth.I.L.R., 149 (1984); UN Doc.A/2929, *supra*, note 67, at 7-8, paras.4-12; Van Boven T., "Distinguishing Criteria of Human Rights", in Vasak K.and Alston P.(eds), International Dimensions of Human Rights, Vol.1, 43 (1982); UN Doc.A/C.3/559, *supra*, note 77, at 40-41, paras.16-22.



rights. However, a number of proposals were made by Australia and the USSR, for the inclusion of certain economic and social rights in the draft Covenant. Without discussing the proposals, the Commission resolved that the Covenant should contain such articles.<sup>100</sup> However, by its next session, the Commission had changed its position. It was felt that additional time was needed to discuss economic and social rights at length, in consultation with the specialised agencies and particularly UNESCO and the ILO.<sup>101</sup> As far as the Commission was concerned, the best course of action was to adopt an initial draft Covenant limited to civil and political rights, with a view to adopting further Covenants on other rights at a later stage.<sup>102</sup> Thus it resolved to begin drafting a separate Covenant on economic, social and cultural rights at its next session in 1951.

In considering the draft Covenant, ECOSOC approved<sup>103</sup> the Commission's decision to consider additional Covenants<sup>104</sup> and requested the Secretary-General to consult the specialised agencies on the matter of economic, social and cultural rights.<sup>105</sup> Furthermore, it asked the General Assembly to make a policy decision regarding the desirability of including articles on economic, social and cultural rights in the existing draft Covenant.<sup>106</sup>

Following the request, the General Assembly made a policy decision.<sup>107</sup> It decided that the Covenant lacked "certain of the most elementary rights" and accordingly instructed the Commission to revise the Covenant with a view to the inclusion of other rights.<sup>108</sup> However in considering specifically the inclusion of economic and social rights, the

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<sup>100</sup> By 12 votes to 0 with 3 abstentions.

<sup>101</sup> The Commission was in possession at this time of the survey of activities of UN organs and specialised agencies in matters within the scope of articles 22 to 27 of the Universal Declaration. UN Doc.E/CN.4/364 (1950).

<sup>102</sup> This was decided by 13 votes to 2.

<sup>103</sup> ECOSOC Resn.303 C (XI), (Aug.9 1950), 11 UN ESCOR, Resns, Supp.(No.1), at 25 (1950).

<sup>104</sup> E/CN.4/SR.377-379, 11 ESCOR, (377-379 mtgs.) (1950). It actually referred to "economic, social, cultural" and "political" rights. The suggestion being that the draft convention only dealt with civil rights.

<sup>105</sup> ECOSOC Resn.303 D (XI), *supra*, note 103, at 25-6.

<sup>106</sup> ECOSOC Resn.303 I (XI), *ibid*, at 29.

<sup>107</sup> Cf. UN Docs.A/C.3/SR.278-316 and 318, 5 UN GAOR, C.3, (278-316 and 318 mtgs.), (1951).

<sup>108</sup> GA Resn.421 (V) Sect.B, *supra*, note 72.



debate was long and acrimonious. The US,<sup>109</sup> Brazil and Turkey introduced a draft in the Third Committee instructing the Commission to consider additional instruments dealing with such rights.<sup>110</sup> The majority however preferred a Yugoslav amendment including economic, social and cultural rights within the existing Covenant. When the matter came to plenary the Assembly adopted the amended text by 35 votes to nine with seven abstentions.<sup>111</sup>

In its resolution the General Assembly decided that "the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent". As such the Commission was to include in the draft Covenant "a clear expression of economic, social and cultural rights in a manner which relates them to the civil and political freedoms proclaimed by the draft Covenant".<sup>112</sup>

At its seventh session in 1951<sup>113</sup> the Commission held a lengthy discussion on the question of including articles on economic, social and cultural rights, for which it had before it a number of documents on the subject.<sup>114</sup> Despite clear opposition to the General Assembly directive,<sup>115</sup> it discussed the various proposals for draft articles<sup>116</sup> first

<sup>109</sup> Opposition of the US to economic, social and cultural rights dates back to the early debates over the drafting of an international instrument for the United Nations. Internal opposition was such in the US that the Senate was unlikely to accept a human rights treaty that included economic, social and cultural rights. It was therefore of prime importance to the delegation to ensure the exclusion of such rights from the draft covenant.

<sup>110</sup> UN Doc.A/C.3/L.76, (1950).

<sup>111</sup> Those who voted against the amendment included Australia, Canada, the UK, and the US.

<sup>112</sup> GA Resn.421 (V) Sect.E., *supra*, note 72.

<sup>113</sup> UN Doc.E/1992, *supra*, note 74.

<sup>114</sup> The discussion was conducted during the Commission's 203 to 208 meetings. The documents that it had before it included: "Memorandum of the Secretary-General on Economic, Social and Cultural Rights", UN Doc.E/CN.4/529, (1951); "Memorandum on Co-operation Between the Commission and the Specialised Agencies and Other Organs of the United Nations", UN Doc.E/CN.4/534 and Add.1-3, (1951); Survey of Action by UN Organs and Specialised Agencies of Matters Within the Scope of Articles 22-27 UDHR", UN Doc.E/CN.4/364, Corr.1-3, and Add.1-3, (1951); various reports containing draft articles and suggestions by Specialised Agencies (UNESCO, WHO, ILO, High Commissioner for Refugees).

<sup>115</sup> The question was mooted as to whether the Commission was bound by the Assembly's decisions. It was considered that even if it was not, it was still bound to carry out the recommendations of ECOSOC which had directed the Commission in accordance with the Assembly's wishes.

<sup>116</sup> The proposals of governments and the specialised agencies are to be found in UN Doc.E/CN.4/AC.14/2 and Add.1-5, (1951).



in a working group then in plenary. The result was the adoption of 14 draft articles on economic, social and cultural rights including two separate "umbrella clauses" concerning obligations and limitations.<sup>117</sup>

Despite the seeming ambiguity in the Commission's position regarding its opposition to the General Assembly's decision, an Indian proposal to ask ECOSOC to recommend that the General Assembly reconsider its decision to include economic, social and cultural rights in the Covenant was defeated by 12 votes to 5 with 1 abstention.<sup>118</sup> The opposition of the western states to economic, social and cultural rights however continued.

ECOSOC, following a discussion of implementation measures, invited the General Assembly to reconsider its decision regarding a single Covenant.<sup>119</sup> The General Assembly Third Committee conducted an extended debate on the matter at its sixth session,<sup>120</sup> and adopted a joint amendment<sup>121</sup> directing the Commission to draft two separate Covenants. This decision was reaffirmed by the General Assembly in Resolution 543 (VI) which requested the Commission:

"To draft two Covenants on human rights..., one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible...".<sup>122</sup>

The Assembly thus reversed its earlier decision, a step which Humphrey has commented as having been "taken largely on ideological

<sup>117</sup> The inclusion of the umbrella clauses (*ibid.* Annex 1, pt.III, draft articles 19 and 32) showed that the Commission was determined to maintain a distinction between the categories of rights even if forced to deal with them in the same convention.

<sup>118</sup> Draft Resn.E/CN.4/619/Rev.1, (1951). The proposal recognised that economic, social and cultural rights were "equally fundamental", but maintained that they formed a separate category of rights "in that they were not justiciable".

<sup>119</sup> ECOSOC Resn.384 (XIII), (Aug.29 1951), 13 UN ESCOR, Resns, Supp.(No.1), at 35 (1951).

<sup>120</sup> *Supra*, note 76.

<sup>121</sup> Joint amendment proposed by Belgium, India, Lebanon and the USA. UN Doc.A/C.3/L.184/Rev.1, *supra*, note 78.

<sup>122</sup> GA Resn.543 (VI), (Feb.5 1952), 6 UN GAOR, Resns, Supp.(No.20), at 36 (1952). The majority in this decision was relatively small: 29 votes to 25 with 4 abstentions.



grounds".<sup>123</sup> On the basis of this decision, the Commission was asked to revise the draft articles on economic, social and cultural rights taking into consideration the views of governments, NGO's and the specialised agencies.<sup>124</sup> From that point on, the Commission continued to draft and discuss economic, social and cultural rights with a view to their adoption in a separate Covenant. Later proposals requesting the General Assembly to revise its decision to draft two separate Covenants were rejected.<sup>125</sup>

The decision to draft two separate Covenants was certainly a momentous one, and has coloured the manner in which human rights, and particularly economic, social and cultural rights, have been treated since. The arguments on behalf of those who desired two separate Covenants may be summarised as follows:

- i) Whereas civil and political rights were absolute and fundamental,<sup>126</sup> economic, social and cultural rights were dependent for their realisation on economic resources<sup>127</sup> and were therefore relative, contingent,<sup>128</sup> long term objectives. It followed that civil and political rights were positive and justiciable<sup>129</sup> whereas economic, social and cultural rights were not.
- ii) Civil and political rights could be undertaken immediately through legislative or administrative action calling for state restraint. Economic, social and cultural rights on the other hand, could only be achieved progressively through positive state action.<sup>130</sup> The implementation of civil and political rights as "legal" rights was thus of an entirely different nature to that of economic, social and cultural rights which were "programme" rights.
- iii) Given that the Covenant was to be acceptable to the majority of

<sup>123</sup> Humphrey, *supra*, note 21, at 107.

<sup>124</sup> GA Resn.544 (VI), *supra*, note 80.

<sup>125</sup> UN Doc.E/CN.4/L.195, (1952), and UN Doc.E/CN.4/L.272, (1953).

<sup>126</sup> *See e.g.*, D'Souza (India), UN Doc.A/C.3/SR.361, at 86, paras.30-32 (1951).

<sup>127</sup> *See e.g.*, Marshall (Canada), UN Doc.A/C.3/SR.362, at 91, paras 30-31 (1951).

<sup>128</sup> *See e.g.*, Alfonzo-Ravard (Venezuela), UN Doc.A/C.3/SR.367, at 122, para.13 (1951).

<sup>129</sup> *See* India's proposed draft resolution at the Commission's seventh session, UN Doc.E/1992, *supra*, note 74, at 15, para.67.

<sup>130</sup> *See e.g.*, Heald (United Kingdom), UN Doc.A/C.3/SR.361, at 87, paras 48-49 (1951).



states, it was unwise to include obligations in the Covenant that would prevent certain states from ratifying it.<sup>131</sup>

iv) As suggested by the general disagreement over the issue, the inclusion of economic, social and cultural rights would delay unduly the completion of the Covenant.<sup>132</sup>

On the other hand those who desired a single covenant containing all the rights advanced the following arguments:

i) That the UN Charter (article 55) and the Universal Declaration of Human Rights both contemplated the unity of all human rights<sup>133</sup> and that the division of the Covenant created a hierarchy of rights contrary to such provisions.<sup>134</sup>

ii) That attempts to secure civil and political rights without regard to their social, economic and cultural context were purely abstract and theoretical.<sup>135</sup>

iii) That the asserted differences were to some extent artificial. Not only were some economic, social and cultural rights immediately enforceable,<sup>136</sup> but it was clear that in some countries civil and political rights were not "legal" in any effective way.<sup>137</sup>

iv) That as economic, social and cultural rights were a more recent phenomenon they expressed the progress achieved in the field of human rights. Their exclusion would merely reaffirm those civil and political

<sup>131</sup> See e.g., Harry (Australia), UN Doc.A/C.3/SR.363, at 101, para.43 (1951).

<sup>132</sup> See e.g., Dehousse (Belgium), UN Doc.A/C.3/SR.361, at 83, para.5 (1951).

<sup>133</sup> See e.g., Dedijer (Yugoslavia), UN Doc.A/C.3/SR.365, at 107, para.5 (1951).

<sup>134</sup> See e.g., Mufti (Iraq), A/C.3/SR.364, at 103, para.5 (1951). The point is an interesting one as, despite indications to the contrary, some states did in fact suggest that civil and political liberty had to be assured before the full enjoyment of economic, social and cultural rights became possible, see Heald (United Kingdom), A/C.3/SR.361, at 87, para.48 (1951).

<sup>135</sup> See, Alborno (Ecuador), A/C.3/SR.366, at 117, para.47 (1951). There were indications that some states considered economic, social and cultural rights as being the condition for the realisation of civil and political rights, and thus of more immediate importance. The tendency to create a new hierarchy of this nature was to become an issue of great controversy later in the General Assembly, see e.g., Howard, *supra*, note 8.

<sup>136</sup> E.g. Trade Union Rights, Article 8(1)(a) ICESCR.

<sup>137</sup> See e.g., summary by Najar (Israel), A/C.3/SR.368, at 129, paras 20-21 (1951).



rights that already exist in constitutions, undermining any real development in the protection of human rights in general.<sup>138</sup>

v) That to separate the rights into two Covenants would amount to postponing indefinitely the realization of economic, social and cultural rights.<sup>139</sup>

The main proponents of the separation of the rights were the Western States, whereas the Soviet Bloc together with certain Latin American states preferred the single Covenant. There was therefore an implicit ideological commitment on either side, given that it was a time of Cold War, to maintain the respective positions. This was made particularly apparent by the scant notice paid to the Israeli Memorandum advocating a new categorisation of the rights along the lines of their differing implementation requirements.<sup>140</sup> It was essentially the shifting Third World vote, however, that allowed the initial General Assembly decision to be reversed.<sup>141</sup>

It is clear that it was not intended that the division of the Covenant should imply any notion of relative value. Indeed it was stated that "the enjoyment of civil and political freedoms and economic, social and cultural rights are interconnected and interdependent" and that "when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man".<sup>142</sup> However it would seem that the division of the Covenants was a solution to an ideological conflict in which the Western States' preference for civil and political rights was to some extent vindicated. That this was an unsatisfactory result is apparent

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<sup>138</sup> See e.g., Cortina (Cuba), A/C.3/SR.366, at 117, para.41 (1951).

<sup>139</sup> *Ibid*, at 116, para.40.

<sup>140</sup> The proposal was to divide the rights into those that were immediately realizable and those that were to be implemented progressively according to the conditions of each state. Each state would therefore have different rights in each category. This would cut across the existing ideological differentiation between civil and political, and economic, social and cultural rights. Israeli Memorandum, UN Doc.A/C.3/565, 6 UN GAOR, C.3, Annexes, (Ag.Item 29), at 17, (1952).

<sup>141</sup> See, Jhabvala, *supra*, note 99, at 50.

<sup>142</sup> Preamble to GA Resn.543 (VI), *supra*, note 122. The unity of the two categories of rights has been continually recognised since, see Proclamation of Teheran, article 13, GA Resn.32/130, (Dec.16 1977), 33 UN GAOR, Resns, Supp.(No.45), at 150 (1977); GA Resn. 41/128, article 6(2), (Dec.4 1986), 41 UN GAOR, Resns, Supp.(No.53), at 186 (1986).



from the continuing debate as to the relationship between the rights and their relative importance.<sup>143</sup>

## B) PROGRESSIVE OR IMMEDIATE OBLIGATIONS.

The Covenants, as finally accepted, have significant differences not only in respect to the relative implementation procedures, but also with regard to the obligations accepted by the States parties to ensure the rights in each Covenant. Whereas under the ICCPR states undertake to "respect and ensure" the rights recognised,<sup>144</sup> under the ICESCR the obligation is one where the States undertake "to take steps...with a view to achieving progressively the full realization of the rights recognised" in the covenant.<sup>145</sup> Thus the obligations under the ICCPR could be said to be immediate in contrast to the progressive nature of the undertakings in the ICESCR.

It was initially suggested that since the two categories of rights were to be of equal importance, the ICESCR should have the same obligations clause as the ICCPR. It was recognised however that the process of realisation of economic, social and cultural rights was generally of a different nature to that of civil and political rights.<sup>146</sup> The obligation upon states with regard to economic, social and cultural rights was considered to be necessarily progressive in character, as full and immediate realisation of all the rights was beyond the resources of many states.

The obligations clause as adopted (article 2(1)) was criticised by many as providing too many loopholes for states to avoid or delay

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<sup>143</sup> Some commentators have maintained the validity of the distinction between the two categories of rights, *see e.g.* Bossuyt, *supra*, note 5. *Contra*, Van Hoof G., "The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views", in Alston P. and Tomasevski K.(eds), The Right to Food, 97 (1985); Berenstein A., "Economic and Social Rights: Their Inclusion in the ECHR-Problems of Formulation and Interpretation", 2 H.R.L.J., 257 (1981). Others have gone further in arguing that civil and political rights are therefore more important, *e.g.* Cranston, *supra*, note 5, or that economic, social and cultural rights are "legally negligible" *e.g.* Vierdag, *supra*, note 5. *Contra* Van Hoof, *ibid*.

The majority in the United Nations has alternatively expressed the interests of developing states with a preference for economic, social and cultural rights, *see generally*, Türk D. Realisation of Economic, Social and Cultural Rights, UN Doc.E/CN.4/Sub.2/1989/19, (1989).

<sup>144</sup> Article 2(1) ICCPR.

<sup>145</sup> Article 2(1) ICESCR.

<sup>146</sup> See above. It has been argued that the implementation of the ICCPR is similarly progressive. Jhabvala *supra*, note 99. This is evidenced by the need for financial input to secure civil and political rights ie. for an efficient court system, and that the reporting procedure under article 40(1) provides for the States to report on the "measures they have adopted... and on the progress made".



undertaking their obligations. However, it was argued that the progressive nature of the obligation was essential given its dependency upon state resources and that it would leave sufficient leeway to the specialised agencies to develop the rights in more elaborate international instruments.<sup>147</sup>

Perhaps the greatest criticism of article 2(1), as will be seen, is its relative lack of sophistication. Despite the fact that it was agreed during the drafting of the Covenant, that certain rights should be seen as capable of immediate implementation, this was not reflected in the terms of article 2(1). Moreover, given that governments are naturally reluctant to give effect to human rights provisions that seem to offer them no obvious benefit in the short run, the general progressive nature of the obligation does appear to provide them with excessive leeway.

### C) THE LOCATION OF OBLIGATION PROVISIONS

A recurring issue in the drafting of the Covenant was the location of provisions outlining State obligations. Although the matter was generally resolved in 1951 with the decision to create an umbrella clause outlining State obligations, individual proposals to specific articles thereafter often contained elaborations of the requirements laid down in the general clause.<sup>148</sup> Thus for example, during the drafting of article 6, there was considerable support for the inclusion of an extra paragraph outlining in more detail the steps to be taken by States in realising the rights within the Covenant.<sup>149</sup>

A number of States continually opposed the inclusion of such phrases, on the basis that they might detract from, or serve to weaken, the general obligation clause,<sup>150</sup> and that it was inconsistent to have those phrases in some clauses and not others.<sup>151</sup> On the whole, it was felt that the general clause in no way prevented the inclusion of more specific implementation provisions within the substantive articles themselves.<sup>152</sup> However, the matter was complicated by the fact that article 2(1) (the general implementation provision) was drafted and adopted after the substantive articles themselves. Thus, at most stages, it

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<sup>147</sup> UN Doc.A/2929, *supra*, note 67.

<sup>148</sup> See e.g. discussion on the inclusion of article 6(2), *below* Chapter 5, text accompanying notes 52-64.

<sup>149</sup> *Ibid.*

<sup>150</sup> See e.g., Rossel (Sweden), E/CN.4/SR.277, at 3 (1952); Roosevelt (USA), E/CN.4/SR.277, at 7 (1952).

<sup>151</sup> See e.g. Elliot (UK), A/C.3/SR.710, at 143, para.26 (1956).

<sup>152</sup> See e.g., Diaz Casanueva (Chile), A/C.3/SR.710, at 144, para.38 (1956).



was not possible to predict exactly what would be provided for in the umbrella clause.

It would appear that the inclusion of obligation clauses in the substantive portion of the Covenant does upset its general conceptual form. Many articles possess a confusing mixture of norms and sub-norms, with both immediate and progressive obligations. Article 11(2), in particular, lacks the conceptual clarity that might have been achieved with a stricter division between norms and measures of implementation. Article 11(2) not only deals with specific implementation provisions that relate to the right to food (such as the reform of agrarian systems), but it provides for an additional sub-norm (the right to be free from hunger) and objectives to which the measures of implementation should be directed (such as the equitable distribution of food supplies).<sup>153</sup>

#### D) SELF DETERMINATION

Article 1 of both International Covenants on human rights proclaims that:

"All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The inclusion of this provision was the first occasion on which self-determination was spelled out in a treaty as a human right. Indeed its formulation was to be a source of great controversy during the drafting of the covenants, to the extent that it was feared that the Covenant was becoming a pawn in the fight against colonialism.

The concept evolved initially<sup>154</sup> as a political principle most notably in the form of Wilson's "Fourteen Points" of 1917.<sup>155</sup> Then on the prompting of the USSR,<sup>156</sup> it was set out as one of the purposes of

<sup>153</sup> See below, Chapter 8.

<sup>154</sup> It is sometimes argued that the self-determination of individuals and peoples was the fundamental concept behind the development of human rights following the enlightenment, *see e.g.* Kameneka E., "Human Rights: Peoples Rights", in Crawford J.(ed), The Rights Of Peoples, 130 (1988).

<sup>155</sup> Wilson stated *inter alia*:

"No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their powers from the consent of the governed".

Address to the US Senate, Jan 1917, Washington 1917.

The principle of self-government was also enshrined in the Atlantic Charter of 1941 and thence in the Declaration of the United Nations of 1942.

<sup>156</sup> The final formulation is thought to be a compromise between the Colonialist and Socialist States. *See*, Cassese A., "Political Self-Determination- Old Concepts and New Developments", in Buergenthal T.(ed), Human Rights, International Law and the



the United Nations in the UN Charter.<sup>157</sup> Although a similar attempt to include an article on self-determination in the UDHR came to nothing,<sup>158</sup> the idea gained more support in the drafting of the Covenant.

Pressure for inclusion of a provision on self-determination came both from the "Socialist bloc" and the developing countries<sup>159</sup> in the General Assembly. Consequently the General Assembly instructed the Commission to study the ways and means to ensure the right to self-determination<sup>160</sup> then specifically directed it to include an article on the subject.<sup>161</sup> There was a significant amount of debate on the subject not

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Helsinki Accord, 137, at 138 (1979).

<sup>157</sup> Article 1(2) of the UN Charter was adopted unanimously and declares one purpose of the United Nations as being "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". A similar reference to self-determination is to be found in article 55(1) of the Charter.

References are made in Chapters XI and XII regarding Non-Self-Governing and Trusteeship Territories to self-government. Although no direct reference is made to self-determination, Bowett argues that it is permissible to consider the entirety of those chapters as "reflections on the basic idea of self-determination". Bowett D., "Problems of Self-Determination and Political Rights in Developing Countries", Proc.Am.Soc.I.L., 134 (1966).

<sup>158</sup> See USSR proposal UN Doc.A/784, (1947). However article 28 reads: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized." Similarly article 21(3) stipulates that "the will of the people shall be the basis of the authority of government" and shall be expressed in periodic and genuine elections.

<sup>159</sup> UN Doc.A/C.3/L.186 and Add.1, (1951). Morphet comments however that the positions of these two groups were not identical. Morphet S., "Article 1 of the Human Rights Covenants: Its Development and Current Significance", in Hill D.(ed), Human Rights and Foreign Policy, 67 (1989).

The influence of the "newly awakened" developing states was perhaps crucial, their political cohesiveness can be estimated by the continual references to the Bandung Conference of April 1955 which inter alia recognised the right to self-determination.

The role of the Western States however is also considered to have been influential, particularly in broadening the scope of the article. See Cassese A., "The Self-Determination of Peoples", in Henkin L.(ed), International Bill of Rights, 92, at 93 (1981).

<sup>160</sup> GA Resn.421 (V) D, *supra*, note 72, at 42-43.

<sup>161</sup> The General Assembly, following a thirteen power Arab-Asian proposal, adopted resolution 545 (VI) on February 5th 1952 in which it stipulated that an article on self-determination should be included which read "All peoples shall have the right of self-determination". It further required that note should be made of the duty of Administering States to promote the right in relation to Non-Self-Governing Territories. GA Resn. 545 (VI), (Feb.5 1952), 6 UN GAOR, Resns, Supp.(No.20), at 36 (1952).



only in the Commission at its eighth session but also later in the General Assembly's Third Committee.<sup>162</sup>

Those who opposed the inclusion of an article on self-determination<sup>163</sup> put forward the following arguments:<sup>164</sup>

- i) That the inclusion of such a politically controversial subject might jeopardise the future of the Covenants by making it impossible for some states to ratify them.<sup>165</sup>
- ii) That self-determination as stated in the UN Charter, was a political principle but not a legal right let alone a human right.<sup>166</sup>
- iii) That the exact nature of the right to self-determination was subject

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<sup>162</sup> See, UN Doc.A/3077, *supra*, note 88, at 30-40. UN Docs.A/C.3/SR.642-646, 10 UN GAOR, C.3, (642-646 mtgs.), (1955).

<sup>163</sup> Opposition was primarily from the Western "colonialist" powers. It must be recognised however that this was not entirely coherent as the opposition of the Western powers faded somewhat towards the end of the drafting process. Humphrey comments in this light that by 1958 "so many dependent territories were becoming independent that the political implications of the articles on self-determination seemed less important", *supra*, note 21, at 252.

<sup>164</sup> See generally UN Docs.A/2929, *supra*, note 67.

<sup>165</sup> That a certain suspicion of the concept of self-determination existed is well reflected by the Belgian representative who stated that it was "tantamount to an incitement to insurrection and separatism", Belgium, A/C.3/SR.643, at 94, para.10 (1955). See also, Emerson R. "Self Determination" 60 *Proc.Am.Soc.I.L.*, 135, at 136 (1966). It was later argued upon this basis that the US should refrain from ratifying the Covenants. See, Haight G., "Human Rights Covenants", 62 *Proc.Am.Soc.I.L.*, 96, at 98 (1968).

Most of the Western States that opposed the article have nevertheless signed and ratified the Covenants. It would seem that this is at least partially due to the anti-colonialist bent of the UN notion of self-determination which has made the issue of marginal importance on the attainment of independence of the former colonies. It is interesting to note that the UK has submitted an "understanding" of its interpretation of article 1, see, Schwelb E., "The United Kingdom Signs the Covenants in Human Rights", 18 *I.C.L.Q.*, 457 (1969).

<sup>166</sup> See United Kingdom, A/C.3/SR 642, at 90, para.12 (1955). The UN Charter only speaks of the "principle" of self determination in articles 1(2) and 55(1). Pomerance maintains in this respect that self-determination was merely a "deciderata" in interpretation of the Charter rather than a legal right. Pomerance M., *Self-Determination in Law and Practice*, 9 (1982). That it was not a right prior to this seems implicit in the decision of the Committee of Jurists in the *Aaland Islands Case* (1920) LNOJ, Spec. Supp.(No.3) at 5. However it could be argued that this decision was confined to the right to secede and not to self-determination as a whole.

The question of whether it has evolved into a legal right since, is also subject to controversy. See, Sinha, "Is Self-Determination Passé?", 12 *Columb.J.Trans.L.*, 260 (1973). He concludes that practice shows the principle to be one of political expediency rather than international law. See also, Emerson R., *From Empire to Nation*, (1960).



to many interpretations and involved the complex issues of minority rights and secession.<sup>167</sup>

iv) That the term "peoples" was incapable of precise definition.<sup>168</sup>

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<sup>167</sup> Thoughts as to how a people might "determine" themselves have ranged from taking full independence to the institution of democratic elections. *See generally*, Cassese, *supra*, note 156. For example the socialist concept of self-determination confined its operation to colonial peoples, *see* Tunkin G., Theory of International Law, 60-69 (1974). Western states however thought the right should be more generally applicable not to become redundant merely on the attainment of independence. *See*, Umozurike U., Self-Determination in International Law, 185 (1972). In this light, socialist states can be seen to prefer the "external" aspect of self-determination, and western states the "internal", *see* Cassese, *ibid*.

The most complex debate centred around the question of whether the right to self-determination included the right to secede. *See generally*, Buchheit L., Secession-The Legitimacy of Self-Determination, (1978); White R., "Self-Determination: Time for Reassessment", 28 Neth.I.L.J., 147 (1981). Fear was expressed that if such a right was established for minorities it would lead to the disintegration of states and a threat to international peace, *see*, Thornberry P., "Self-Determination, Minorities, Human Rights: A Review of International Instruments", 38 I.C.L.Q., 867 (1989).

<sup>168</sup> *See e.g.*, Emerson, *supra*, note 165, at 136. In this respect Jennings commented that "the people cannot decide until somebody decides who are the people". Jennings I., The Approach to Self-Government, 56, (1956).

The debate as to the exact meaning of the term "peoples" goes back to the San Francisco Conference in 1945. A Belgian amendment was proposed (and ultimately rejected) to avoid any confusion of the term "peoples" with "states". UN Doc.374 I/I/17 at 1, 6 UNCIO, at 300, (1945). The UN Secretariat concluded that "'nations' is used in the sense of all political entities, States and non-States, whereas 'peoples' refers to groups of human beings who may, or may not, comprise States or nations", UN Doc.W.D.381 CO/156, 18 UNCIO, at 657-58 (1945). *See generally*, Swan G., "Self-Determination and the UN Charter", 22 Ind.J.I.L., 264 (1982). The confusion over terms is amply illustrated by Kelsen who concludes that "the term 'peoples'... means probably states, since only states have 'equal rights' according to general international law". Kelsen, *supra*, note 34, at 52.

Although the Commission Draft originally stated that the right should belong to all peoples and all nations, the latter was excluded on the grounds that the term "peoples" was more comprehensive. Chen L-C., "Self Determination as a Human Right" in McDougal M., Lasswell H. and Chen L-C.(eds), Human Rights and World Public Order, 198, at 217 (1980). The right was deemed to be universal: applying not only to non-self-governing territories but also to fully independent states. Cassese, *supra*, note 156, at 94. Its purpose is to define the population as distinct from a particular government. *Cf.*, Falk R., "The Rights of Peoples", in Crawford (ed), The Rights of Peoples, 17 (1988).

It would seem logical that any claim of self-determination is ultimately based upon the subjective conviction that the governmental rule is either alien or colonial, *see* Pomerance, *supra*, note 166, at 14. The question is therefore whether an objective criterion can be elucidated, *see*, Buchheit, *supra*, note 167, at 10; Dinstein Y., "Collective Human Rights of Peoples and Minorities", 25 I.C.L.Q., 102, at 104 (1976). This is especially crucial given the general desire to exclude the operation of the principle from minorities. In practice it would seem that the United Nations has applied the right solely to colonial peoples, *see e.g.* Pomerance, *supra*, note 166, at 14-23.



- v) That the internal aspect of self-determination was ignored in favour of the external aspect<sup>169</sup> in that it was promoted merely as a tool for independence.
- vi) That the UDHR, which was intended to cover all human rights, contained no reference to self-determination.<sup>170</sup>
- vii) That self-determination was a right of a collective nature and therefore it was inappropriate to include it in a covenant which was devoted to the rights of individuals.<sup>171</sup>

On the other hand those who wanted to include an article on self-determination put forward the following arguments:

- i) That states had undertaken under the UN Charter to respect the right

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<sup>169</sup> Cassese succinctly outlines the two aspects of self-determination: "External self-determination refers to the ability of a people or a minority to choose in the field of international relations, opting for independence or union with other States. Internal self-determination usually means that a people in a sovereign State can elect and keep the government of its choice".

*Supra*, note 156, at 137.

Pomerance has noted in this respect that UN practice "consists of decolonization as an end result rather than "self-determination" as a technique or method". *Supra*, note 166, at 28. At the time of drafting the Soviet States and the Developing States tended to emphasise the colonial (external) aspect of self-determination at the expense of questions of representative government and periodic elections. Ironically those states that opposed inclusion of the article (Western States) were the ones that advocated the human rights aspect of the concept most strongly. *Cf. Cassese, supra*, note 156, at 140.

The forthright statement of Afghanistan that self-determination "will have to be proclaimed even in a world from which colonial territories have vanished" however became the majority view, Afghanistan, A/C.3/SR.644, para.10 (1955).

<sup>170</sup> The UDHR however did make reference to the internal aspect of self-determination, namely, representative government.

<sup>171</sup> *See e.g.* Shann (Australia), A/C.3/SR.400, at 320, para.19, (1952). Sieghart argues that such peoples rights form an entirely distinct category separate from human rights. He asks:

"How then can the rights of a 'people' ever form part of human rights- that is, precisely the rights that the individual may invoke against the claims of those who exercise power over him, and which they only too often assert in the name of the people".

Sieghart P., The Lawful Rights of Mankind, 164 (1986).

Similar problems might have also been raised in connection with article 27 ICCPR relating to the rights of minorities, *see* Rousseau C., "Droits de l'Homme et Droit des Gens", in Cassin R.(ed), Amicorum Discipulorumque, Liber IV, 315 (1969). However the drafters were concerned with excluding minorities from the ambit of article 1, thus they would be conceived of as individual rights primarily, *see*, Thornberry, *supra*, note 167, at 880.



of self-determination.<sup>172</sup>

ii) That the realisation of the right to self-determination was essential to the maintenance of peace. In reaffirming that right in the Covenants the United Nations would create the necessary conditions for the establishment of peaceful relations and international cooperation.<sup>173</sup>

iii) That the intended article was not concerned with the rights of minorities or the right of secession and therefore fears of such an interpretation were unfounded.<sup>174</sup>

iv) That it had already been decided by the General Assembly to include such an article and to reverse such a decision would call into question the authority of that body.

v) That although self-determination was a collective right it was the "source" or "prerequisite" for the enjoyment of all other individual human rights.<sup>175</sup>

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<sup>172</sup> In the USSR's view, the distinction between self-determination as a right and a principle was artificial, USSR, A/C.3/SR.646, para.23 (1955). Some commentators argue that the principle was established as a legal right even before the Charter, *see* Lachs M., "The Law in and of the United Nations- Some Reflections on the Principle of Self-Determination", 1 Ind.J.I.L. 429, at 432 (1960-1). Whether or not this is the case it would seem that it has emerged as a legal right since that time, *see* Higgins R., The Development of International Law Through the Political Organs of the United Nations, 103 (1963).

<sup>173</sup> *See e.g.* Panama who felt that the right was essential to the maintenance of peace, as otherwise such peoples would resort to force to ensure their claims, Panama, A/C.3/SR.827, at 322, para.32 (1957).

<sup>174</sup> *See e.g.*, D'Souza (India), A/C.3/SR.399, at 311, paras.5-6 (1952); Greece declared that the issue "was that of national majorities and not of minorities", Acritas (Greece), A/C.3/SR.369, at 134, para.13 (1951). Buchheit concludes that "article 1 of the covenants appears in spite of its possible secessionist interpretation, rather than as a confirmation of that interpretation". *Supra*, note 167, at 83-84.

Article 27 of the ICCPR protects the cultural, religious and linguistic rights of persons belonging to minorities. *See*, Sohn L., "The Rights of Minorities", in Henkin L.(ed), International Bill of Rights, 270 (1982); Thornberry, *supra*, note 167, at 877-884; Capotorti F., Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Groups, UN Doc. E/CN.4/Sub.2/384/Rev.1. (1979).

<sup>175</sup> *See*, Cassese, *supra*, note 159, at 101-2. Such a view has been termed the "contextual approach" by Van Boven. Van Boven T., "The Relations Between Peoples' Rights and Human Rights in the African Charter", 7 H.R.L.J., 183 (1986). It might also be contended that the inclusion of an article on self-determination is merely an example of the development of a "collective" approach to human rights already manifest in economic, social and cultural rights. Marie J-B., "Les Pactes Internationaux Relatifs Aux Droits De L'Homme Confirment- Ils L'Inspiration De La Déclaration Universelle?", 3 H.R.J. 397 (1970); *also* "Relations Between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions", 7 H.R.L.J., 195, (1986). This argument, however, can be criticised on the basis that all the other rights in the covenants (including that of minorities) relate to the individual.

The Yugoslavian representative attempted to establish an individual facet to the



A certain number of suggestions were made to reconcile the two conflicting camps of opinion. For example proposals were made for a declaration on self-determination, or that it should be contained in a protocol and annexed to the covenants, or even that a third covenant should be drafted on the subject to be opened for signature at the same time as the other covenants.<sup>176</sup> The lobby preferring to include an article on self-determination were however not to be dissuaded and forced the issue by sheer weight of numbers.<sup>177</sup>

Following a proposal from the Chilean representative in 1952, the Commission added a clause to the article stating that the right to self-determination "shall also include permanent sovereignty over their natural resources".<sup>178</sup> The reasoning was that states should be able to exercise control over their own natural resources albeit through a process of expropriation. Such a provision was deemed to be necessary since political independence was considered to depend to an extent upon economic independence.<sup>179</sup> This provision which finally became article 1(2)<sup>180</sup> forged a link between self-determination and development issues and can be seen as a forerunner of the later moves

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concept, he proposed an amendment stating that "the right of peoples to self-determination shall include the right of every person to participate in action to assure or maintain the free exercise of that right", UN Doc.E/CN.4/L.22/Rev.1, at 7-8, para.65, 14 UN ESCOR, Supp.(No.4), (1951). This was rejected by the slightest margin of six votes to six with six abstentions. There seems to have been considerable support therefore for individual remedies, *see* Buchheit, *supra*, note 167, at 81.

Cassese contends that "internal self-determination... is the synthesis and summa of civil and political rights," *ibid*. However it has been argued that it is more than just a collection of the other rights in that "it goes one step further than individual human rights in that it grants to a group those rights necessary to the preservation of a group identity". White, *supra*, note 167, at 168. Nevertheless it is stressed that this must not imply any form of hierarchy in the rights, *see* Triggs G., "Peoples' Rights and Individual Rights: Conflict or Harmony?" in Crawford J.(ed) The Rights of Peoples, 141 (1988).

<sup>176</sup> UN Doc.A/3077, *supra*, note 88, at 34, paras.41-44.

<sup>177</sup> Article one of both Covenants was finally adopted by 33 votes to 12, with 13 abstentions.

<sup>178</sup> UN Doc.E/CN.4/L.24, (1952). This aspect of self-determination has been termed "economic self-determination", *see* Umozurike, *supra*, note 167, 205-224. Green has commented that the inclusion of this provision "clearly reflected the historic conflict between the underdeveloped and developed countries over the issue of expropriation of private property", *supra*, note 21, at 689.

<sup>179</sup> UN Doc.E/2256, at 5-6, paras.45-46, 14 UN ESCOR, Supp.(No.4), (1952). Umozurike comments in this vein that "political self-determination is...incomplete without economic self-determination". *Supra*, note 167, at 224.

<sup>180</sup> The General Assembly acknowledged this aspect of the right to self-determination in, GA Resn.1314 (XII), (Dec.12 1958), 13 UN GAOR, Resns, Supp.(No.18), at 27 (1958).



to create a New International Economic Order (NIEO)<sup>181</sup> and a right to development.<sup>182</sup>

It was argued however that the term "permanent sovereignty" was meaningless as states were free to limit their sovereignty as they wished. Moreover the developed States contended that the provision would sanction unwarranted expropriation or confiscation of foreign property without just compensation and might jeopardise international agreements.<sup>183</sup> Accordingly a general limitation clause<sup>184</sup> was included stating that the principle should operate "without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law". Thus the intention seems to have been to subject expropriation under this provision to the current rules of international law.<sup>185</sup>

However Article 25 ICESCR was subsequently adopted which states that "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources".<sup>186</sup> This seems to merely restate the principle found in article 2(1) without the concomitant reference to international law. It has been suggested nevertheless that this does not alter the requirements of article 1 in any substantial way.<sup>187</sup>

The provision on self-determination was finally adopted by the Third Committee by 33 votes to 12 with 13 abstentions and included as article 1 in both Covenants. The question had been raised whether the

<sup>181</sup> GA Resn.3201 (S-VI), (May 1 1974), 13 I.L.M. 715 (1974). A series of General Assembly Resolutions have dealt with the international economic issues related to development, beginning with the resolution on the Permanent Sovereignty Over Natural Resources in 1962, GA Resn.1803 (XVII), (Dec.14 1962), 17 UN GAOR, Resns, Supp.(No.17), at 15 (1962). Most recently is the Charter of Economic Rights and Duties of States, GA Resn.3281 (XXIX), (Dec.12 1974), 29 GAOR, Resns, Supp.(No.31), at 50 (1974). On the status of these resolutions see Texaco v.Libya (1977) 53 I.L.R. 389.

<sup>182</sup> Declaration on the Right to Development, GA Resn.41/128 (Dec.4 1986) *supra*, note 142. See, Baxi U., "The New International Economic Order, Basic Needs and Rights: Notes Towards Development of the Right to Development", 23 Ind.J.I.L., 225 (1983).

<sup>183</sup> UN Doc.A/2929, *supra*, note 67, at 15, paras.19-21.

<sup>184</sup> It is interpreted by Cassese in this light. *Supra*, note 159, 103-4.

<sup>185</sup> It is thought that the current standard at the time was for "prompt, adequate and effective" compensation. These traditional elements of compensation were not challenged until the 1960's.

<sup>186</sup> Cf. Article 47 ICCPR.

<sup>187</sup> Dinstein, *supra*, note 168, at 110-111.



provision should have been included in both Covenants or only one of them. If in both, it was further asked whether its meaning differed between them.<sup>188</sup>

### E) PROPOSED ADDITIONAL CLAUSES

In considering the draft Covenant, ECOSOC asked the General Assembly to make a policy decision on the desirability of including a special article on the application of the Covenant to Non-Self-Governing and Trust Territories.<sup>189</sup> The General Assembly adopted a resolution directing the Commission to include a territorial provision or "colonial clause" in the Covenant extending application of the Covenant to Trust and Non-Self-Governing Territories.<sup>190</sup> Although such a provision was drafted, the Third Committee decided in 1960 that the suggested territorial clause ("colonial clause") should be deleted from the final draft on the basis that the concept of colonial subjugation had been declared illegal by the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>191</sup> This contrasts strongly with the fate of the "federal clause" which eventually became article 28 of the Covenant. Although it was agreed that the absence of a "territorial clause" did not relieve an administering state from the duty to extend the provisions of the Covenant to all its dependent territories, by failing to stipulate that fact means that the obligation is deprived of any effective legal force. It is highly likely nonetheless that even with a territorial clause, States would be prepared to enter reservations as to the application of the Covenant to dependent territories.

Proposals for the inclusion of a reservations clause suffered a similar fate. Although the question was discussed by the Commission, no agreement was possible. The matter was referred to the General

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<sup>188</sup> UN Doc.E/CN.4/649, (1952). Chile for example argued that if self-determination was included in the ICCPR it would apply to countries that had lost their independence; alternatively if it was included in the ICESCR "it would relate to under-developed countries that did not have full control over their natural resources". The majority position finally was that the article should apply equally to all peoples.

Equally that there was no reference to different meanings for each of the two articles it is assumed that they are identical in this respect. The comments of the Human Rights Committee on the subject are of relevance then to the ICESCR.

<sup>189</sup> ECOSOC Resn.303 I (XI), *supra*, note 103.

<sup>190</sup> GA Resn.422 (V), (Dec.4 1950), 5 UN GAOR, Resns, Supp.(No.20), at 42 (1950). This was included in the text of the Covenant, despite the vigorous opposition of the administering powers, by the Commission at its tenth session in 1954. However it was subsequently deleted by the General Assembly Third Committee in 1966, UN Doc.A/6546, 21 UN GAOR, C.3, Annexes, (Ag.Item 62), (1966).

<sup>191</sup> GA Resn.1514 (XV), (Dec.14 1960), 15 UN GAOR, Supp.(No.16), at 66 (1960).



Assembly. After some debate in the Third Committee, it was considered that the general principles of international law were sufficiently clear that it was unnecessary to include an article on reservations.<sup>192</sup>

At certain points in the drafting of the Covenant, a proposal to include an article on the right of property was discussed. A draft article based upon article 17 of the Universal Declaration of Human Rights was put forward,<sup>193</sup> but serious disagreement arose over the issues of expropriation and compensation. After the rejection of a working group proposal, it was decided to postpone *sine die* consideration of the question.<sup>194</sup> Perhaps the most interesting aspect of the proposal was that, despite having strong roots in the Western natural rights tradition, the article should be proposed for inclusion in the Covenant on Economic, Social and Cultural Rights. Had it been included, it might have been associated more with claims for land rights than with the idea of freedom from expropriation.

#### F) GENERAL OR SPECIFIC PROVISIONS

During the drafting process, an argument that underlay much of the Commission's and Third Committee's debates, was whether or not the provisions of the ICESCR should be outlined in general or specific terms. Broadly speaking there was awareness that provisions should not be so general as to deprive the instrument of any coherent obligation, and not be so specific as to limit the scope of the instrument and render it obsolete a few years thereafter. However, there was considerable difference of opinion over the amount of detail to be included in each provision.

Those States that advocated more general provisions (the Western States) often argued that specific provisions might restrict the scope of the articles,<sup>195</sup> and may well conflict with the standards established by the specialised agencies (particularly the ILO).<sup>196</sup> Indeed, it seems to have been assumed that the specialised agencies would be central to the supervision system, and would themselves provide more detailed

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<sup>192</sup> See UN Doc.A/C.3/L.1353/Rev.1 and 2, (UK proposal for an additional article relating to the question of reservations).

<sup>193</sup> Proposal of the US: UN Doc.E/CN.4/L.313, (1949).

<sup>194</sup> Although the constituent parts of the Sub-Committee proposal were agreed upon, the text as a whole was rejected by seven votes to six with five abstentions.

<sup>195</sup> See e.g. opposition to the proposal to include a partial definition of article 9, Simarsian (USA), E/CN.4/SR.282, at 13 (1952); Juvigny (France), *ibid*.

<sup>196</sup> See e.g. Elliot (UK), A/C.3/SR.710, at 143, para.26 (1956); see also, Pickford (ILO), E/CN.4/SR.282, at 8 (1952).



standards at a later stage.<sup>197</sup> Other States however, whilst not disputing the putative role of the specialised agencies, argued that the Covenant, as a binding human rights instrument, should at least provide more detailed and precise standards than those found in the Universal Declaration.<sup>198</sup> If otherwise, the Covenant would be open to conflicting and subjective interpretations which would undermine its effectiveness.<sup>199</sup>

Whilst the Covenant is considerably more detailed than some States desired, it still remains fairly general in its terms. On certain occasions, this was merely a result of a failure to agree on appropriate terminology. On other occasions, there was a tendency to discuss questions of implementation at the expense of more detailed consideration of the normative content. It is noticeable moreover, that even where agreement was achieved as to the inclusion of more detailed standards they were accompanied by more restrictive limitations.<sup>200</sup>

#### G) MEASURES OF IMPLEMENTATION<sup>201</sup>

The question of implementation was seen as being of primary importance as early as 1946. Following the recommendation of the Nuclear Commission, ECOSOC expressed the view that the purposes of the United Nations "can only be fulfilled if provisions are made for the implementation of human rights and of an international bill of rights".<sup>202</sup> The Commission accordingly began to consider the question

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<sup>197</sup> This is indicated in particular, by the inclusion of article 8(3) which refers to ILO Convention No.87.

<sup>198</sup> See e.g. Abdel-Ghani (Egypt), A/C.3/SR.710, at 143, para.20 (1956).

<sup>199</sup> See e.g. Shoham-Sharon (Israel), A/C.3/SR.728, at 235, para.1 (1957).

<sup>200</sup> See e.g. the inclusion of article 8(2). *Below*, Chapter 7.

<sup>201</sup> See generally Sohn, *supra*, note 21, at 120-169; Schwelb E., "Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants", in Mélanges Modinos, 270 (1968); Schwelb E., "Some Aspects of the International Covenants on Human Rights of December 1966" in Eide A. and Schou A.(eds), International Protection of Human Rights, 103 (1968); Schwelb E., "Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights", 1 H.R.J., 363 (1968); Capotorti F., "The International Measures of Implementation Included in the Covenants on Human Rights Proceedings" in Eide A. and Schou A.(eds), International Protection of Human Rights, 132 (1967); Starr R., "International Protection of Human Rights and the United Nations Covenants", 4 Wisc.L.Rev., 862 (1967).

<sup>202</sup> ECOSOC Resn.9 (II), (June 21 1946), 2 ESCOR, 400-2, (1946).



of implementation in its first session,<sup>203</sup> and formed a working group on implementation to discuss the matter at its second session.<sup>204</sup> At the adoption of the UDHR the General Assembly implicitly endorsed this view by deciding that the drafting of the covenant and measures of implementation should be given priority in the Commission's work.

At the Commission's fifth session in 1949, a number of suggestions were made on the question of implementation. Proposals were put forward, *inter alia*, for the establishment of an International Court of Human Rights, a special Commission with authority to receive petitions from individuals, and a panel of experts to review inter-state complaints on an *ad hoc* basis.<sup>205</sup> The USSR in particular objected to such international implementation mechanisms which it considered to undermine the sovereignty of states. It suggested instead a system of measures to ensure that human rights are guaranteed by the state itself. Nevertheless a majority of the Commission agreed upon the necessity of some form of international supervision with the possibility of inter-state petitions. Opinion was divided however over the issue of individual complaint procedures. In light of the disagreements, the Commission decided to submit a questionnaire on implementation<sup>206</sup> and the proposals to governments for their comments.

At its sixth session<sup>207</sup> in 1950 the Commission continued with its consideration of the mechanisms of implementation. It decided on the establishment of a permanent human rights committee with provision for inter-state (but not individual<sup>208</sup>) complaints.<sup>209</sup> It would seem however that such machinery was considered to be applicable primarily

<sup>203</sup> The Commission had before it at this stage proposals from a number of states including one from Australia suggesting the establishment of an International Court of Human Rights with original and appellate jurisdiction, UN Doc.E/CN.4/15, 1-2, (1947).

<sup>204</sup> The Working Group on Implementation drafted a proposal for a Standing Committee with power to collect information, receive petitions, and submit unresolved disputes to the ICJ, UN Doc.E/CN.4/53, (1947), UN Doc.E/600, *supra*, note 49, at 33-53.

<sup>205</sup> In addition to these proposals from Australia, France and the UK, Guatemala suggested the establishment of a Commission within each state and a Conciliation Committee mandated with the review of individual petitions with final recourse to the International Court of Justice. *Ibid*, Annex III.

<sup>206</sup> The questionnaire was drafted by the Secretary-General and then amended by the Commission before referral to governments. *Ibid*. Annex III, pt.II.

<sup>207</sup> UN Doc.E/1681, *supra*, note 71.

<sup>208</sup> The suggestion for NGO petitions was rejected by 7 votes to 4 with 3 abstentions; that of individuals by 8 votes to 3 with 3 abstentions.

<sup>209</sup> *Supra*, note 71.



to civil and political rights, as the issue of whether economic, social and cultural rights should be included in a single covenant had not been resolved.<sup>210</sup>

This view was reinforced when, despite being instructed by the General Assembly to draft a single covenant including the whole range of rights, the Commission proceeded to draft a number of articles outlining a system of state reporting under UN supervision<sup>211</sup>, which appeared to appertain solely to economic, social and cultural rights.<sup>212</sup> Faced with the unwieldy prospect of having a "covenant within a covenant"<sup>213</sup> (in the sense of having two separate implementation systems), it became somewhat inevitable that the provisions be separated into two covenants. It was primarily the question of implementation that induced ECOSOC to request in resolution 384 C (XIII)<sup>214</sup> that the draft Covenant be divided into two separate instruments. As has been noted above, this recommendation was eventually endorsed by the General Assembly.

Nevertheless discussion of whether the Human Rights Committee procedure should apply to economic, social and cultural rights continued despite the division of covenant. Two proposals were submitted at the Commission's tenth session for the application of such a procedure to selected economic, social and cultural rights.<sup>215</sup> Doubts were expressed about the capability of the Committee to exercise its quasi-judicial functions with regard to rights that were of a programmatic nature.<sup>216</sup> The suggestions were also opposed by the

<sup>210</sup> Schwelb, "Notes", *supra*, note 201, at 275, n.19.

<sup>211</sup> For a discussion of the rejection of the ILO proposal *see below*, text accompanying notes 232-235.

<sup>212</sup> Much of the discussion centred around the role of the specialised agencies in the reporting process suggesting that it was tailor-made for economic, social and cultural rights, E/CN.4/SR.218, 237-8, 241-3, 236-7, (1951). Similarly the question of whether the petition procedure should apply to only the civil and political rights was to be decided at a later stage, *ibid*, Annex 1, pt.IV.

<sup>213</sup> Humphrey, *supra*, note 21, at 144.

<sup>214</sup> UN Doc.E/2152, at 36, 13 UN ESCOR, Supp.(No.1), (1952).

<sup>215</sup> For the French proposal *see*, UN Doc.E/CN.4/L.338 (1954), 18 ESCOR, Supp.(No.7), UN Doc.2573, para.216, (1954). It was suggested that the States Parties might be given the opportunity of accepting the Human Rights Committee's complaints procedure for specific economic, social or cultural rights as they so desired. Such a procedure would be subject to reciprocal agreement by the States concerned.

<sup>216</sup> Not only was it considered that there was a lack of criteria to evaluate state compliance, it was argued that:

"Complaints relating to that covenant could only refer to insufficient programmes in the attainment of certain goals and it would be



Specialised Agencies who considered that they were technically better qualified to implement economic, social and cultural rights, and such a procedure would only lead to duplication of work.<sup>217</sup> As with the proposal to authorise ECOSOC to receive individual petitions,<sup>218</sup> the suggestions were withdrawn before being taken to vote.<sup>219</sup>

The Third Committee then turned to the question of the implementation of the Covenants in the following year at the eighteenth session.<sup>220</sup> To aid it in this task, the Secretary-General had compiled an explanatory paper on measures of implementation as directed by the General Assembly.<sup>221</sup> The review continued at the twenty-first session where there was general agreement as to the system of implementation suggested by the Commission on Human Rights.<sup>222</sup>

At this late stage the US and Italy put forward amendments providing for the establishment of an expert committee to review the State reports.<sup>223</sup> These were largely based upon the measures recently adopted for the International Convention on the Elimination of All

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impossible for the committee to determine what the rate of progress in any particular case should be."

UN Doc.A/2929, *supra*, note 67, at 124, para.41.

<sup>217</sup> *Ibid*, para.40. However it was stressed by the proponents of the suggested mechanism that in case of overlap the Specialised Agencies would have priority. Moreover not all the rights in the Covenant were covered by the Specialised Agencies, nor would all States Parties to the Covenant be members of the Agencies, *ibid*, para.42.

<sup>218</sup> The proposal was subsequent to a General Assembly draft resolution submitted to the Commission by resolution 737 B (VIII) proposing that the Commission draft provisions recognising the right of petition of groups of individuals and NGOs.

<sup>219</sup> *See*, UN Doc.E/2573, *supra*, note 83, at 21-22.

<sup>220</sup> UN Doc.A/5365, *supra*, note 92, at 14-25.

<sup>221</sup> GA Resn.1843 B (XVII), (Dec.19 1962), 17 UN GAOR, Resns, Supp.(No.17), at 35 (1962). For the Explanatory Paper *see*, UN Doc.A/5411 and Add.1-2, 18 UN GAOR, C.3, Annexes, (Ag.Item 48), 1-13 (1963).

<sup>222</sup> UN Doc.A/6546, *supra*, note 190, at 7-26.

<sup>223</sup> For the US proposal *see*, A/C.3/SR.1401, at 9-10, paras 13-14 (1966). It proposed that the reports should be considered by a "Committee on Economic, Social and Cultural Rights" consisting of independent experts elected by States Parties. It is considered that the independence of the proposed Committee and the fact it would have drawn on expert individuals from States Parties and not ECOSOC as a whole, were matters that recommended the proposal, *see* Alston P., "The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights", 18 Columb.J.Trans.L, 91 (1979).



Forms of Racial Discrimination.<sup>224</sup> To an extent the opposition to the US proposal was a reaction to the recent opinion of the International Court of Justice in the South West Africa Cases.<sup>225</sup> Following that decision, in the developing world at least, such "expert" bodies were to some extent discredited. The majority resisted the proposal on the grounds that it would unduly restrict ECOSOC's discretion as the main supervisory body and that it would encroach upon the work of the Specialised Agencies in the area of economic, social and cultural rights. In light of the disagreement the proposals were subsequently withdrawn before going to the vote. It was specifically recognised nevertheless that the withdrawal of the amendments would not prevent ECOSOC establishing in future "such other Commissions as may be required for the performance of its functions".<sup>226</sup> This might include the establishment of such an expert committee if it was considered necessary for the administration of the reporting system.<sup>227</sup>

#### H) THE ROLE OF THE SPECIALISED AGENCIES.

The ILO, UNESCO, the World Health Organisation (WHO) and the Food and Agriculture Organisation (FAO) played an important role in the drafting of the International Bill of Human Rights and particularly the International Covenant on Economic, Social and Cultural Rights.<sup>228</sup> This was in part due to the effectiveness of their lobbying system<sup>229</sup> and to the natural part they played in the implementation of human rights.<sup>230</sup> Each of the organisations submitted

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<sup>224</sup> GA Resn.2106, (Dec.21 1965), 20 UN GAOR, Supp.(No.14), (1965). 660 U.N.T.S. 195.

<sup>225</sup> South West Africa Cases, Second Phase, (1966) ICJ Rep. 6. The ICJ decided that individual members of the League of Nations had no legal standing to enforce the terms of South Africa's mandate over South West Africa.

<sup>226</sup> Article 68 UN Charter.

<sup>227</sup> Cf. Rumbos (Venezuela), A/C.3/SR.1399, at 126, para.12 (1966).

<sup>228</sup> See generally, Alston, *supra*, note 223, at 79-92; Humphrey, *supra*, note 21, at 141-149.

<sup>229</sup> See, Humphrey, *supra*, note 21, at 85.

<sup>230</sup> "Human Rights are not a separate part of the activities of the International Labour Organisation (ILO), but lie at the very heart of its mission". Wolf F., "Human Rights and the International Labour Organisation", in Meron T.(ed) Human Rights in International Law, 273 (1985); see also, Jenks C., "The International Protection of Trade Union Rights" in Luard E.(ed), The International Protection of Human Rights, 210 (1957); Landy E., The Effectiveness of International Supervision: Thirty Years of ILO Experience, (1966); Valticos N., "The Role of the ILO: Present Action and Future Perspectives", in Ramcharan B.(ed), Human Rights Thirty Years After the Universal Declaration, 211 (1979). The 1944 Declaration of Philadelphia as incorporated into the



detailed proposals for articles within their respective fields of operation and attended the relevant drafting sessions.<sup>231</sup>

The ILO, being somewhat resistant to any interference in the scope of its jurisdiction, initially resisted the inclusion of economic and social rights in the Covenant.<sup>232</sup> When this became an inevitable outcome, it argued that the provisions should be drafted only in a general form.<sup>233</sup> Again with regard to implementation, it stressed the necessity of preserving the primacy of the ILO procedures in relation to economic and social rights. In 1951, it actually proposed an implementation system in which the ILO itself would review the state

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ILO Constitution (annex II(a)) recognises the principle that "all human beings, irrespective of race, creed or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." 15 UNTS.35; amended 7 UST.245.

The Constitution of UNESCO similarly states that the purpose of the Organisation is to:

"contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world... by the Charter of the United Nations."

UNESCO Constitution Art.1(1), 4 UNTS 275. *See generally*, Saba H., "UNESCO and Human Rights" in Vasak K. and Alston P.(ed), The International Dimensions of Human Rights, 401 (1982); Marks S., "UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture and Communication" 13 Tex.I.L.J., 35 (1977); UNESCO Secretariat, "UNESCO and the Challenges of Today and Tomorrow: Universal Affirmation of Human Rights" in Ramcharan B.(ed), Human Rights Thirty Years After the Universal Declaration, 197 (1979); Alston P., "UNESCO's Procedures for Dealing with Human Rights Violations", 20 Santa Clara L.R., 665 (1980).

Paragraph 3 of the preamble to the WHO Constitution states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being". The constitution of the FAO makes no direct reference to human rights, but paragraph 1 of its preamble envisages the improvement of the "common welfare" through higher nutrition levels and living standards. 14 UNTS 185.

<sup>231</sup> From the records of the Commission sessions it is apparent that the ILO was initially the most involved (having attended from the first Commission session), UNESCO became involved at a later stage. The WHO and FAO, despite submitting proposals, seemingly did not become significantly involved in the debate at any stage.

<sup>232</sup> Alston, *supra*, note 223, at 84. It has been argued that the ILO was motivated by a desire to be the principle organ in the promotion of economic and social rights. *See*, Humphrey, *supra*, note 21, at 12 and 141.

<sup>233</sup> The ILO in this respect fell into one of two schools of thought: "One school held that each article should be a brief clause of a general character; another school was of the opinion that each right, its scope and substance, its limitations, as well as the obligations of the State in respect thereof, should be drafted with the greatest precision."

UN Doc.A/2929, *supra*, note 67, at 8, para.13. It would seem that the ICESCR contains a mixture of these approaches. Compare for example Article 9 and Article 13.



reports.<sup>234</sup> Given that the Covenant deals with issues that extend beyond the competence of the ILO, it is appropriate that this proposal was rejected in favour of the Secretariat draft.<sup>235</sup>

The other Specialised Agencies did not share the view of the ILO in this respect. Not only did they actively encourage the addition of certain provisions<sup>236</sup> but also desired that they be given sufficient specificity.<sup>237</sup> However as regards implementation, like the ILO, they also expressed concern about their jurisdiction.<sup>238</sup> Thus although in principle UNESCO called for the "speediest and fullest possible implementation of human rights in matters of education and culture",<sup>239</sup> it was opposed to the creation of an expert committee to review state reports.

The role of the Specialised Agencies in the drafting of the Covenant was thus extremely mixed. The duality of their position in supporting the human rights initiatives at the same time as attempting to preserve their exclusive jurisdictional competence, meant that full cooperation was never possible.<sup>240</sup>

<sup>234</sup> UN Doc.E/CN.4/AC.14/1, (1951).

<sup>235</sup> The Secretariat plan for implementation was inspired by the technical assistance program and "the idea that it was better to help governments to fulfil their obligations than to penalise them for violations", Humphrey, *supra*, note 21, at 143.

<sup>236</sup> See e.g. the fact that UNESCO favoured the inclusion of an article on compulsory primary education was considered influential in its adoption. UN Doc.A/2929, *supra*, note 67, at 114, para.51.

<sup>237</sup> The Secretary-General commented with regard to Article 13 on the right to health:

"In the drafting of the text of article 13, which is more detailed than the preceding articles, consideration was given to the attitude of the World Health Organisation (WHO), which favoured the inclusion in the article of a certain degree of detail."

UN Doc.A/2929, *supra*, note 67, at 111, para.33. A similar comment was made on article 14 in relation to UNESCO, *ibid.* at 112, para.36.

<sup>238</sup> The ILO, FAO, WHO and UNESCO all had existing reporting procedures in their respective fields. For a comparison of the different agency reporting mechanisms see, UN Doc.A/5411 and Add.1-2, *supra*, note 221, paras.1-82.

<sup>239</sup> UN Doc.A/2907, 10 UN GAOR, C.3, Annexes, (Ag.Item 28), Pt.1, at 2, (1955).

<sup>240</sup> The respect given to the Specialised Agencies with regard to their work is well reflected in the ICESCR. Not only do they figure substantially in the provisions on implementation (articles 16-23), but article 24 provides that "Nothing in the present Covenant shall be interpreted as impairing the provisions ... of the constitutions of the specialised agencies... in regard to the matters dealt with in the present Covenant."



## I) APPROACHES TO HUMAN RIGHTS DURING THE DRAFTING PROCESS

Many of the disputes that arose during the drafting of the Covenant were underpinned by political and ideological conflicts. To a great extent, the whole question of human rights was used as a means of pursuing the controversies between East and West, and between North and South. This is evidenced by the quite discrete approaches to human rights displayed by the different political groupings.

Broadly speaking, three main groupings of States have been identified: the Western States, the Socialist States and the Developing States. Categorisation of States into these three groups is something of a generalisation as it assumes an ideological homogeneity over a wide range of issues. It also has to be noted that States' policy did not remain consistent over the period of the drafting. During that twenty year period, both domestic changes (such as changes in government) and external changes (such as the shifts in the balance of power within the United Nations<sup>241</sup>) affected the external policies of most States.

It is difficult to identify a coherent approach as regards the developing States (or Third World States<sup>242</sup>). Not only did the majority of such states only emerge onto the international scene during the second decade of drafting, but it is by definition a heterogeneous body.<sup>243</sup> However, there is no doubt that the newly-independent African and Asian States did exercise a certain amount of influence in the development of human rights. This is seen particularly by the emphasis on problems of colonialism and racism<sup>244</sup> which manifested itself, in human rights terms, in the inclusion of an article on self-determination in the Covenants and the Convention on Racial Discrimination.<sup>245</sup> Such States generally supported the inclusion of economic, social and cultural

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<sup>241</sup> See, Green J., "Changing Approaches to Human Rights: The United Nations, 1954 and 1974", 12 Tex.I.L.J., 223 (1977).

<sup>242</sup> The use of the term the "Third World" is not without its problems. Gros Espiel comments that the ambiguity of the term "complicates to a high degree all analysis of the evolution of human rights classified under this term". Gros Espiel H. "The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches", in Ramcharan B.(ed) Human Rights Thirty Years After the Universal Declaration, 41, at 48 (1979).

<sup>243</sup> Tyagi Y., "Third World Response to Human Rights", 21 Ind.J.I.L., 119, at 137 (1981).

<sup>244</sup> Vincent R., Human Rights and International Relations, 80 (1986).

<sup>245</sup> GA Resn.2106 (XX), *supra*, note 224.



rights within the Covenant, and as such associated themselves with the position of the socialist States.<sup>246</sup>

The Latin American States however, took a view distinct from that of their African and Asian counterparts.<sup>247</sup> They were strong advocates of including human rights provisions in the UN Charter<sup>248</sup> and pushed for the drafting of a bill of rights. They are said to have had a "fully-fledged" natural rights conception which made no distinction between civil and political rights and economic, social and cultural rights.<sup>249</sup> This is illustrated by their insistence on the inclusion of economic, social and cultural rights in the UDHR and the Covenant. Similarly they argued for the retention of a single Covenant<sup>250</sup> implicitly necessitating identical implementation procedures.

The Western States in comparison advocated a "liberal-democratic" conception of human rights emphasising individual liberty and governmental restraint. In the drafting process they accordingly argued for a minimum catalogue of "traditional" civil and political rights. When faced with the inevitable fact of economic, social and cultural rights they pushed for the separation of the rights into two covenants. Opposition to "new" rights also manifested itself in the Western Powers objections to an article on self-determination. This was particularly apparent in relation to the old colonial powers such as Belgium and the UK. Their position however shifted during the period of drafting, from one of outright opposition to acceptance of the idea in so far as it underlined the necessity for representative and democratic government.<sup>251</sup>

On the question of implementation the Western States varied quite widely in their views. Although the majority supported in principle strong international implementation procedures, they were not willing to go as far as the establishment of an International Court of Human Rights as proposed by Australia.

<sup>246</sup> Cassese sees this as being the position as far as Self-Determination is concerned. *Supra*, note 156; Vincent, *supra*, note 244, at 77. *Contra*, Morphet, *supra*, note 159, at 69.

<sup>247</sup> Gros Espiel, *supra*, note 242, at 49.

<sup>248</sup> *Supra* text accompanying note 29.

<sup>249</sup> Morsink, *supra*, note 9; Tolley, *supra*, note 21.

<sup>250</sup> De Alba (Mexico), A/C.3/SR.360, at 81, para.44 (1951); Valenzuela (Chile), A/C.3/SR.362, at 93, para.49 (1951). This was not the view of the Third World as a whole however. D'Souza (India), E/C.3/SR.361, at 86, para.31 (1951), and Malik (Lebanon), E/C.3/SR.370, at 139, para.36-40 (1951), both took the Western view and advocated the separation of the rights into two covenants.

<sup>251</sup> See, Pomerance, *supra*, note 166, at 38-39.



The position of the US, although generally similar to that of the European States, was dominated by internal politics. Although the US was at the forefront of international concern over human rights during the Presidency of Roosevelt and up to the adoption of the UDHR,<sup>252</sup> in the early 1950's, internal political pressures<sup>253</sup> spearheaded by the Bricker Amendment movement<sup>254</sup> lead to a change in US Policy regarding the Human Rights Covenants. Accordingly in 1953, J.F. Dulles announced that the US government "did not intend to become a Party to any such covenant or present it as a treaty for consideration by the Senate".<sup>255</sup> In the following period until about 1960, the US became

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<sup>252</sup> Falk R., "Ideological Patterns in the United States Human Rights Debate: 1945-1978", in Hevener (ed), The Dynamics of Human Rights in US Foreign Policy, 29, at 33 (1981).

<sup>253</sup> It is thought that a substantive and an institutional concern were operative here. The substantive concern was about the increasing US involvement internationally. The onset of the Cold War marginalised human rights issues and increased concern about the US domestic jurisdiction. The institutional concern was over the distribution of power between the federal government and the constituent States. See, Kaufman N. and Whiteman D., "Opposition to Human Rights Treaties in the US Senate: The Legacy of the Bricker Amendment", 10 Hum.Rts.Q., 309, at 312-318 (1988). This issue had recently been brought to life by the decision of the lower court in Sei Fujii v. California, 217 P.2nd 481 (Cal.Dist.Ct.App. 1950) where it was found that the UN Charter was equal in rank to any federal statute and therefore superseded state legislation. See, Buergenthal T., "The US and International Human Rights", 9 H.R.L.J., 141 (1988).

<sup>254</sup> The Bricker Amendment sought to amend the US Constitution to make it impossible for the US to adhere to the Covenants. Principally it would have eliminated self-executing treaties so that an Act of Congress would be necessary for the provisions to become part of domestic law. This would entail that Congress would be unable to implement a treaty unless that legislation would have been within the powers of Congress in absence of a treaty. Implicitly then the decision of the Supreme Court in Missouri v. Holland, 252 U.S. 416 (1920) which maintained executive treaty-making power over State concerns, would be reversed. See, Henkin "International Concern' and the Treaty Power of the United States", 63 A.J.I.L., 272, (1969). Buergenthal, *supra*, note 253, at 145-152.

It is sometimes suggested that the Bricker Amendment was the result of a general fear that eventually human rights treaties would deal with the condition of blacks in the US. Ferguson C., "The United Nations Human Rights Covenants: Problems of Ratification and Implementation", 62 Proc.Am.Soc.I.L., 83, at 91 (1968).

<sup>255</sup> Dulles J., Hearings, Subcom., Senate Judiciary Comm., 83rd Cong., 1st Sess., at 824 (1953). See Blaustein J., "Human Rights: A Challenge to the United Nations and To our Generation", in Cordier A.(ed), The Quest For Peace, 315, (1962); Green, *supra*, note 21, at 699-705.

It was considered that a treaty was not the "proper and most effective way to spread throughout the world the goals of human liberty". The US committed itself to a policy of "persuasion, education and example rather than formal undertakings which commit one part of the world to impose its particular social and moral standards upon another part of the world community". As part of this new initiative the US outlined



overtly unwilling to compromise its domestic jurisdiction,<sup>256</sup> and its participation in the drafting process seriously decreased. It is thought that the disinterestedness of the US was instrumental in the acceptance of the USSR position on two provisions, the right to property and the federal state clause.<sup>257</sup> It was not until the early 1960's (an era of "expansive liberalism"<sup>258</sup>), that the US once again took up the human rights cause, by which time much of the drafting had already been concluded.<sup>259</sup>

The Socialist States (primarily of Central and Eastern Europe<sup>260</sup>) tended to view human rights in terms of the individual within society. That philosophy considered that rights are acquired not be reason of a person's humanity but as a citizen or social being. The individual in this sense is not in competition with the State but is endowed with rights and duties by the State.<sup>261</sup> The corollary of this philosophy is that emphasis is placed upon economic, social and cultural rights as being essential to

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what it termed a Human Rights Action Program. This consisted of three programmes: a reporting system for those rights found in the UDHR, a system of special studies, and a system of advisory services in the field of human rights. The action program was taken up by the UN and has formed part of its work in the field of human rights since.

<sup>256</sup> Its policy on implementation at the time was one of inter-state procedures. It had previously supported the idea of individual petitions, UN Doc.E/CN.4/21, at 95 (1947), and later returned to such a policy.

<sup>257</sup> Looper R., "Federal State Clauses in Multilateral Instruments", 32 B.Y.I.L., 163, at 197 (1955-6).

<sup>258</sup> Falk, *supra*, note 252, at 33.

<sup>259</sup> The US has nevertheless still failed to ratify either of the Covenants. Several human rights treaties have been submitted to the Senate for ratification including the Covenants but approval has not often been forthcoming. *See* McChesney A., "Should the US Ratify the Covenants? A Question of Merits, not of Constitutional Law" 62 A.J.I.L., 912 (1968); Buergenthal, *supra*, note 254, at 152-163. The US has however recently ratified the Genocide Convention, *see* 80 A.J.I.L., 612 (1986). It is thought that the constitutional issues that surrounded the Bricker Amendment are still alive presenting strong opposition to ratification of human rights treaties as a whole. *See*, Kaufman and Whitman, *supra*, note 253, at 309. In addition it is unlikely that there will be sufficient domestic support for the ICESCR given the ideological opposition to such rights within the US. *See*, Howell J., "Socioeconomic Dilemmas of US Human Rights Policy", 3 Hum.Rts.Q., 78 (1981); Good M., "Freedom From Want: The Failure of United States Courts to Protect Subsistence Rights", 6 Hum.Rts.Q., 335 (1984).

<sup>260</sup> Yugoslavia however quickly made clear its non-aligned position.

<sup>261</sup> *See generally*, Rees A., "The Soviet Union", in Vincent R.(ed), Foreign Policy and Human Rights, 61 (1986); Przetacznik, *supra*, note , at 239-251; Kartashkin V., "The Socialist Countries and Human Rights", in Vasak K. and Alston P.(eds), The International Dimensions of Human Rights, 631 (1982).



the establishment of the Socialist consciousness.<sup>262</sup> The Socialist States thus fought for the inclusion of economic, social and cultural rights in the Covenants and the UDHR, presenting an ideological opposition to the West at the level of human rights.

Following the US abstention from proceedings in 1953 the USSR exercised considerable influence over the drafting process. The overt effects of its policy can be seen in the position adopted regarding the Federal State and Colonial Clauses.<sup>263</sup> Similarly the inclusion of the provision on Self-determination was a matter strongly advocated by the Socialist States generally.<sup>264</sup>

With regard to implementation, the Socialist States' position was characterised by two propositions.<sup>265</sup> First they considered human rights as matters "essentially within the domestic jurisdiction" of States in accordance with article 2(7) of the UN Charter.<sup>266</sup> Secondly they considered that States were the only real subjects of international law. Thus although the Socialist States were willing to comply with a reporting procedure at a State level, they resisted any form of complaints procedure especially those relating to individuals.

#### IV) A DISRUPTED DRAFTING PROCESS

Many of the imperfections in the final text of the Covenant may be put down to the confused and disrupted nature of the drafting process. The text of the Covenant was drafted first by the Commission

<sup>262</sup> Rees, *ibid*, at 62.

<sup>263</sup> No exception is made in either Covenant for the application of the provisions to Federal States or Colonial Territories. It is interesting to note that the USSR itself was a federal state.

<sup>264</sup> The Soviet view on self-determination was to consider it as applying solely to colonial territories, *see above* note 167.

<sup>265</sup> *See*, Tedin K., "The Development of The Soviet Attitude Toward Implementing Human Rights Under the UN Charter", 5 H.R.J., 399 (1972); Korowicz M., "Protection and Implementation of Human Rights Within the Soviet Legal System", 53 Proc.Am.Soc.I.L., 248 (1959); Jhabvala F., "The Soviet-Bloc's View of the Implementation of Human Rights Accords", 7 Hum.Rts.Q., 461 (1985).

<sup>266</sup> The issue is one of general interest, *see e.g.* Fawcett J., "Human Rights and Domestic Jurisdiction", in Luard E.(ed), The International Protection of Human Rights, 286 (1957); Bossuyt M., "Human Rights and Non-Intervention in Domestic Matters" 35 Rev.I.C.J., 45 (1985); Bernhardt R., "Domestic Jurisdiction of States and International Human Rights Organs", 7 H.R.L.J. 205 (1986); Henkin L., "Human Rights and 'Domestic Jurisdiction'", in Buergenthal T.(ed), Human Rights, International Law and the Helsinki Accord, 21 (1977); Ermacora F., "Human Rights and Domestic Jurisdiction" 124 Hague Recueil, 371 (1968).



and then revised by the Third Committee.<sup>267</sup> The time-lag between the discussion of the provisions by each body did nothing to improve the quality of the final text. In many cases the same arguments and proposals were put forward in both bodies. Earlier decisions were often reversed and amendments deleted. In only a small number of cases did the Third Committee profitably extend the debate initiated in the Commission.

Perhaps the greatest obstacle in the drafting process was the ideological conflict that underlay many of the issues and debates. Provisions often had to be drafted in the face of direct opposition by certain States. Indeed it is perhaps only due to the fact that the two Covenants were linked in the drafting process, that agreement upon a final text was possible. However, this in itself was a problem. That both Covenants had to be completed for adoption at the same time meant that the drafting of each took on a piecemeal character and became unduly extended.

Despite the length of time taken in the drafting of the Covenants, certain provisions clearly suffered from being discussed too little.<sup>268</sup> At other times, although there was sufficient discussion, agreement was only possible when the provision was left as a very general statement or subjected to excessive limitations.<sup>269</sup> Moreover, even where there was agreement as to a certain wording, there was often no common understanding of the meaning.<sup>270</sup>

It was the expressed intention of the drafters that the Covenants should be subject to a "rationalising" process before being presented for adoption. This would have ironed out the inconsistencies within and between the two Covenants. That this did not take place has meant that the Covenant has been left with a number of provisions that the drafters intended to revise. In particular, the right to an adequate standard of living was retained in article 11 despite being thought to be so general as to be included in Part II of the Covenant.<sup>271</sup>

The disruptive effect of the drafting process is evident in the curious mixture of rights and obligations, the vastly different form of

<sup>267</sup> *See above*, text accompanying notes 67-98.

<sup>268</sup> *See e.g.* article 7(b) on safe and healthy working conditions. *Below* Chapter 6.

<sup>269</sup> For example agreement on the right to strike was only possible with the limitations provided in article 8(2), which are more restrictive than those provided for by the ILO. *See below*, chapter 7.

<sup>270</sup> For example there was no final agreement as to the meaning of the term "workers" in article 7(a). *See below*, chapter 6.

<sup>271</sup> *See below*, chapter 8.



the various articles, and the excessively casual and inconsistent use of terminology. A few examples illustrate these points. First, whereas article 9 is relatively short, this is not the case with articles 11 or 13. Article 9 is restricted to a brief statement of the right concerned, whilst article 11 (like articles 6, 12, 13 and 15) contains in addition, an outline of steps that should be taken by States in the realisation of the right.

Secondly, although a number of articles demonstrate a clear pattern of wording, there are several unexplained exceptions. Thus, many articles begin with the phrase "The States Parties to the present Covenant recognize the right of everyone...". Articles 3 and 8, on the other hand, use the term "ensure", articles 13(3) and 15(3) use the term "respect", article 2(2) uses the word "guarantee" and there is no reference to rights at all in articles 10 or 14. This presents particular difficulties in so far as the main obligation clause (article 2(1)) envisages progressive realisation of the "rights recognised".

Finally, whereas most of the rights within the Covenant specifically relate to the individual, articles 8(1)(b) and (c) refer to the rights of trade unions. Whether or not the inclusion of collective rights is appropriate in a human rights instrument of this kind,<sup>272</sup> there was no need to state them in that manner. As is clear from the 1988 Additional Protocol to the American Convention on Human Rights,<sup>273</sup> such rights could have been inferred from the individual right to join and form trade unions. The inclusion of the rights as they stand, however, shows carelessness or lack of foresight on the part of the drafters.

## V) THE SCOPE AND LEVEL OF PROTECTION OFFERED

One of the most significant aspects of the Covenant is the material scope of the protection offered. Not only does the Covenant deal with labour rights traditionally associated with the ILO, but also offers protection in the social and cultural fields. It is primarily in the latter fields that the Covenant may be seen to stand out in comparison with the

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<sup>272</sup> For an argument against the inclusion of collective rights *see*, Sieghart, *supra*, note 171, at 164.

<sup>273</sup> P.A.U.T.S.69. Article 8(1) of the Protocol states:

"1. The States Parties shall ensure:

a. The right of workers to organise trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations of confederations, or to affiliate with those that already exist, as well as to form international trade union organisations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;"



European Social Charter.<sup>274</sup> In particular, it contains the right to education, the right to cultural life, the right to food and clothing, and a specific statement of the right to housing which are not to be found in the ESC. On the other hand it does suffer from failing to identify specific vulnerable groups (apart from women and children) who might be considered to need special protection. In particular, one might mention aliens, migrant workers, the elderly,<sup>275</sup> and those with physical or mental disabilities.

To some extent, these defects are remedied by the scope of the Covenant *ratio personae*. Whereas the ESC is restricted to nationals of Contracting parties, the Covenant explicitly relates to "everyone". This is apparently confirmed by article 2(3) which permits "developing states" to determine the extent to which they would guarantee the economic rights to non-nationals. The clear implication here is that aliens automatically have equal social and cultural rights in all cases, and equal economic rights in all developed states. It might be assumed in light of this fact, that articles on the rights of aliens and migrant workers did not need to be explicitly stated.

Whilst the Covenant certainly does have an impressive breadth of coverage, it is often framed in excessively general terms. For example, whereas the Covenant provides for a bare statement of the right to social security in article 9, this compares unfavourably with the three articles to be found in the ESC.<sup>276</sup> Whether or not article 9 is read to include the various elements found in the ESC is ultimately left to the vicissitudes of the supervision system.

The generality and breadth of the Covenant's terms, whilst allowing for a considerable amount of constructive and dynamic interpretation, does place a heavy burden on the supervisory body whose role inevitably becomes one of developing and defining the normative content. Whilst the drafters clearly envisaged a continuing process of standard setting (whether under the auspices of the ILO or otherwise), the fact that this must take place after ratification leaves the way open to conflicts in interpretation that might ultimately undermine the supervision process as a whole. The degree to which this may be

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<sup>274</sup> The European Social Charter (1961), 529 U.N.T.S. 89. For the scope of the ESC see, Harris D., The European Social Charter, 192-199 (1986).

<sup>275</sup> It was argued during the drafting of article 9 that the rights of the elderly should be provided for in a separate convention. See e.g. Mehta (India), E/CN.4/SR.282, at 10 (1952).

<sup>276</sup> The European Social Charter provides for the right to social security (article 12), the right to social and medical assistance (article 13) and the right to benefit from social welfare services (article 14).



avoided depends upon the skill and commitment of the supervisory body.

Similar comments may be made about the level of protection afforded by the Covenant. The need for additional standard setting not only relates to defining the material scope of the provisions, but also the establishment of "benchmarks" or levels of compliance. Thus, although States are under a general obligation to realise the right to adequate housing in a progressive manner (under article 11), standards have to be set to ensure that the amount and quality of housing available is consonant with the level of development of the country concerned. In absence of concrete targets of achievement, the possibility of relying upon the Covenant as a means of protection becomes considerably more restricted.

An important comparison between the Covenant and the ESC may be made here. Whereas the Covenant provides for the progressive achievement of all the rights, the ESC allows States to contract into the realisation of selected rights. Each system has its benefits and disadvantages. The ESC benefits from allowing for (in theory at least) a single standard of achievement for each right but suffers from allowing a more restricted coverage of rights. The Covenant on the other hand, whilst allowing more lee-way in the level of protection, benefits from providing for a more immediately extensive coverage.

## **VI) CONCLUSION**

Although the International Bill of Rights was intended to form the backbone of an international human rights regime following the Second World War, the drafting process became a focal point of the political confrontation between East and West. Effectively the ideological dispute can be said to be responsible for the arbitrary division of the draft convention into two different Covenants, the weakening of the supervisory mechanisms envisaged for the ICESCR, much of the textual confusion that remains within the Covenant, and the unduly protracted nature of the drafting process.



## **CHAPTER TWO: STATE OBLIGATIONS**

### *Article 2(1)*

*"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."*

### **I) INTRODUCTION**

Article 2(1) could be described as the linch-pin of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In describing the duties incumbent upon States Parties in the realization of the rights contained in the Covenant, it is of critical importance both as to the substance and implementation of the Covenant as a whole. Quite appropriately the Committee has produced a General Comment on the subject of article 2(1) which has formed the basis for the Committee's approach to the Covenant in general.

### **II) THE NATURE OF THE OBLIGATIONS**

Before examining the text of article 2(1) specifically, it is intended to consider the general nature of the obligations within the Covenant. Two particular methods of analysis have been mentioned in the Committee's work: one centring upon obligations of conduct and result, the other upon obligations to respect, protect and fulfil.

#### **A) OBLIGATIONS OF CONDUCT AND RESULT**

Article 2(1) has been variously interpreted as imposing "obligations of conduct" or "obligations of result" upon the States Parties. An "obligation of conduct" as understood by the International Law Commission is one where an organ of the State is obliged to undertake a specific course of conduct, whether through act or omission, which represents a goal in itself. It is to be contrasted with an "obligation of result" which requires a State to achieve a particular result through a course of conduct (which again can be act or omission), the form of which is left to the State's discretion.<sup>1</sup> On this analysis, the International Law Commission came to the conclusion that Article 2(1) ICESCR imposed an obligation of result.<sup>2</sup>

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<sup>1</sup> Report of the International Law Commission, 2 Yrbk.I.L.C., 11-30, (1977).

<sup>2</sup> *Ibid*, at 20, para.8.



To a large extent the difference between the two forms of obligation is not as great as first appears. In cases of obligations of conduct, there will often be an objective towards which that conduct is aimed. On the other hand, obligations of result will invariably require a specific course of action.<sup>3</sup> The classification of a particular obligation within one category or the other will rest primarily upon whether or not the objective is spelt out and the degree of specificity given to the conduct required.

The obligation "to take steps" in article 2(1) is particularly ambiguous in this respect. It is arguable that it has to be read in the light of the requirement that the steps be taken "with a view to achieving... the full realization of the rights recognized" in the Covenant. As such, the reference to a clearly stated objective would seem to place the obligation in the category of an "obligation of result". However, to the extent that the steps to be taken are outlined both in article 2(1) and in the substantive provisions of the Covenant, it could also be said to incorporate an obligation of conduct.<sup>4</sup>

Article 2(1) is perhaps best explained, as the Committee has noted,<sup>5</sup> as incorporating a mixture of the two types of obligation.<sup>6</sup> The fundamental objective of the Covenant is undoubtedly the full realisation of the rights contained within. This itself may involve both obligations of conduct and result. For example, article 6, which provides for the right to work, requires steps to be taken towards the achievement of full employment (an obligation of result), but also prohibits forced labour (an obligation of conduct).<sup>7</sup>

In so far as the rights within the Covenant are not capable of immediate fulfilment, States are required to undertake certain obligations of conduct with a view to their progressive achievement. It is one of the anomalies of the Covenant that such obligations of conduct

<sup>3</sup> This was readily recognised by the International Law Commission who commented that "every international obligation has an object or, one might say, a result...[c]onversely, every international obligation, even if it is of the type called an obligation "of result", requires of the obligated State a certain course of action". *Ibid*, at 13, para.8.

<sup>4</sup> It is worth noting that the realisation of article 8 is primarily an obligation of conduct. States are obliged to follow a course of conduct that ensures *inter alia* the right of everyone to form and join trade unions.

<sup>5</sup> General Comment No.3 (1990), UN Doc.E/1991/23, Annex III, UN ESCOR, Supp.(No.3), at 83 (1991). *See also*, Turk, E/C.12/1990/SR.21, at 4, para.7.

<sup>6</sup> *See e.g.* Alston P. and Quinn G., "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", 8 *Hum.Rts.Q.*, 156, at 165 (1987).

<sup>7</sup> *See below*, Chapter 5.



are spelt out in the substantive articles themselves.<sup>8</sup> However, these obligations may themselves be presented as "sub-norms" or "intermediary goals" in their own right. For example, article 6 provides for the recognition of the right to work. Paragraph 2 of that article outlines the "steps to be taken" including *inter alia* "technical and vocational guidance". Although described as a "step", it is possible to view article 6(2) as providing for a right to vocational guidance as a sub-norm of the right to work itself.<sup>9</sup>

As will be seen below, the Committee has tended to concentrate upon obligations of conduct. In so far as it has never actually conceded that a State has achieved the full realisation of the rights (if indeed that were possible), the Committee has focused its attention upon the measures undertaken towards that objective. In doing so, the Committee has gone some way towards outlining certain principles that should govern States conduct in the implementation of the rights. In particular the Committee, in its early stages of work, concentrated upon the procedural adequacy of State action. Its initiatives centred, specifically, upon the establishment of norms associated with the reporting requirement of States Parties under article 16.<sup>10</sup> Theoretically the obligations incumbent upon States under article 16 are distinct from those found in article 2(1), in that they relate to the supervision process as opposed to the substantive realization of the rights. However, in so far as both the domestic implementation of the Covenant and its supervision involve similar monitoring obligations, this differentiation loses much of its force. Accordingly, a convergence between the procedural and substantive obligations of States Parties is evident, conditioned primarily by an approach that emphasises the process or conduct of State action rather than the result achieved.<sup>11</sup>

Although the approach of the Committee at this stage is legitimate it must not be lost from sight that the objective of the State obligation is clearly stated in article 2(1), namely the "full realization of the rights recognized" in the Covenant. The compliance of a State with its

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<sup>8</sup> This forces the conclusion that an analysis of the obligations within the Covenant cannot be achieved merely by looking at article 2(1).

<sup>9</sup> See below, Chapter 5.

<sup>10</sup> Article 16 ICESCR requires States Parties to submit reports on the measures adopted and the progress made in achieving observance of the rights recognised in the Covenant. This trend can be seen in the Committee's General Comment No.1 on the purpose of the reporting guidelines at its Third Session in 1989. UN Doc.E/1989/22, Annex III, UN ESCOR, Supp.(No.4), at 87-89, (1989).

<sup>11</sup> Thus a member of the Committee referred to obligations of conduct by way of reassuring the State Party concerned that the articles did not have to be implemented immediately in full. See, Alston, E/C.12/1988/SR.13, at 5, para.19.



obligations ultimately is to be measured not merely by the fulfilment of some procedure, but by the degree to which it has achieved the full realization of the rights.<sup>12</sup>

## B) OBLIGATIONS TO RESPECT, PROTECT AND FULFIL

A more useful method of analysis adopted by members of the Committee<sup>13</sup> has been to view the obligations in terms of the tripartite typology utilised by a number of commentators, viz the obligations to respect, protect and fulfil.<sup>14</sup> This approach provides a detailed analytical framework describing obligations in the context of human rights,<sup>15</sup> and serves to counteract some of the traditional assumptions<sup>16</sup> that place economic, social and cultural rights at a lower level than the more civil and political rights.<sup>17</sup>

According to the tripartite typology, all human rights entail three forms of State obligation. The "obligation to respect" requires the State to abstain from interference with the freedom of the individual. The "obligation to protect" refers to the duty on the State to prevent other individuals from interference with the rights of the individual. The

<sup>12</sup> This has to some extent been recognised by members of the Committee. See for example the comment of Miss Taya in which she recognised that attention should be paid to the "ideal situation" in the achievement of economic, social and cultural rights. E/C.12/1990/SR.4, at 2, para.2.

The International Law Commission commented in this regard that "there is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation". *Supra*, note 1, at 11. Article 21 (1).

<sup>13</sup> Although there is considerably concurrence in the Committee as to the utility of this method of analysis, there appear to remain a few doubts. It was commented, for example, at the Committee's fourth session that there was "no consensus within the Committee as to the very nature of economic, social and cultural rights". Alston, E/C.12/1990/SR.4, at 10, para.49.

<sup>14</sup> The tripartite typology of obligations is to be found in Mr Eide's presentation on the Right to Food at the Committee's General Discussion at its Third Session. E/C.12/1989/SR.20. *Cf also*, Centre for Human Rights, Right to Adequate Food as a Human Right, (1989).

<sup>15</sup> It would appear that the obligations to respect and protect tend to fall into the category of obligations of conduct. The obligation to fulfil relates more closely to an obligation of result.

<sup>16</sup> A common contention subsists that whereas civil and political rights require "State abstention", economic, social and cultural rights require "State action". See e.g. Bossuyt M., "La Distinction Juridique entre les Droits Civil et Politique et les Droits Economiques, Sociaux et Culturels", 8 H.R.L.J., 783, at 790 (1975).

<sup>17</sup> See, Alston, E/C.12/1990/SR.21, at 8, para.28 Concern has often been expressed about the disinterest shown in economic, social and cultural rights on the international plane. See e.g. General Comment No.2, UN Doc.E/1990/23, Annex III, para.4, (1990), ESCOR, Supp.(No.3), at 86-7 (1990).



"obligation to fulfil" requires the State to take the necessary measures to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual.<sup>18</sup>

The characterisation of State obligations in such a manner has been explicitly accepted by members of the Committee,<sup>19</sup> and has been confirmed by the practice of the Committee as a whole. Although economic, social and cultural rights are often characterised as necessitating a "delivery system" for meeting basic needs, to conceive of State obligations with regard to the Covenant as merely requiring "State action" is somewhat superficial.

### 1) The Obligation to Respect.

It is clear that economic, social and cultural rights require State abstention in particular cases. This is primarily clear with regard to those rights that are considered to be of immediate application. Thus it has been commonly stated that the trade union rights found in article 8(1) require no substantial economic input on the part of the State and therefore can be implemented without delay merely through the exercise of State restraint.<sup>20</sup> Similarly, a number of articles contain references to "freedoms" and "liberty". Such phraseology implies that the State obligation in these areas is negative, involving self-restraint. For example, article 13(3) refers to the "liberty of parents... to choose for their children schools, other than those established by the public authorities".<sup>21</sup> The State here is obliged merely to refrain from placing obstacles in the way of parents wishing to exercise this right.

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<sup>18</sup> Some typologies have an additional fourth part: the duty to promote. *See*, Van Hoof G., "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views", in Alston P. and Tomasevski K.(Eds), The Right To Food, 97 (1985). Alternatively Shue speaks of the duty to aid as it more clearly describes "having to go back and make up for failures in respect and protection", Shue H., "The Interdependence of Duties", in Alston P. and Tomasevski K.(Eds), The Right To Food, 85, at 86 (1985). At an earlier stage he characterised the three obligations as those to forbear, protect and aid. Shue H., "Rights in the Light of Duties", in Brown P. and Maclean D.(eds), Human Rights and U.S. Foreign Policy, 65, at 76 (1979).

<sup>19</sup> *See e.g.*, Simma, E/C.12/1990/SR.21, at 8, para.28.

<sup>20</sup> *See e.g.*, Sparsis, E/C.12/1989/SR.12, at 4, para.21. That article 8 also imposes a positive obligation on States to protect the exercise of the right (for example through prevention of arbitrary dismissal) is indicated by the use of the word "ensure" in that article. *Cf.* Buergenthal T., "To Respect and Ensure: State Obligations and Permissible Derogations", in Henkin L.(Ed), The International Bill of Rights, 72, at 77 (1981).

Article 15(1)(a), which refers to the right of everyone to take part in cultural life could also be seen as a matter for State restraint.

<sup>21</sup> Article 13(4) also refers to the liberty to establish such schools. The same principle could apply to the references to "freedoms" in articles 6(2) and 15(3).



The State is also required to refrain from acts which would serve to deprive individuals of their rights under the Covenant. It has been commented that "a systematic deprivation of certain sectors of the community through the action of the State would obviously constitute a violation of the rights derived from the Covenant".<sup>22</sup> Thus a law in Zaire, that required married women to request their husband's permission either to work outside the home or to open an individual bank account,<sup>23</sup> was criticised by the Committee for being in contravention of article 6 of the Covenant.<sup>24</sup>

It has been argued that State obligations with regard to the realization of the rights are in fact secondary to those of the individual. Thus Eide has commented that "the primary responsibility for the guarantee of economic, social and cultural rights lay with the individual, who must try first of all to satisfy his own needs by means of his own resources".<sup>25</sup> It is considered that this is overstating the point. Certainly, as in the context of the right to development, it is appropriate that individuals should be seen as the principal "subject" of development<sup>26</sup> in the sense of being given the opportunity to provide for their own needs without impediment. However, to argue that the individual is the primary duty-holder would provide States with a convenient excuse for not taking the action required of them.

A point that could be made, is that even where States are required to take positive action to realise the rights in the Covenant, they should

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<sup>22</sup> Rattray, E/C.12/1990/SR.20, at 11, para.48. *See also*, Tomasevski K., *Development Aid and Human Rights*, 126 (1989).

<sup>23</sup> Article 3(c) Zairian Labour Code. E/1986/3/Add.7, at 2.

<sup>24</sup> *See e.g.*, Texier, E/C.12/1988/SR.17, at 6, para.36. The same might be said for the eviction of 15,000 families from their homes by the Dominican Republic authorities. *See*, UN Doc.E/1991/23, at 64, para.249, UN ESCOR, Supp.(No.3), (1991).

<sup>25</sup> Eide, E/C.12/1989/SR.20, at 2, para.9.

<sup>26</sup> If individuals were seen merely as the "object" of development, their rights would then subsist merely at the level of entitlements to delivery of specific goods and services, or the fulfilment of certain "needs". The notion of the individual as a "subject" of development envisages an emphasis on self-reliance and participation in the development process which accords more closely to the concept of human dignity. *See e.g.* Tomasevski, *supra*, note 22, at 155. Article 2(1) of the Declaration on the Right to Development thus States:

"The human person is the central subject of development and should be the active participant and beneficiary of the right to development".

GA Resn.41/128, (Dec.4 1986), 41 UN GAOR, Resns, Supp.(No.53), at 186 (1986).



nevertheless do so in a manner that preserves the individual's freedom of action. As has been explained by one member of the Committee:

"One of the principles underlying the Covenant was to secure full development of the human personality, something that called for the element of free choice in the exercise of the rights set forth... [therefore] a fine balance had to be maintained between protective conditions and the need to make sure that they did not inhibit the development of the human personality".<sup>27</sup>

Although it might be argued that achievement of economic and social rights entails significant government intervention, this must not detract from the fact that the final goal is the improvement of the situation of the individual.

## 2) The Obligation to Protect

The obligation to protect the individual's rights from violation by third parties, similarly crosses the border between civil and political and economic, social and cultural rights.<sup>28</sup> Such an obligation implies the "horizontal effectiveness" of rights, often known as "drittwirkung der grundrechte". As a concept, "drittwirkung" has had considerable recognition both in national<sup>29</sup> and international jurisprudence.<sup>30</sup> However, we are concerned here, not so much with the ability of the individual to "enforce" his or her fundamental rights against another individual as, in absence of a petition procedure, that is primarily a question of national law,<sup>31</sup> but rather with the correlative State obligations that accompany a recognition of the horizontal effect of the rights.

<sup>27</sup> Rattray, E/C.12/1987/SR.13, at 6, para.24.

<sup>28</sup> The obligation to protect in the field of civil and political rights would seem to require at minimum the provision of an effective police force and justice system. The problem that many jurists have with the concept of the obligation to protect is that it not only confers positive obligations upon States with regard to civil and political rights, but also that the extent of such an obligation is unclear. See, Sieghart P., The Lawful Rights of Mankind, 90-91 (1986).

<sup>29</sup> Starck C., "Europe's Fundamental Rights in their Newest Garb", 3 H.R.L.J., 103, at 111 (1982). The Netherlands mentioned to the Committee that its legal system envisages the horizontal effectiveness of certain human rights provisions. E/C.12/1989/SR.15, at 10, para.59.

<sup>30</sup> See e.g., Van Dijk P. and Van Hoof G., Theory and Practice of the European Convention on Human Rights, 16-20 (2nd ed. 1990); Drzemczewski A., European Human Rights Convention in Domestic Law: A Comparative Study, 199-228 (1983); Buergenthal, *supra*, note 20, at 77.

<sup>31</sup> However, on the possibility of the "direct effect" of treaty provisions, see *below*, Chapter 3.



There is no indication that the drafters of the Covenant expressly intended the rights to have horizontal effect. That no mention was made of this aspect of State obligations is not sufficient evidence to conclude that the Covenant was not intended to impose an obligation upon States to protect the rights of the individual from violations by other individuals. There has to be an overriding assumption, given that the drafters were committed to ensuring the fundamental rights of every individual, that States would have obligations in this respect.

Indeed, the horizontal effectiveness of human rights is of particular importance in the field of economic, social and cultural rights. In the context of article 7, for example, if State obligations were limited to ensuring that public employees enjoyed fair conditions of work, the right would be largely deprived of effect (especially in the case of "mixed" or "market" economies). Similar considerations also apply in particular to the right to work (article 6) and the right to housing (article 11). It must be assumed that where the State is not in position to ensure the rights itself, that it must regulate private interactions to the extent that individuals are not arbitrarily deprived of the enjoyment of their rights by other individuals.<sup>32</sup>

Recognition of an obligation to protect can be found in the Covenant itself. First, it is clear that the rights pertain to "everyone". It would be contrary to this clearly worded obligation if a State were to declare, for example, that it could only secure the right to strike for those who worked in the public sector.<sup>33</sup> It is obvious that action must be taken for all sectors of the population.<sup>34</sup>

Secondly, article 10(3) expressly stipulates that "children and young persons should be protected from economic and social exploitation" and that certain practices should be punishable by law. There is a clear recognition here that the responsibility of the State goes beyond the actions of itself or its agents, and into positive protection from third party violations. A similar reference is made in article 13(3) and (4) to the role that the State may take in establishing minimum standards in private educational

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<sup>32</sup> Such a proposition has been explicitly rejected by advocates of the "market principle" however. *See e.g.* Hayek F., The Constitution of Liberty, 230-232 (1960).

<sup>33</sup> *See*, Marchan Romero, E/C.12/1989/SR.10, at 7, para.34. His question implied that the right to strike had to be secured in the private sphere.

<sup>34</sup> This is also conditioned by the provision of article 2(2) whereby the State is under an obligation to take measures in a non-discriminatory fashion.



establishments. Although not stated in terms of an obligation, such provisions seem to envisage a role for the State in which obligations over individual relations are not outside the scope of its responsibility.

Finally, the preamble to the Covenant establishes that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant". Whereas the substantive portions of the Covenant do not refer to individual duties, the preamble may be seen to outline the philosophical context in which the realisation of the rights is to be undertaken. It can be assumed, as a result, that the State has a general obligation to regulate the private relations between individuals in so far as is necessary to ensure the enjoyment of the rights in the Covenant.

The Committee has both expressly and impliedly established an obligation upon States Parties to protect the individual's interests against third party interference. It has shown particular concern over the operation of the rights in the private sphere, especially with regard to employment. Questions have been asked *inter alia* as to the employment of women,<sup>35</sup> the right to strike,<sup>36</sup> retirement ages<sup>37</sup> and the provision of pensions<sup>38</sup> in the private sector.<sup>39</sup> As a corollary the Committee has looked towards the enactment of legislation as a means of regulation of the private sector,<sup>40</sup> the effective enforcement of those conditions,<sup>41</sup> and the establishment of mechanisms for the settlement of any private disputes.<sup>42</sup>

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<sup>35</sup> See e.g., Butragueno, E/C.12/1989/SR.8, at 8, para.46.

<sup>36</sup> See e.g., Marchan Romero, E/C.12/1989/SR.10, at 7, para.34.

<sup>37</sup> See e.g., Butragueno, E/C.12/1988/SR.10, at 8, para.41.

<sup>38</sup> See e.g., Simma, E/C.12/1989/SR.15, at 3, para.9.

<sup>39</sup> The Committee has also concerned itself with other aspects of the private sector like tenants' rights. See e.g. Sparsis, E/C.12/1988/SR.13, at 14, para.83; Mrachkov, E/C.12/1988/SR.10, at 7, para.27.

<sup>40</sup> E.g. The enactment of a Labour Code, see Texier, E/C.12/1987/SR.5, at 5, para.22.

<sup>41</sup> For example the provision of a Labour inspectorate and sanctions for enforcement of minimum conditions of work. See, Simma, E/C.12/1988/SR.5, at 7, para.29; Taya, E/C.12/1988/SR.12, at 8, para.34; Sparsis, E/C.12/1990/SR.10, at 14, para.82.

<sup>42</sup> See e.g., Sparsis, E/C.12/1988/SR.7, at 5, paras. 30-31.



Thus far, the Committee has established in a diverse range of cases, that the State has a duty to protect the rights of individuals against interference by third parties. It has not directly stated this as a proposition that relates to every right, but it is difficult to imagine how a State could undertake its obligations in a realistic manner without regulating the private sector. Indeed, to the extent that it requires States to actively combat discrimination in inter-personal relations, it has to be assumed that the State has a duty to protect all the economic, social and cultural rights of the individual.

### 3) The Obligation to Fulfil.

The obligation to fulfil is central to the realization of economic, social and cultural rights, and is the principal concept upon which the terms of article 2(1) were built.<sup>43</sup> As was clear in the drafting of the Covenant,<sup>44</sup> in contrast to the ICCPR,<sup>45</sup> it was felt that States could not commit themselves to the full realisation of economic, social and cultural rights immediately. Accordingly, the wording of article 2(1) was specifically drafted to reflect the need to allow for greater flexibility in the fulfilment of the rights

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<sup>43</sup> It might be added that the positive role of the State has been particularly contentious in political philosophy. Nozick, for example, envisages "a minimal state limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on". Nozick R., Anarchy, State and Utopia, 26 (1974).

<sup>44</sup> See above, Chapter 1, text accompanying notes 44.

<sup>45</sup> Article 2(1) of the ICCPR requires States parties to "respect and to ensure" the rights. It is apparent, however, that civil and political rights do entail certain positive obligations upon States (outside those relating to the protection of individuals) such as the establishment of a court system and the provision of effective remedies. See, Airey v. Ireland, Eur.Court H.R., Series A, Vol.32, Judgement of Oct.9, 1979, (1979-80) 2 EHRR 305, where it was established that there was a right to legal aid for those who were unable to afford court costs in civil cases; Marckx v. Belgium, Eur.Court H.R., Series A, Vol.31, Judgement of June 13, 1979, (1979-80) 2 EHRR 330, where the Court found that the State had certain positive obligations to respect family life, particularly in the provision of legal safeguards to allow a child's integration in its family. See also, Berenstein A., "Economic and Social Rights: Their inclusion in the European Convention on Human Rights. Problems of Formulation and Interpretation", 2 H.R.L.J., 257 (1981).

The provision of legal remedies is specifically envisaged by article 2(3)(a) ICCPR which requires each State Party "to ensure that any person whose rights or freedoms... are violated shall have an effective remedy". However it must be recognised that although civil and political rights do not differ categorically from economic, social and cultural rights, their emphasis is without doubt more upon State restraint than State action.



in the Covenant. The intricacies of the obligation to fulfil as reflected in article 2(1) will be dealt with in the following sections.

### III) "UNDERTAKES TO TAKE STEPS"

The fundamental obligation in the ICESCR is for the States Parties to "take steps" towards the realization of the rights contained therein. The phrase "undertakes to take steps" itself however, merely appears to reflect the general rule of international law,<sup>46</sup> requiring States to take the necessary action to execute the provisions of the Covenant. The precise nature of that commitment, however, is to be drawn from the other phrases within article 2(1). As is apparent from the discussion above, the phrase "undertakes to take steps" may refer either to obligations of conduct or obligations of result according to its context.<sup>47</sup>

It has been argued that since the phrase "to take steps" was considered an alternative to "ensure" or "guarantee" in the preparatory work, it has progressive overtones.<sup>48</sup> An analysis of the phrase as used in other international instruments does not seem to bear out this conclusion though. The obligation to take steps or measures<sup>49</sup> is to be found in various other international human rights instruments. For example under article 2(2) of the ICCPR each State Party "undertakes to take the necessary steps" to adopt measures to give effect to the rights contained therein. Similarly the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>50</sup> obliges States to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".<sup>51</sup> It

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<sup>46</sup> This was the conclusion of the P.C.I.J. in its advisory opinion in The Case Relative to the Exchange of Greek and Turkish Populations Under the Lausanne Convention VI, P.C.I.J. (1925), Series B, No.10, at 20. It advised that a "State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken".

<sup>47</sup> *See above*, text accompanying note 4.

<sup>48</sup> *See*, Alston and Quinn, *supra*, note 6, at 165.

<sup>49</sup> Whereas the term "measures" appears to be a narrower concept than that of "steps", implying merely legal action, the terms were used interchangeably. Whereas the English version of the phrase is "to take steps", the Spanish is "to adopt measures" ("a adoptar medidas") and the French "to act" ("s'engage à agir"). *See*, General Comment No.3, *supra*, note 5, at 83, para.2.

<sup>50</sup> GA Resn.39/46, (June 26, 1987), 39 UN GAOR, Supp.(No.51), at 197, (1984). 24 I.L.M. 535.

<sup>51</sup> Article 2(1), Torture Convention.



would seem that use of the phrase, occurring as it does in Conventions of immediate application,<sup>52</sup> in itself holds no progressive connotations.

Whilst the phrase "to take steps" does not make any stipulations as to the manner of implementation, it is not entirely redundant. As noted above, it signals the immediate assumption of legal commitments by the States parties upon ratification.<sup>53</sup> The Committee has commented:

"...while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."<sup>54</sup>

It appears to be considered that all States, whether developing or developed, will need to take specific measures following ratification of, or accession to, the Covenant. Lack of resources in itself would not allow States to defer indefinitely taking the necessary action to give effect to the obligations under the Covenant.

#### IV) "BY ALL APPROPRIATE MEANS"

In so far as the full realisation of the rights within the Covenant represents an obligation of result, States have a degree of discretion in the conduct they pursue to that end.<sup>55</sup> Thus in principle a State may choose between legislative, administrative,

<sup>52</sup> With regard to the Torture Convention *see*, Boulesbaa A., "The Nature of the Obligations Incurred by States Under Article 2 of the UN Convention Against Torture" 12 Hum.Rts.Q., 53, at 80 (1990). For the ICCPR *see below*, notes 71-72.

<sup>53</sup> Robertson comments in contrast that the Covenant "does not set out obligations which contracting parties are required necessarily to accept immediately". Robertson A., Human Rights in the World, 230 (3rd Ed. 1992).

<sup>54</sup> General Comment No.3, *supra*, note 5, at 83, para.2. This conclusion was incidentally one which had been drawn in paragraph 16 of the influential Limburg Principles which declares that:

"All States Parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant".

9 Hum.Rts.Q., 122, at 125 (1987). *See also* Eide's address to the Committee where he took this view. E/C.12/1989/SR.20, at 5, para.14.

<sup>55</sup> It was certainly the view of a number of governments during the drafting of the Covenant that this would be the case. Yugoslavia remarked that the text should "require governments to undertake to do everything to promote those rights, it being left to each to choose the measures it would adopt for the purpose". E/CN.4/AC.14, at 16 (1951).



judicial, social, educational, or other methods to undertake the realisation of the rights.<sup>56</sup> Given the variety of economic, social and legal systems that exist among the States Parties to the Covenant, and their different levels of development, it is natural that the approach of each State will vary according to the circumstances in which they find themselves. The Committee has commented in this respect:

"...the phrase 'by all appropriate means' must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the 'appropriateness' of the means chosen will not always be self-evident. It is therefore desirable that States parties reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most 'appropriate' under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make".<sup>57</sup>

During discussion of the General Comment, one member stressed that the Committee could not require States to demonstrate why the measures taken were the most appropriate, as that was a task for the Committee itself to undertake.<sup>58</sup> However, the text of the General Comment does suggest that the States parties should make the initial decision as to what measures are considered appropriate. It appears that the Committee, quite correctly, considers that it is not in a position to prescribe to each State party the steps to be taken. In effect, the Committee might be seen to give the States parties a "margin of appreciation" in deciding the appropriate course of action to be taken.<sup>59</sup> Nevertheless, as the final sentence of the General Comment suggests, the Committee does have a

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<sup>56</sup> General Comment No.3, *supra*, note 5, at 85, para.7.

<sup>57</sup> *Ibid*, at 84, para.4.

<sup>58</sup> *See*, Konate, E/C.12/1990/SR.46, at 10, para.48.

<sup>59</sup> For the "margin of appreciation" doctrine in the context of the European Convention on Human Rights *see*, Van Dijk and Van Hoof, *supra*, note 30, at 585-606; MacDonald R., "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights", in International Law and the Time of its Codification: Essays in Honour of Robert Ago, 187 (1987); O'Donnell T., "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", 4 Hum.Rts.Q., 474 (1982).



residual power to assess whether or not the measures taken were the most appropriate in the circumstances.<sup>60</sup>

There are two main limits upon the exercise of State discretion in determining what measures are considered to be appropriate in the realisation of the rights. First, certain provisions in the Covenant do provide indications as to the type of action required of States parties. Secondly, the Committee, in exercising its supervisory role, has established a number of obligations of conduct as regards the steps to be taken to implement the Covenant. Each will be dealt with in turn below.

## A) TEXTUAL REQUIREMENTS

### 1) Prescribed Means

As a result of the somewhat confused method of drafting, some of the substantive provisions of the Covenant contain details of the steps to be taken in implementation.<sup>61</sup> Thus articles 6(2), 11(2), 12(2), 13(2) and 15(2) all contain some indication of the methods by which the State should realize the rights. Article 13(2)(a) for example, stipulates that primary education should be made compulsory and freely available to all, as a method by which the right to education should be realized. In certain cases the steps are expressly stated to be illustrative rather than exhaustive.<sup>62</sup> The Committee has emphasised, nevertheless, the mandatory nature of these obligations.<sup>63</sup>

It is important to note that the steps, as spelt out in the substantive articles, highlight the interplay between the substance of the rights and their method of implementation. For example article 12(2) specifies as a step towards the achievement of the right to health, "the creation of conditions which would assure to all medical service and medical attention in the event of sickness". This has been considered "both a definition of what it might mean

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<sup>60</sup> See e.g., Alston, E/C.12/1990/SR.48, at 8, para.40.

<sup>61</sup> During the drafting process it was not decided until 1951 to include a general "umbrella" clause on economic, social and cultural rights which is now found in article 2(1). E/CN.4/SR.233, at 21 (1951). Prior to this, some representatives had felt that the role of the State should be defined in each article. See e.g. Chile (Santa Cruz), E/CN.4/SR.216, at 22 (1951). *Generally*, UN Doc. A/2929, para.19, 10 UN GAOR, Annexes, (Ag.Item 28), Pt.II, (1955). The articles however were not amended sufficiently to conform entirely to the final view.

<sup>62</sup> For example articles 6(2), 12(2) and 15(2) all state that the steps taken "shall include" those stipulated.

<sup>63</sup> An example is the Committee's criticism of Zaire with regard to article 13(2)(a). E/C.12/1988/SR.17.



to realize a right to health and the outline of part of a health delivery strategy which stresses equal access to curative medical services".<sup>64</sup> As the Committee develops the normative content of the various rights contained in the Covenant, it will also implicitly be prescribing methods by which the States Parties should implement their obligations.

## 2) Appropriate Means

Article 2(1) further limits the scope of State discretion as to the means to be employed to those that are "appropriate". The appropriateness of the method employed can be determined by its relation to two desiderata. Not only must the method adopted make some progress towards the final objective *viz* the full realization of the right concerned, but it must also conform to the requirements of action prescribed by the nature of the rights themselves.<sup>65</sup>

That the measures undertaken conform to the achievement of the final objective in the Covenant is quite plain. Full realization requires that policies are not discriminatory *ratio loci*, or *ratio personae*. Thus a policy which fails to account for a sector of the population could be classed as inappropriate unless accompanied by safeguard measures.<sup>66</sup> Equally, measures should not promote one right at the expense of another,<sup>67</sup> nor should they apply to only selective parts of the territory.<sup>68</sup>

As far as the nature of the rights is concerned, it is appropriate that those rights that are capable of immediate implementation be realised in that manner. Thus States should not undertake to implement article 8, which merely calls for State restraint, in a progressive manner. On the other hand, however, it does remain open for States to implement "progressive" rights immediately.

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<sup>64</sup> Trubeck D., "Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs", in Meron T.(ed), Human Rights in International Law: Legal and Policy Issues, 205 (1984).

<sup>65</sup> *See above*, text accompanying notes 13-46.

<sup>66</sup> The I.L.C. has noted that some obligations of result allow the State to achieve the required result subsequently by obliterating an earlier course of action that was incompatible with the achievement of the result. It cites as an example the provision for compensation for unlawful arrest in article 9(5) ICCPR. *Supra*, note 1, at 22, para.12.

<sup>67</sup> *But see below*, text accompanying note 176.

<sup>68</sup> This is subject to the possible positive measures taken to promote the rights of disadvantaged sectors of the population.



Article 2(1) itself does express a preference for legislative measures, the nature of which will be discussed below.<sup>69</sup> The International Law Commission concludes that legislative measures are therefore "the most normal and appropriate for achieving the purposes of the Covenant in question".<sup>70</sup> A similar provision in the ICCPR<sup>71</sup> has been described as being a "conditional" obligation of conduct.<sup>72</sup>

## B) COMMITTEE REQUIREMENTS

Outside the question of specific rights-related comments as to the means for the fulfilment of the rights,<sup>73</sup> the Committee has elaborated certain general methodological requirements for the reporting process that have a bearing upon the approach to be taken by the States Parties in their implementation of the Covenant's obligations. Its approach has also suggested that certain substantive considerations should be borne in mind in the realization of the rights.

### 1) Methodological Requirements

In its General Comment No.1, the Committee outlined seven "objectives" to be served by the reporting procedure.<sup>74</sup> Some of these can be seen as having evolved into preconditions to the effective realization of the rights recognized in the Covenant.

As a first step, States are obliged to monitor and evaluate the actual situation with regard to each of the rights within its jurisdiction.<sup>75</sup> In particular, attention must be paid to the

<sup>69</sup> See text accompanying notes 125-145.

<sup>70</sup> *Supra*, note 1, at 21, para.8. It also comments that the expression of a preferred means of implementation is entirely consistent with an obligation of result as there is no obligation to take this course of action.

<sup>71</sup> Article 2(2) ICCPR. It reads:

"[E]ach State Party...undertakes to take the necessary steps...to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant".

<sup>72</sup> Schachter O., "The Obligation to Implement the Covenant in Domestic Law", in Henkin L.(ed), The International Bill of Rights, 311 (1981).

<sup>73</sup> Such comments will be dealt with in subsequent chapters. *See below*, Chapters 5-8.

<sup>74</sup> *Supra*, note 10.

<sup>75</sup> In its General Comment No.1 the Committee stated that the first objective of the reporting process was "to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and



proportion of citizens that do not enjoy a specific right.<sup>76</sup> In addition, where possible, those specific sectors of the population that appear to be vulnerable or disadvantaged should be identified.<sup>77</sup> Thus attention merely on aggregate national statistics, such as per capita G.N.P., is insufficient as it fails to reflect the position of the marginalised sectors of the population.<sup>78</sup> In practice

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procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant". Similarly the second objective "is to ensure that a State party monitors the actual situation with respect to each of the rights". *Supra*, note 10, at 88, para.2. *See also*, Alston, E/C.12/1989/SR.3, at 3, para.10; Sparsis, E/C.12/1989/SR.3, at 5, para.19.

<sup>76</sup> *See e.g.*, Alston, E/C.12/1988/SR.10, at 11, para.59.

<sup>77</sup> In its General Comment No.1, the Committee commented that in order to monitor the situation adequately "special attention (should) be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged". *Supra*, note 10, at 88, para.3. The Committee has long held that the "principal concern" of the ICESCR is the position of the vulnerable and disadvantaged. *See*, Alston, E/C.12/1987/SR.3, at 3, para.10.

Such an emphasis on "sectors" of the population suggests that the Committee takes a "structuralist" approach to the non-enjoyment of rights. Briefly, it identifies the structures of national and international organization as the main impediments to the full realization of human rights. *See*, Muchlinski P., "'Basic Needs' Theory and 'Development Law'", in Snyder F. and Slinn P.(Eds), International Law of Development: Comparative Perspectives, 237, at 238 (1987). This has been one of the views that has marked development thinking on the international plane. *See*, Eide A., "Developmentalism and Human Rights- Toward a Merger? Some Provisional Reflections" in Rehof L. and Gulmann C.(eds), Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries, 69, at 74 (1989). Alston argues that the structuralist approach tends to overemphasise the international aspect of development. Alston P., "Prevention Versus Cure as a Human Rights Strategy", in I.C.J., Development, Human Rights and the Rule of Law, 31 (1981).

<sup>78</sup> *See e.g.*, Alston, E/C.12/1987/SR.7, at 9, para.42; General Comment No.1, *supra*, note 10, at 88, para.3.

The use of statistics plays a crucial role in the realization of the rights in the Covenant, both as a means of monitoring on the part of the State Party concerned, and as a tool in assessment of governmental performance by the Committee. The Committee undertook a discussion on the use of statistical indicators at its sixth session in 1991, *see*, UN Docs.E/C.12/1991/SR.20-21. The problems involved in the use of statistics weigh heavily on the work of the Committee. As Tomasevski has noted:

"Quantified results (data, indicators, tables) do not reflect reality but theoretical assumptions of reality, and they cannot be interpreted without an insight into the underlying assumptions".

Tomasevski K., "Human Rights Indicators: The Right to Food as a Test Case", in Alston P. and Tomasevski K.(eds), The Right to Food, 135, at 136 (1985). *See also*, Turk D., The New International Economic Order and the Promotion of Human Rights: Realisation of Economic, Social and Cultural Rights, UN



reports that fail to identify and analyze the relative position of such disadvantaged sectors of the population have been criticised.<sup>79</sup>

Given the somewhat vague and general wording of certain provisions in the Covenant, such as "an adequate standard of living" or "adequate food, clothing and housing", an essential step in the realization of the rights is for these provisions to be defined more closely. It has been the policy of the Committee to demand that State Parties establish national "yardsticks" or "benchmarks" by which it might evaluate the domestic situation.<sup>80</sup> In the words of one Committee member, he "failed to see how a State could meet the obligation specified in article 11 of the Covenant... if it had not itself decided what might be regarded as an adequate standard of living, in other words if it had not established what the poverty threshold was."<sup>81</sup> The use of such indicators must be seen

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Doc.E/CN.4/Sub.2/1990/19, at 3-37 (1990); Goldstein R., "The Limitations of Using Quantitative Data in Studying Human Rights Abuses", 8 Hum.Rts.Q., 607 (1986); Stohl M., Carleton D., Lopez G. and Samuels S., "State Violation of Human Rights: Issues and Problems of Measurement", 8 Hum.Rts.Q., 592 (1986); Claude R. and Jabine P., "Editors Introduction", 8 Hum.Rts.Q., 551 (1986).

<sup>79</sup> E.g. Concluding remarks on the report of Argentina, Report of the Committee's Fourth Session, E/1990/23, at 64, para.254, UN ESCOR, Supp.(No.3), (1990); and Philippines, E/C.12/1990/SR.11, at 11, paras.40-41. This is also suggested by the requirement under article 17 that States indicate the factors and difficulties encountered in fulfilling the obligations under the Covenant. See, Alston, E/C.12/1987/SR.12, at 8, para.34. This is by no means confined to developing States. See, Comments of the Committee on the Netherlands report, E/C.12/1987/SR.5-6.

<sup>80</sup> In its General Comment No.1 the Committee decided that an objective of the reporting process was:

"to provide a basis on which the State Party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant. For this purpose, it may be useful for States to identify specific bench-marks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health care provider, etc."

Such bench-marks would seem to include both qualitative and quantitative data. General Comment No.1, *supra*, note 10, at 89, paras. 6-7. See also references to a poverty threshold: Butragueno, E/C.12/1989/SR.3, at 7, para.28; Alston, E/C.12/1990/SR.2, at 11, para.65; *ibid*, SR.21, at 7, para.22.

<sup>81</sup> Sparsis, E/C.12/1989/SR.17, at 8, para.35.



as an essential part of government policy-making whereby problem areas can be targeted and priorities established.<sup>82</sup>

The necessity of utilising national indicators, as opposed to international ones, is justified primarily by the variety of social and economic contexts in which the rights operate.<sup>83</sup> However, although it might be appropriate for States to be given a degree of discretion in determining the level at which a national benchmark should be set, it may be questioned whether the Committee should use national standards as the sole criterion of assessment of State compliance with the obligations under the Covenant. If the indicators for assessment vary from country to country, the universality of the rights may be undermined.<sup>84</sup> Indeed it might be said that this is tantamount to giving States Parties the power to decide the extent of their own obligations.<sup>85</sup>

Accordingly, the Committee established at its fourth session that it "cannot accept their (States') national indicators as a general criterion for international assessment".<sup>86</sup> In practice, it has

<sup>82</sup> See General Comment No.1 where the Committee stated:

"While monitoring is designed to give a detailed overview of the existing situation the principal value of such an overview is to provide the basis for the elaboration of clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant".

Supra, note 10, at 88, para.4.

<sup>83</sup> The Committee has commented that in many areas "global bench-marks are of limited use, whereas national or other more specific bench-marks can provide and extremely valuable indication of progress". General Comment No.1, *supra*, note 10, at 89, para.6.

<sup>84</sup> Bossuyt argues that economic, social and cultural rights differ from their civil and political rights counterparts by the fact that they are variable, and dependent upon the resources of the country concerned. Bossuyt, *supra*, note 16, at 790.

<sup>85</sup> See, Alston, E/C.12/1989/SR.3, at 3, para.7. He comments that such a conclusion "would deprive the obligations set forth in the Covenant of any real significance, and there would be no point in having a monitoring procedure or an international supervisory body". Tomuschat has similarly concluded that "each State Party is entitled to suggest an interpretation which it believes to reflect the meaning of the provision concerned. There is no power for a state to determine unilaterally the legal substance of an ambiguous text". Tomuschat C., "National Implementation of International Standards on Human Rights", Can.H.R.Yrbk., 31, at 36 (1982).

<sup>86</sup> E/C.12/CRP.1/Add.10, at 5. Oddly enough this sentence was altered (by mistake it appears) in the final copy of the Committee's report, which reads: "...although Governments were duty bound to submit reports, the Committee could accept their national indicators as a general criterion for international assessment". UN Doc.E/1990/23, *supra*, note , at 68, para.271.



questioned national qualitative and quantitative data on the basis of that received from international and non-governmental sources. It would appear then that national bench-marks are useful not so much as a definitive means of assessment, but rather as an indication of whether the State Party is taking its international obligations seriously. It should be noted, however, that the success of the Committee's approach here is crucially dependent upon access to reliable alternative sources of information against which the State reports may be balanced. In absence of such information, the State benchmarks may be the only basis on which assessment might be made.<sup>87</sup>

The next stage in implementation is for the States Parties to establish a coherent policy to overcome the problems encountered and to make sufficient progress in the realization of the rights. This is envisaged specifically in article 14 which establishes that for those States Parties that do not have free and compulsory primary education for all, they should adopt a plan for the progressive implementation of this obligation. It could be said that the provision of article 14 merely spells out the obligations implicit in the other articles.<sup>88</sup> Thus a member of the Committee commented in respect to article 11:

"Governments were not entitled to content themselves with making a vague general commitment to take steps to ensure that their people did not suffer from hunger, but should be obliged to adopt a precise programme for the implementation of all the rights".<sup>89</sup>

The establishment of such a programme or policy should also include benchmarks to provide a "conceptual framework" in which the progress made towards the full realization of the rights can be evaluated.<sup>90</sup> It has also been suggested that a timetable should be established for the implementation of such a policy.<sup>91</sup> This would be in accordance with the requirements of article 14 which

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<sup>87</sup> For the role of alternative information in the supervision process, *see below*, Chapter 9, text accompanying notes 333-388.

<sup>88</sup> This was the conclusion of the Committee in its General Comment No.1. *Supra*, note 10, at 88, para.4.

<sup>89</sup> Alston, E/C.12/1987/SR.4, at 3, para.6.

<sup>90</sup> *See*, Sparsis, E/C.12/1989/SR.8, at 10, para.58. It might be noted that the full realisation of some rights might of itself be progressive in nature in which case the requirement of progress is continuous.

<sup>91</sup> *ibid.*



stipulates that the number of years, in which the obligation to provide for free primary education will be implemented, should be fixed in the plan.

## 2) Substantive Concerns

The perspective of the Committee in developing the substantive obligations incumbent upon States Parties has been dominated by three major issues: participation, impoverishment and State control.<sup>92</sup>

First, the question of participation has been foreseen to some extent by the explicit recognition of democratic principles in the Covenant itself. Article 1(1) for example, proclaims the right of all peoples to self-determination and "by virtue of that right they *freely determine their political status* and freely pursue their social and cultural development" [emphasis added]. This "internal" aspect of self-determination<sup>93</sup> is also foreseen in article 21(3) of the Universal Declaration which more explicitly states that "the will of the people shall be the basis of the authority of government".<sup>94</sup> That the Covenant conceives of democracy as a concept inherent in the rights is further emphasised by references to "democratic society" in articles 8(1)(a) and (c), and by the agreement that education "shall enable all persons to participate effectively in a free society".<sup>95</sup>

Such a reading of the Covenant coincides with the central role of participation in the development process. Not only is the individual posited as the primary subject of development, but common emphasis is placed upon self-reliance as an objective.<sup>96</sup> Thus the development process is conceived of as being an

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<sup>92</sup> These issues are by no means the only concerns of the Committee, they merely represent areas in which the Committee seems to have expressed a continuing interest. Participation and impoverishment are issues that have derived from current development approaches, the question of State control on the other hand, reflects a world-wide trend towards privatization of essential social services.

<sup>93</sup> See, Cassese A., "The Self-Determination of Peoples", in Henkin L.(Ed), The International Bill of Rights, 92 (1981).

<sup>94</sup> This is reflected in article 25(b) ICCPR which provides for the right to vote. The interdependence of the rights within the two Covenants is foreseen in the preamble to the Covenants.

<sup>95</sup> Article 13(1).

<sup>96</sup> Shepherd G., "The Power System and Basic Human Rights: From Tribute to Self-Reliance", in Shepherd G. and Nanda V.(eds), Human Rights and Third World Development, 13 (1985).



"enabling" process whereby structural impediments (both social and economic, on a micro and macro scale) are lifted to allow the individual to fulfil his or her material and non-material needs.<sup>97</sup>

Thus one member of the Committee commented with regard to article 11:

"Even if the responsibility to ensure observance of the right to an adequate standard of living lay ultimately with the state, efforts should be made to see to it that individuals could exercise their right to participate in the achievement of the country's development objectives".<sup>98</sup>

Similar requirements for representation can be found in comments of Committee members with regard to employment rights. Here preference has been expressed for a tripartite bargaining process including representatives of the State, employers and employees.<sup>99</sup>

To a certain degree, the issue of participation has also been manifest in the requirement that the government undertake promotional and publicity strategies regarding the provisions of the Covenant. Thus it has been felt that the State report should be disseminated as widely as possible,<sup>100</sup> that NGO's should participate in its drafting,<sup>101</sup> and that the Covenant itself should be publicised.<sup>102</sup> The role of the government in this respect to educate and encourage participation is central to "increasing the will of the people to implement social change".<sup>103</sup>

Democratic participation also has a subsidiary aim of ensuring that all sectors of the population are catered for in any human rights strategy. This relates to the second matter in which it has generally been established that the "principal concern" of the

<sup>97</sup> For the relationship between human rights and basic needs, *see*, Alston P., "Human Rights and Basic Needs: A Critical Assessment", 12 H.R.L.J., 19 (1979); Muchlinski, *supra*, note 77.

<sup>98</sup> Konate, E/C.12/1987/SR.10, at 2, para.2.

<sup>99</sup> *See e.g.*, Sparsis, E/C.12/1987/SR.6, at 10, para.42. Such a tripartite system has also been advocated with respect to establishing a strategy to combat unemployment, *see*, Badawi El Sheikh, E/C.12/1989/SR.15, at 16, para.93.

<sup>100</sup> General Comment No.1. The primary purpose of dissemination at the reporting stage is to facilitate public scrutiny of government policies and engender a constructive dialogue on the national level. *Supra*, note 10, at 88, para.5.

<sup>101</sup> *See e.g.*, Alston, E/C.12/1988/SR.12, at 13, para.72.

<sup>102</sup> *See e.g.*, Taya, E/C.12/1988/SR.12, at 9, para.43.

<sup>103</sup> Ruiz Canañas (Mexico), E/1986/WG.1/SR.8, at 8, para.43.



ICESCR is the position of the vulnerable and disadvantaged sectors of society.<sup>104</sup> The Committee has consistently required that governments look towards the position of such social groups within States. Accordingly, just as much as the use of aggregate national statistics is criticised, so also State policies that are centred solely upon general economic growth have been felt to be inadequate for securing the rights of marginalised sectors of the population.<sup>105</sup> The emphasis placed upon such groups by the Committee suggests that its approach has been marked by considerations of equality and non-discrimination.<sup>106</sup> To some extent this has allowed the Committee to side-step the issue of developing substantive norms for the rights within the Covenant.

Finally, the State's obligation to fulfil raises the question of how far the private provision of essential services is compatible with the Covenant.<sup>107</sup> Primarily the Committee has been very wary of the possible inequality and discrimination involved in the provision of public services by the private sector.<sup>108</sup> Its concern has been that access to public services becomes a correlate of income distribution in which the poorer sectors of the population may not be able to afford the services,<sup>109</sup> or merely that the State cannot exercise such control as might be necessary. As one member has commented upon the privatisation process:

"The threat to one or other of those [economic, social and cultural] rights was certain, bearing in mind the substantial element of laissez faire involved in privatization and the very long delay which could

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<sup>104</sup> See e.g., Alston, E/C.12/1987/SR.3, at 3, para.10; *ibid*, 1990/SR.31, at 3, para.10; Simma, E/C.12/1990/SR.15, at 3, para.7. Van Boven comments:

"If a human rights programme has any relevance to people, it should first and foremost be concerned with the vulnerable, the weak, the oppressed, the exploited".

Van Boven T., People Matter: Views on International Human Rights Policy, 74 (1982).

<sup>105</sup> See, Sparsis, E/C.12/1989/SR.16, at 17, para.92; Rattray, *ibid*, SR.17, at 17, para.90.

<sup>106</sup> See *below*, article 2(2).

<sup>107</sup> A distinction has been drawn between public services whose aim is "to ensure the best possible functioning of the community", and social services whose aim is "based upon the solidarity of all the members of the Community". Wold T., "The Right to Social Services", 9 Jour.I.C.J., 41 (1968). The distinction however can be criticised for failing to recognise the contribution of humanitarian services to the development process.

<sup>108</sup> See e.g., Neneman, E/C.12/1988/SR.12, at 11, para.56.

<sup>109</sup> See e.g., Wimer Zambrano, E/C.12/1988/SR.13, at 3, para.6.



occur between the time when a problem was identified and the possible intervention of the State, which was no longer considered a principal protagonist".<sup>110</sup>

A secondary issue is that "the replacement of a *public* service by the *market* principle undermines the very notion of government obligations in the area"<sup>111</sup> in that the State purportedly delegates its responsibility for a particular service to the private sector. It is arguable that whatever the reason given for privatization, the question of whether the government complies with its obligations under the Covenant depends entirely upon the results achieved. However, given the concern of the Committee with the process of realization of the rights, it would seem doubtful that they would accept a philosophy that had at its heart the reduction of governmental responsibility in those areas.

This conclusion is most apparent with regard to the obligation to take steps to the maximum of available resources. According to the policy adopted by the Committee, it is questionable whether a State could legitimately cut its spending on public services outside a claim under article 4. Even if it is conceded that this is possible, if that reduction were not accompanied by similar reductions in other sectors, such as defence, it would constitute a violation of the provisions of the Covenant.

### C) STATE ORGANISATION

It is commonly assumed, partly as a result of the politicisation of human rights, that economic, social and cultural rights require a "socialist" or "centrally planned" form of government. Although a proposal to make realization of the rights dependent upon the "organization" of the State was narrowly rejected in the drafting of the Covenant,<sup>112</sup> it was made clear that the Covenant itself did not prefer any particular system of organization despite arguments to that effect.<sup>113</sup>

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<sup>110</sup> Alston, E/C.12/1989/SR.15, at 7, para.40.

<sup>111</sup> Tomasevski, *supra*, note 22, at 170.

<sup>112</sup> E/CN.4/SR.233, (1951), at 22. The vote was evenly split by six votes to six, with six abstentions.

<sup>113</sup> See Alston and Quinn, *supra*, note 6, at 181-183. Indeed it was stated: "The Commission... was not concerned with the organization or the Constitution of a State but merely with the guarantee of human rights by the State. The Covenant would lay down the obligation: how that obligation would be fulfilled may vary from State to State".



The Committee has made its position clear on this matter. In its General Comment it noted that:

"...the undertaking 'to take steps... by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a, socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognised in the Covenant are susceptible of realisation within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognised and reflected in the system in question."<sup>114</sup>

The Committee has followed this policy in admitting no preference for any particular form of State structure. It appears to concur with the assertion that "successes and failures have been registered in both market and non-market economies, in both centralized and de-centralized political structures."<sup>115</sup> Accordingly it could be concluded that there is "no single road" to the full realization of the rights.<sup>116</sup>

However, whereas the Covenant does not prescribe the precise form of organisation required, it does nevertheless require that the State possess certain general attributes. Thus, article 8

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Chile, E/CN.4/SR.271, at 7 (1952).

<sup>114</sup> General Comment No.3, *supra*, note 5, at 85, para.8.

<sup>115</sup> Limburg Principle 6. *Supra*, note 54, at 124, para.6. Falk comments generally that "the human rights records of both socialism and capitalism are so poor in the Third World at this point that it is quite unconvincing to insist that one approach is generically preferable to the other". Falk R., "Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries", 1 *Uni.H.R.*, 3, at 5 (1979).

<sup>116</sup> This is implicit in the approach of the Committee. *See e.g.* Badawi El Sheikh, E/C.12/1987/SR.12, at 2, para.1.



would seem to require that the State structure allowed for the existence of more than one trade union,<sup>117</sup> and the non-discrimination provisions arguably require the separation of the Church and State.<sup>118</sup> Members of the Committee have in this respect been critical of certain forms of organization that do not seem capable of fulfilling the rights in the Covenant.<sup>119</sup> One member concluded that the Committee "understood that questions of a general nature on wider aspects of the political or economic system of a country were not their concern except in so far as they affected the enjoyment of the rights embodied in the Covenant."<sup>120</sup>

Some recognition of this fact was evident in the debate preceding the adoption of the General Comment. There, certain members suggested that reference be made to the need for "democratic" government.<sup>121</sup> Although the final text does not contain any reference to democratic government, there appears to have been agreement as to that interpretation.<sup>122</sup> Indeed, the Committee's emphasis on participation lends weight to the argument that some form of democracy is a prerequisite to the implementation of the rights within the Covenant.<sup>123</sup>

However, even if the Committee does view democracy as being a prerequisite for the fulfilment of the rights within the Covenant, neither has it defined what it understands by that term, nor has it ever challenged a State upon that basis. Indeed if it were

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<sup>117</sup> An example is the criticism of Rwanda whose allowance for only a single general Trade Union seemed to violate article 8 of the Covenant. Texier, E/C.12/1989/SR.12, at 4, para.18.

<sup>118</sup> *See e.g.* the criticism of Chile's education policy, Texier, E/C.12/1988/SR.13, at 8, para.35.

<sup>119</sup> Particular criticism was aimed at the equation of "citizen" with "activist in the People's Movement" in Zaire. *See e.g.* Alvarez Vita, E/C.12/1987/SR.19, at 3, para.9.

<sup>120</sup> Badawi El Sheikh, E/C.12/1987/SR.19, at 4, para.15.

<sup>121</sup> *See e.g.*, Marchan Romero, E/C.12/1990/SR.46, at 7, para.35.

<sup>122</sup> *See*, Alston, E/C.12/1990/SR.48, at 8, para.41.

<sup>123</sup> *Cf.* Article 4, which refers to "democratic society". This does not necessarily exclude single party states however. At the Butare Colloquium on Human Rights it was generally agreed that "the one party state was not necessarily less democratic or more likely to give rise to violations of human rights than a multiparty system". Hannum H., "The Butare Colloquium on Human Rights and Economic Development in Francophone Africa: A Summary and Analysis", 1 *Uni.H.R.*, 63, at 75 (1979). Indeed it has been considered that minorities can be better protected in such systems. I.C.J., *Human Rights in a One-Party State*, at 110 (1978).



to do so, the Committee would have to face the dilemma of weighing the majoritarian tendencies of a democratic system with the need to protect minority interests.

## **V) "INCLUDING PARTICULARLY THE ADOPTION OF LEGISLATIVE MEASURES"**

### **A) THE REQUIREMENT OF LEGISLATION**

It has been commonly asserted that legislation is indeed essential to the implementation of the rights at the domestic level.<sup>124</sup> The travaux préparatoires however are quite clear on the matter. The original wording of the article which provided that States take steps "by legislative as well as other means" was amended in light of the various constitutional forms, to make it clear that legislation was not obligatory.<sup>125</sup> Hence it was considered that:

"The ratification of a treaty entailed, for the States Parties to it, no more than the fulfilment of the obligations expressed in the treaty, whether by legislation, administrative action, common law, custom or otherwise".<sup>126</sup>

Similarly the International Law Commission, in identifying article 2(1) as imposing an obligation of result upon States Parties, recognized that reference to legislative action, although indicating a preferred method of implementation, did not alter the fundamental principle of State discretion in the choice of means to undertake its obligations under the Covenant.<sup>127</sup>

This view seems to have been adopted by the Committee. As in the case of the Working Group,<sup>128</sup> few questions have been asked as to the lack of legislation in a particular case. Questions have rather been directed at the existence of legal or

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<sup>124</sup> See, Sviridov, E/C.12/1987/SR.6, at 4, para.14. Equally, during the drafting process, Nikolaeva (USSR) argued that "legislative measures were absolutely essential to ensure respect for rights stated in the Covenant", A/C.3/SR.1184, at 251, para.31, (1962).

<sup>125</sup> See, U.K. objections to the original phrase, UN Doc.A/2910/Add.1, at 4, 10 UN GAOR, Annexes, (Ag.Item 28), Pt.1, (1955). Also, comment of Sharp (New Zealand), A/C.3/SR.1181, at 238, para.33, (1962).

<sup>126</sup> UN Doc.E/CN.4/SR.427, at 10 (1954).

<sup>127</sup> See above, text accompanying notes 1-3.

<sup>128</sup> Alston and Quinn, *supra*, note 6, at 167. The exception to this rule is perhaps the prohibition of discrimination.



administrative remedies.<sup>129</sup> It has been recognised nevertheless, that the enactment of legislation does indicate a certain commitment on the part of the State to undertake its obligations in good faith. One member of the Committee has commented in this light that "the Covenant did not automatically imply that legislation was an indispensable component" of government policy.

"However, it was evident that, if that were the interpretation adopted by Governments, the burden of proof would lie with those Governments, which would therefore be expected to show that the non-legislative measures that they had taken effectively ensured" the rights concerned "and that it was not essential to take legislative measures".<sup>130</sup>

Similarly, there are situations in which legislation could be said to be essential. The existence of a law contravening the provisions of the Covenant would oblige the State concerned to take the necessary action to annul its effectiveness.<sup>131</sup> Legislation might also become obligatory if alternative measures undertaken by the State such as education or persuasion were manifestly ineffective.<sup>132</sup> Finally the implicit obligation on States Parties to protect individuals from third party violations would also seem to require legislation in certain instances to ensure the rule of law.<sup>133</sup> As the Committee has noted in its General Comment:

"...in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes".<sup>134</sup>

Clearly a decision as to whether further legislation is required, will turn upon the extent to which existing legislation is adequate.

<sup>129</sup> See e.g., Simma, E/C.12/1989/SR.15, at 2, para.3; Jimenez Butragueno, E/C.12/1988/SR.19, at 4, para.12.

<sup>130</sup> Alston, E/C.12/1987/SR.6, at 3, para.8.

<sup>131</sup> Limburg Principle 18, *supra*, note 54, at 125.

<sup>132</sup> This was noted during the drafting of the Covenant. Pico (Argentina), A/C.3/SR.1184, at 250, para.16 (1962).

<sup>133</sup> For example the necessity of legislation in the field of industrial safety and health measures. Sparsis, E/C.12/1988/SR.6, at 5, para.33.

<sup>134</sup> General Comment No.3, *supra*, note 5, at 83, para.3.



In such a case, there can never be a blanket requirement for legislation to be adopted.

The work of many human rights bodies would seem to be directed towards a situation whereby the rights are embodied in the law of each State and guaranteed by effective legal remedies. Legislation inevitably plays a major role in this scenario. The alternative, whereby the rights are secured through administrative or other practices, would not seem to give the effective stability and impartiality of established judicial systems, nor equivalent recourse procedures.<sup>135</sup> If this is the ideal, however, effective legal protection is to be achieved as a result. The means by which States Parties achieve this does not necessarily involve legislative action. Indeed, it has to be recognised that for States to create a situation whereby legal remedies are a realistic option, they will generally have to take a series of measures above and beyond the mere enactment of legislation.

## B) THE ADEQUACY OF LEGISLATION

Even if legislation is considered to be an essential part of the implementation process, it has to be considered whether the enactment of legislation alone, is sufficient for States to fulfil effectively their obligations under the Covenant. During the drafting of the Covenant, it was often commented that legislation, whilst being essential,<sup>136</sup> was not necessarily adequate to secure the rights effectively.<sup>137</sup> Indeed it was remarked that:

"It would be deceiving the people of the world to let them think that a legal provision was all that was required to implement certain provisions, when in fact an entire social structure had to be transformed".<sup>138</sup>

Accordingly legislative measures were intended to be merely one element of a series of economic and social activities intended to give effect to the rights in the Covenant.<sup>139</sup> This has been expressly recognised by the Committee, which commented that:

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<sup>135</sup> Tomuschat, *supra*, note 85, at 42.

<sup>136</sup> With the implicit limitations above.

<sup>137</sup> Representative of the USSR, E/CN.4/SR.272, at 10 (1952). The representative of the U.S. dropped the use of the word "ensure" in its amendments to article 2(1) for fear that it might imply that legislation alone is enough to secure the rights. E/CN.4/SR.271, at 12 (1952).

<sup>138</sup> Cassin (France), E/CN.4/SR.232, at 11 (1951).

<sup>139</sup> Limburg Principle 18, *supra*, note 54, at 125.



"The Committee... wishes to emphasise, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties."<sup>140</sup>

On a more detailed examination, however, it is apparent that a number of articles in the Covenant are clearly capable of being adequately secured by legislation when accompanied by corresponding enforcement procedures.<sup>141</sup> This is particularly true with respect to those rights that are not dependent for their implementation upon State resources (for example the right to form and join a trade union in article 8).<sup>142</sup> Similarly, there is nothing to prevent the State undertaking to guarantee other rights, such as the right to equal remuneration, even if they do have considerable resource implications. All that is required is the necessary commitment on the part of the State concerned.

It is clear, however, that in a number of cases the existence of certain social structures or resources, will be a precondition to the effective realization of the rights by means of legislation. For example, it would be simply meaningless for the State to guarantee every individual a house, yet do nothing to ensure that there was sufficient housing available. In such a situation there is clearly a need for the state to take the appropriate economic or social action necessary to ensure that the legislation, if it exists, may be effectively implemented.<sup>143</sup>

Two questions thus present themselves to the Committee in analysing the adequacy of legislative measures in a particular situation. First is whether the social conditions are compatible with the legislative enforcement of the right. The second element is whether the enforcement procedures are adequate to secure the right in practice. Thus the Committee has stressed that a description of the legal provisions in a given State would not of

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<sup>140</sup> General Comment No.3, *supra*, note 5, at 84, para.4.

<sup>141</sup> Often when the Committee refers to the inadequacy of legislation, it is in fact speaking about the presence or absence of enforcement procedures. It is submitted that coupled with the latter, legislation will often be sufficient.

<sup>142</sup> *See below*, Chapter 7.

<sup>143</sup> A similar position exists with regard to the ICCPR. In its General Comment 3(13) the Human Rights Committee recognized that "implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not *per se* sufficient". 5th Annual Report of to the General Assembly. UN Doc.A/36/40, Annex VII, 36 GAOR, Supp.(No.40), (1981).



itself suffice.<sup>144</sup> In addition, the State should provide information on the progress made in the practical implementation of the rights.<sup>145</sup>

### C) JUDICIAL REMEDIES.

The existence of judicial remedies assumes the presence of the right in the domestic legal system. Having seen above, the use of legislative means to secure the rights is by no means the only method open to States Parties. However, as far as legislation has been enacted the Committee has been clear about the need for recourse procedures.<sup>146</sup> These have their parallel in the administrative or other recourse mechanisms that run outside the ambit of the legal system. As the Committee stressed in its General Comment:

"Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for

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<sup>144</sup> See e.g. criticism of the Canadian report E/C.12/1989/SR.8. In particular Simma commented that:

"When reports focused too narrowly on legal aspects, the suspicion naturally arose that there might be some gap between law and practice."

E/C.12/1989/SR.8, at 8, para.42.

<sup>145</sup> E.g. Butragueno, E/C.12/1988/SR.13, at 2, para.1. Too much emphasis on theoretical implementation as opposed to practice has also been criticised, Neneman, E/C.12/1988/SR.2, at 4, para.17.

<sup>146</sup> Alston comments that in order to determine whether rights were realized the Committee "looked for a degree of entrenchment in a legal instrument such as a constitution and for "justiciability"". E/C.12/1990/SR.7, at 2, para.6. Stoljar argues with respect to rights in general:

"You cannot have a right unless it can be claimed or demanded or insisted upon, indeed claimed effectively or enforced.... Rights thus are performative-dependent, their operative reality being their claimability; a right one could not claim, demand, ask or enjoy or exercise would not merely be "imperfect" - it would be a vacuous attribute".

Stoljar S., An Analysis of Rights, at 3-4 (1984). So far as implementation concerns the transferral of international obligations onto the national plane, domestic enforceability must therefore be a prime objective of the Covenant.

It has been noted that although economic, social and cultural rights are to be found in the constitutions of many countries, there was little inclination on the part of national courts to enforce them. See, Simma, E/C.12/1990/SR.3, at 11, para.68. With respect to Canada, see, Vandycke R., "La Charte Constitutionnelle et les Droits Économiques, Sociaux et Culturels", Can.H.R.Yrbk., 167 (1989-90).



example, that the enjoyment of the rights recognised, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts.2 (paras. 1 and 3) 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognised in that Covenant are violated, 'shall have an effective remedy' (art. 2(3)(a))."<sup>147</sup>

The Committee goes on to state that it considers a number of provisions within the Covenant that "would seem to be capable of immediate application by judicial and other organs in many national legal-systems".<sup>148</sup> These include articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3).<sup>149</sup>

The specification, by the Committee, of the provisions that may be open to immediate application by judicial organs, is in part a response to the common assertion that economic, social and cultural rights are not justiciable. According to that view, economic, social and cultural rights are considered too vague for violations of their provisions to be effectively determined.<sup>150</sup> A distinction however has to be drawn between international and domestic enforcement of the rights. At the international level, judicial determination of violations would weigh up the actual situation in relation to the obligation contained in the Covenant. Domestically however, judicial remedies focus upon the enforcement of existing legislative or administrative measures taken with regard to the economic and social climate in the State

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<sup>147</sup> General Comment No.3, *supra*, note 5, at 84, para.5.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.*

<sup>150</sup> Vierdag E., "The Legal Nature of the Rights Guaranteed by the International Covenant on Economic, Social and Cultural Rights", 9 *Neth.I.L.R.*, 69 (1978). Similarly the representative of Colombia asserted before the Committee that economic, social and cultural rights "were too vague for their infringement to give rise to legal action". E/C.12/1990/SR.14, at 6, para.31. *Contra*, Van Hoof, *supra*, note 18, at 104.



concerned.<sup>151</sup> An insistence on judicial remedies at the domestic level is merely to ensure that the measures taken towards the full realization of the rights are not purely superficial and empty of any real value.

A related issue is that, given the discretion that States with respect to the domestic implementation of the Covenant, the rights are unlikely to enter into municipal law in the form that they exist in the Covenant.<sup>152</sup> For example it was recognized by one member of the Committee that the right to an adequate standard of living could be secured through a policy of full employment, welfare benefits, or a combination of the two.<sup>153</sup> States, thus, may adopt a form of implementation that is suitable to the requirements of their social and legal organization, but it is clear that the Committee will assess the adequacy of such measures by reference to the degree to which there is provision for individual remedies or other enforcement procedures.

## VI) "FULL REALISATION"

Whatever the intricacies of the implementation process, it would appear that the ultimate objective of the Covenant is the "full realisation" of the rights. During the drafting of the Covenant the words "full realisation" were included to replace the term "implementation" "in order to strengthen rather than to weaken the objective set before future contracting parties".<sup>154</sup> Its effect is to emphasise that the State conduct referred to in article 2(1) is to be directed at this particular result. States therefore can not make do with rights "on the cheap".<sup>155</sup>

The Committee itself has noted that the principal obligation of result in article 2(1) is the "full realisation" of the rights.<sup>156</sup> That this objective is conditioned by the phrase "progressive realisation" is merely a recognition of the fact that "the full

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<sup>151</sup> A caveat may be that the rights could be entrenched in a constitution without substantial change in form. The rights have been enforced in practice on occasions, *e.g.* Canada, E/C.12/1989/SR.10, at 12, para.42; Netherlands, E/C.12/1989/SR.14, at 3, para.8.

<sup>152</sup> For the variety of forms of social legislation, *see*, Cranston R., "Rights in Practice", in Sampford C. and Galligan D.(eds), Law, Rights and the Welfare State, 1 (1986).

<sup>153</sup> *See*, Sparsis, E/C.12/1988/SR.9, at 5, para.26.

<sup>154</sup> Cassin (France), E/CN.4/SR.223, at 8, (1951).

<sup>155</sup> *Ibid*, E/CN.4/SR.237, at 7 (1952).

<sup>156</sup> General Comment No.3, *supra*, note 10, at 85, para.9.



realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time".<sup>157</sup> Although reference has occasionally been made to the need to establish an understanding of the "ideal situation",<sup>158</sup> the Committee has generally concentrated upon the process rather than the result of implementation. It is assumed, even in the case of developed countries, that the full realisation of the rights has not been achieved. Hence the Committee requires that all States, not merely developing ones, show the "progress made" and the "difficulties encountered" in the realization of the rights. The Committee has not, on the other hand, analysed closely what it envisages to be the full realisation of the rights.

It is submitted that the phrase "full realisation" should relate to the scope of the rights *ratio materiae*, *ratio personae* and *ratio loci*. A particular right could be said to be fully realised only when all people in all parts of the country enjoy the right at the requisite level. In so far as the rights might be realised through State restraint, the major consideration is the personal scope of the provisions. However, for the fulfilment of the rights, a specific level of achievement has to be established.

That there may be some difficulty in establishing concrete objectives is apparent from the fact that certain rights were intended to be dynamic standards. During the drafting of the Covenant, it was commented that the introduction of the word "progressively" "introduced a dynamic element, indicating that no fixed goal had been set",<sup>159</sup> and that "the realization of those rights did not stop at a given level".<sup>160</sup> This is reflected particularly in article 11 which refers to "the continuous improvement of living conditions".<sup>161</sup> Here the result to be achieved becomes merged with the desired conduct.

In asserting that the objectives of the Covenant are dynamic in nature is not to suggest that they are deprived of value. Although it is necessary for the rights to be given sufficient detail such that it is possible to predict, with reasonable accuracy,

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<sup>157</sup> *Ibid.*

<sup>158</sup> Taya, E/C.12/1990/SR.4, at 2, para.2.

<sup>159</sup> Sorensen (Denmark), E/CN.4/SR.236, at 21 (1951).

<sup>160</sup> Mr Whitlam (Australia), E/CN.4/SR.237, at 5 (1951).

<sup>161</sup> One member of the Committee has commented with regard to this article that "the individual was entitled not only to "well-being", but to "better-being", and thus the right to play a part in determining living conditions". Konate, E/C.12/1987/SR.11, at 11, para.54.



whether or not a State has achieved that objective, any definition will have to be given enough flexibility to take into account the differing nature of each State's social and economic systems, and the need for the provision to stand the test of time. For example, it would not be appropriate for a precise figure to be given as a definition of "fair wages" in article 7(a)(i). Other human rights bodies have similarly asserted the dynamic nature of human rights obligations.<sup>162</sup> However at present, many of the provisions within the Covenant remain excessively general. The main problem that faces the Committee in defining those standards, is establishing a normative balance that reflects both predictability and flexibility.

## VII) "PROGRESSIVE ACHIEVEMENT"

The dominant characteristic of obligations concerning economic, social and cultural rights must be their "progressive" nature. Although more recently such rights have been included in the African Charter on the same basis as civil and political rights,<sup>163</sup> they are generally considered to be incapable of immediate implementation owing to the considerable expense involved in their realization. All major instruments relating to economic, social and cultural rights provide therefore for implementation in a piecemeal fashion.<sup>164</sup> The requirement in the ICESCR that the rights be realized progressively can be contrasted with the undertaking in the ICCPR to "respect and to ensure" the rights recognized in the Covenant.<sup>165</sup> Considerable debate has centred upon whether the obligation in the ICCPR is in itself immediate.<sup>166</sup> Particular emphasis has been placed upon the

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<sup>162</sup> With regard to the ECHR *see*, Tyrer Case, Eur.Court H.R., Series A, Vol.26, Judgement of April 25 1978, (1979-80) 2 EHRR 1.

<sup>163</sup> African Charter on Human Rights and Peoples' Rights (1981), 21 I.L.M. 59.

<sup>164</sup> Article 1 of the Additional Protocol to the Inter-American Convention on Human Rights speaks of progressive achievement. O.A.S. Treaty Series No.69, Nov.17 1988. Article 20 of the European Social Charter (1961), allows States Parties to select which articles (over and above a minimum) they consider themselves bound to.

<sup>165</sup> *See*, Buergenthal, *supra*, note 20.

<sup>166</sup> With the view that civil and political rights are resource dependent themselves and therefore capable only of progressive implementation, *see*, Jhabvala F., "Domestic Implementation of the Covenant on Civil and Political Rights", 32 Neth.I.L.R., 461 (1985). *Contra*, Schwelb E., "Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants", in 1 René Cassin Amicorum Discipulorumque, 301 (1969);



economic consequences of implementation of civil and political rights. Alston and Quinn comment in this vein:

"the reality is that the full realization of civil and political rights is heavily dependent both on the availability of resources and the development of the necessary societal structures. The suggestion that realization of civil and political rights requires only abstention on the part of the state and can be achieved without significant expenditure is patently at odds with reality".<sup>167</sup>

The practice of the Human Rights Committee seems to bear out the conclusion agreed during the drafting process that "the notion of implementation at the earliest possible moment was implicit in article 2" of the ICCPR.<sup>168</sup>

Whereas the European Social Charter provides for the immediate implementation (with a few exceptions such as article 12(3)) of a selected number of rights,<sup>169</sup> the ICESCR and the Protocol to the Inter-American Convention require the progressive implementation of all of the rights. The difference is one of emphasis in that the Social Charter concentrates upon the full realization of a selection of rights, whereas the ICESCR gives legal recognition to steps being taken towards the full realization of all the rights. Not only does the ICESCR require action to be taken immediately over the whole set of rights, it also has regard to the process by which the rights are realized.

Concern was expressed during the drafting of the Covenant that reference to progressive achievement would allow States to

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Schachter O., *supra*, note 72, at 324. A debate on this issue is to be found in Correspondence in the Human Rights Quarterly: Humphrey J., "Letter to the Editor", 6 Hum.Rts.Q., 539 (1984); Jhabvala F., "Letter to the Editor", 7 Hum.Rts.Q., 242 (1985); Iwasawa Y., "Letter to the Editor", 7 Hum.Rts.Q., 565 (1985).

<sup>167</sup> Alston and Quinn, *supra*, note 6, at 172.

<sup>168</sup> UN Doc.A/5655, para.23, 18 UN GAOR, C.3, Annexes, (Ag.Item 48), (1963). It might be argued that a similar comment could be made about the obligation in article 2(1) ICESCR notwithstanding the reference to available resources.

<sup>169</sup> Article 20, European Social Charter (1961). At minimum, States parties are obliged to consider themselves bound by at least five specified articles and not less than 10 articles altogether. Some States have accepted obligations relating to all of the rights in the Charter. *See generally*, Harris D., The European Social Charter, (1984).



postpone the realization of the rights indefinitely<sup>170</sup> or entirely avoid their obligations.<sup>171</sup> The majority however did not agree with this view; it was felt that implementation should be continued "without respite"<sup>172</sup> so that full realization could be achieved "as quickly as possible".<sup>173</sup> These concerns have been reflected by the Committee in its General Comment No.3, where it states:

"the fact that realisation over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."<sup>174</sup>

Thus, far from viewing the phrase "progressive realisation" as a let-out clause, the Committee has sought to give it a meaning that supplements the meaning of other phrases within article 2(1). According to its analysis, States may not delay in their efforts to realise the rights,<sup>175</sup> and indeed they must take the course which would achieve that objective in the shortest possible time.

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<sup>170</sup> UN Doc. A/2929, *supra*, note 61, at 20.

<sup>171</sup> Chile, E/CN.4/SR.273, at 8 (1952). The Eastern European countries were concerned that the references to resources and progressive achievement in article 2(1) created "so many restrictions and exceptions that its entire significance would evaporate". Ukraine, E/CN.4/SR.233, at 9 (1951).

<sup>172</sup> Egypt, E/CN.4/SR.233, at 10 (1951). The replacement of the words "by stages" with "progressive" during the drafting was thought to have this effect on the meaning of the article.

<sup>173</sup> Volio (Costa Rica), A/C.3/SR.1202, at 338, para.27 (1962). It should be noted however that the Costa Rican amendment for the establishment of a general time-limit for implementation of the rights was rejected. Opponents felt that States should be entitled to proceed according to a time scale determined by their own resources. *See*, Diaz Casanueva (Chile), A/C.3/SR.1181, at 237, para.26 (1962).

<sup>174</sup> General Comment No.3, *supra*, note 10, at 85.

<sup>175</sup> *See also*, Alston, E/C.12/1990/SR.21, at 7, para.21.



The obligation thus outlined would appear to require a continuous improvement of conditions over time without backward movement of any kind- in what may be described as a form of ratchet effect. The Committee comments in this regard:

"...any deliberately retrogressive measures... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources."<sup>176</sup>

Notably the Committee does not present retrogressive measures as *prima facie* violations of the Covenant, even where they are deliberate. It does, however, suggest that any retrogressive step would need to be "fully justified". Two forms of justification appear to be envisaged by the Committee. First, where the State is suffering an economic recession such that, even by utilising "the maximum of available resources", a deterioration of the situation is inevitable. Secondly, where a retrogressive measure is taken for the purpose of improving the situation with regard to the "totality of the rights in the Covenant". The Committee, according to this second point, appears to legitimise "trade-offs" between rights. It might be open for a State, for example, to deliberately increase the number of unemployed if the benefits were better wages and a higher standard of living for the majority of workers.

It is submitted, however, that this approach provides States with undue lee-way and conflicts with a number of principles that underpin the Covenant. First, any retrogressive measure would represent a "limitation" on the enjoyment of the rights and accordingly should be justified in relation to article 4. This requires *inter alia* that any such limitation must be "determined by law" and must promote the "general welfare in a democratic society". Secondly, despite the wording of article 4, the Covenant was principally intended for the protection of the rights of the individual. As such, it cannot be governed solely by strict utilitarian principles. Indeed the Committee itself has often stressed that the Covenant is a vehicle for the protection of the vulnerable and disadvantaged groups in society.

Certainly some adverse effects may flow from well-intentioned measures, but efforts should be made to mitigate those effects to the greatest degree possible. However, where retrogressive measures were the result of deliberate policy, the Committee would do better to consider it a *prima facie* violation

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<sup>176</sup> General Comment No.3, *supra*, note 10, at 85, para.9.



of the Covenant in absence of further justificatory evidence. Admittedly the Committee comes close to this position but does so in an excessively tentative manner.

It is apparent from the terms of the Covenant that the principal, but not exclusive,<sup>177</sup> constraint upon the immediate realisation of the rights will be the lack of economic resources. It follows that where possible, States should achieve the rights immediately. This applies in the case of those rights that are not dependent for their realisation upon the presence of adequate resources, and where the State concerned clearly has adequate resources to take the relevant steps. This approach was apparent in the drafting of article 2(1). There, the fear that the article would become an escape clause for developed States<sup>178</sup> was opposed by the view that each State must ensure the rights "except in circumstances where retarded economic development made that impossible".<sup>179</sup> According to this view, developed States are under an obligation to implement the provisions of the Covenant immediately, the progressive nature of the obligation applying only to those States that lack sufficient resources to do so themselves.<sup>180</sup>

The Committee however has not taken the view that developed States should be bound to implement the obligations immediately. On the contrary it has stressed that it can not be assumed that the rights are fully realized in developed countries despite their economic strength.<sup>181</sup> Indeed it has been unwilling to

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<sup>177</sup> In addition, States will have to overcome matters such as existing structural impediments within the social and economic system and personal ignorance and prejudice.

<sup>178</sup> *E.g.* Lebanon, UN Doc. E/CN.4/SR.271, at 11 (1952).

<sup>179</sup> Yugoslavia, E/CN.4/SR.233, at 5 (1951). Alston and Quinn have noted that supporters of the idea of progressive achievement "viewed it not as an escape hatch for states whose performance failed to match their abilities ...(but) simply as a necessary accommodation to the vagaries of economic circumstances". *Supra*, note 6, at 175.

<sup>180</sup> This is the view of Kartashkin V., "Covenants on Human Rights and Soviet Legislation", 10 *H.R.L.J.*, 97, at 98-99 (1977). In this vein the UK representative commented rather ambiguously that the word "progressively" "did not in any way mean that States whose social development was adequate would not be bound by the obligations laid on them in the Covenant". E/CN.4/SR.237, at 10 (1951).

<sup>181</sup> *See*, Alston, E/C.12/1988/SR.8, at 6, para.22; Neneman, E/C.12/1988/SR.20, at 5, para.21.



accept statements of government representatives claiming that the rights are fully implemented in their country.<sup>182</sup>

The Committee has emphasised, on the other hand, that even developed States have specific problems that limit their ability to secure the rights for the whole of the population. As such there has been an awareness that the high cost of welfare institutions,<sup>183</sup> ageing populations<sup>184</sup> and rising unemployment<sup>185</sup> can represent significant problems for developed countries.<sup>186</sup> The dynamic approach of the Committee as to the objectives in the Covenant<sup>187</sup> has led it to require information on the "progress made"<sup>188</sup> and the problems encountered in the realization of the rights even in respect to developed countries. As will be noted below, the Committee has similarly not accepted the dominance of economic considerations as an excuse for avoidance of a State's commitment under the Covenant.

Whereas failure to act may clearly be identified as a breach of State responsibility, in the majority of cases it will be particularly difficult for the Committee to evaluate whether or not a State has taken the appropriate course of action. Outside the difficulties of measuring progressive achievement, whether or not a situation improves will not be conclusive as regards State responsibility. If the situation deteriorates (for example with an increase in numbers of homeless families), that has to be directly attributable to State action or inaction for a violation of the Covenant to be established. Even where the State was directly responsible, the Committee suggests that it will not necessarily find a violation of the Covenant. On the other hand, if the situation

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<sup>182</sup> See the Committee's reaction to the Austrian representative's statement that its domestic situation was fully in conformity with the Covenant. E/C.12/1988/SR.4, at 2, para.3.

<sup>183</sup> The Committee expressed some concern over the expense of social welfare institutions in Sweden. E/C.12/1988/SR.9.

<sup>184</sup> This was the reason given by the Polish representative as the main obstruction to the implementation of Poland's new social policy in 1989. E/C.12/1989/SR.5 at 2, para.5.

<sup>185</sup> See, Sparsis, E/C.12/1987/SR.14, at 9, para.30.

<sup>186</sup> E.g. Sparsis, E/C.12/1988/SR.10, at 4, para.13.

<sup>187</sup> See below, text accompanying notes 159-162.

<sup>188</sup> Article 16 requires that States submit reports on the measures adopted and the progress made in achieving observance of the rights in the Covenant. The notion of progress is central to the obligations of States under the Covenant. Sparsis, E/C.12/1989/SR.8, at 10, para.58.



improves, it is not necessarily the case that the State will have taken the appropriate path. For example, it may have been able to achieve more in the given circumstances. To intervene at this stage, it is clear that the Committee will have to consider the possible alternative courses of action open to the State (including the allocation of resources) and weigh up the competing priorities. Here it is particularly difficult for the Committee to evaluate State action without becoming entirely prescriptive as to the course of action to be taken.

### VIII) "RIGHTS RECOGNIZED"

Under a strict reading of the Covenant, the general clause in article 2(1) should apply only to those "rights recognized" in the Covenant. A certain number of provisions either do not contain the word "recognize" or fail to refer to a "right", suggesting that they should fall outside the scope of its application.

With regard to the former, articles 3 and 8 refer to an undertaking to "ensure"; articles 13(3) and 15(3) to an undertaking to "respect"; and article 2(2) requires States to "guarantee" the exercise of the rights without discrimination. Such articles contain no mention of the word "recognize". It might be argued that as such articles do not contain this essential "trigger word", they are no longer covered by the terms of article 2(1) and therefore must be implemented immediately. This conclusion is supported by the fact that the terms "respect" and "ensure" are to be found in article 2(1) ICCPR which requires immediate realisation.<sup>189</sup> Similarly the obligation to "guarantee" suggests an undertaking considerably more stringent than that found in article 2(1).<sup>190</sup> However, although it was recognised during the drafting of the Covenant that article 8 was to be implemented immediately, it was less clear whether this was also intended to be the case for articles 13(3), 15(3) or 2(2).<sup>191</sup>

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<sup>189</sup> The obligation to "respect" has been interpreted to be an aspect of the general obligation implying State abstention. *See above*, text accompanying notes 20-27.

<sup>190</sup> The term "guarantee" was rejected in the drafting of article 2(1) as being too "onerous in the circumstances". Nissot (Belgium), E/CN.4/SR.272, at 10 (1952).

<sup>191</sup> Denmark (Mr Sorensen) commented that only trade union rights were of immediate application. E/CN.4/SR.236, at 21 (1951). A Chilean amendment (E/CN.4/L.62/Rev.2) for the immediate application of article 7(a)(i) providing for equal remuneration for work of equal value was rejected. E/CN.4/SR.281, at 14 (1952).



The Committee has referred to the immediate realisation *inter alia* of articles 3, 8, 13(3), and 15(3).<sup>192</sup> To a large extent, these provisions would appear to be capable of immediate realisation. Whether or not article 2(1) is said to apply to these provisions, it is submitted that priority has to be given to the specific terminology within the substantive articles themselves. Accordingly, it would not be open for States to rely upon the terms of article 2(1) to delay the application of those provisions.

A similar concern relates to articles 10 and 14 which make no reference to "rights".<sup>193</sup> Article 14 on the one hand, is a contingency provision that specifies a specific time period within which States should adopt a plan for the progressive implementation of the principle of compulsory primary education. There is no room in this case for the provision to be implemented in a progressive fashion.

On the other hand, article 10 refers to special protection that "should" exist for the family, mothers and children. It is arguable that the use of the word "should" implies nothing more than a moral obligation upon States to undertake protective measures. The Covenant however, was drafted specifically with the intent to put into binding form some of the provisions found in the UDHR. It can not be assumed that its provisions do not possess legal force unless there are overriding indications otherwise.<sup>194</sup> More conclusively however, neither the Committee nor any of the States parties, have made any differentiation between article 10 and the other rights in terms of their legally binding nature.

Given the legal nature of such an obligation, the immediacy of implementation is particularly clear in relation to article 10(1) and 10(3). These provisions, relating to the protection of the family and of children, are particularly reminiscent of articles 23 and 24 ICCPR and should perhaps be treated in a similar manner. Article 10(2) however seems to be the exception. It refers to the provision of paid leave or social security benefits for working mothers during childbirth, and thus requires State financial input,

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<sup>192</sup> General Comment No.3, *supra*, note 10, at 84, para.5.

<sup>193</sup> These articles reflect the great emphasis placed upon obligations in the terms of the Covenant. The representative of the ILO noted during the drafting that the ICESCR reflected a middle road between the citation of a number of rights on the one hand and the establishment of government obligations on the other. E/C.14/AC.14/SR.1, at 32 (1951).

<sup>194</sup> See, Bernhardt R., "Treaties", in Encyclopedia of Public International Law, Vol.7, 459, at 460 (1984).



placing it within the category of rights that were intended to be implemented progressively.

The mere fact that article 10 makes no specific reference to "rights" does not prevent those provisions being treated in a similar manner to the other provisions in the Covenant. The Committee in its reporting guidelines refers to "rights" in article 10,<sup>195</sup> and specifically to the right to enter into marriage with full and free consent.<sup>196</sup> It is to be assumed that as article 2(1) was intended to outline State obligations with respect to all the substantive articles, it should also apply to article 10 notwithstanding the lack of specific reference to "rights".

Although article 2(1) refers to the "rights recognised" in the Covenant, this should be interpreted as including the rights both specifically and implicitly recognised. Thus even where the substantive articles provide that the States should "ensure" a right, it could be said that they should, at the very least, recognise that right. This would lead to the more satisfactory conclusion that article 2(1) does indeed apply to all the substantive rights within Part III of the Covenant. It does not however require that such rights should all be applied in a progressive manner. As seen above, the realisation of the rights should be taken "without delay". In cases where the realisation of the rights is not impeded by lack of resources, they should be put into effect immediately.

## **IX) "TO THE MAXIMUM OF ITS AVAILABLE RESOURCES"**

Perhaps the most overstated characteristic of economic, social and cultural rights is their reliance upon economic resources. It has been the major consideration in differentiating between economic, social and cultural rights from civil and political rights, and was the primary justification both for allowing States to implement the rights in a progressive manner and for having a reporting system as the means of supervision.

As noted above, the fact that the implementation of the rights was considered to be contingent upon economic resources, did not, in the drafters eyes, constitute an excuse for States to delay in the realisation of the rights.<sup>197</sup> It was merely a recognition of the fact that many States did not have sufficient

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<sup>195</sup> Reporting Guidelines, UN Doc.E/1991/23, Annex IV, 98-99, UN ESCOR, Supp.(No.3), (1991).

<sup>196</sup> *Ibid*, at 97.

<sup>197</sup> *See above*, text accompanying note 174.



resources to undertake the large-scale action required by the Covenant immediately.

On a general level the Committee has shown that the economic situation of a country will be taken into consideration in its evaluation of State reports.<sup>198</sup> In particular it has found itself bound to use different yardsticks to judge the efforts of States with varying economic circumstances.<sup>199</sup> It has thus resorted to the use of national benchmarks as an initial indicator of State compliance with the obligations in the Convention.<sup>200</sup> As such, States are given a degree of discretion in the assessment of what resources are available.<sup>201</sup> This does not mean, however, that the Committee will defer entirely to State assessments of the situation, or that it has no right to express opinions on the adequacy of governmental budgetary appropriations.<sup>202</sup>

It was apparent even in the drafting of the Covenant that a State's resources were not limited merely to those which it

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<sup>198</sup> A "contextual approach" has sometimes been advocated. Badawi El Sheikh, E/C.12/1989/SR.7, at 4, para.13; Texier, E/C.12/1989/SR.12, at 4, para.18.

<sup>199</sup> *See*, Texier, E/C.12/1988/SR.8, at 3, para.5; Konate, E/C.12/1988/SR.17, at 6, para.36. Rather ambiguously Texier has also commented the "the Committee did in fact use the same criteria to evaluate the efforts made by countries, but it took account of their levels of development". E/C.12/1988/SR.23, at 11, para.103.

A differentiation should perhaps be made on between qualitative and quantitative criteria. Whereas it is possible to evaluate State performance on the same qualitative criteria of homelessness for example, the quantitative aspect will vary considerably according to the social and economic position of the country concerned. However it is particularly difficult to separate the two forms of data, particularly as quantitative criteria are dependent upon qualitative assumptions. Moreover it is difficult to imagine that a particular set of considerations can be used universally to describe the notion of poverty for example.

In reality the Committee has not stipulated the use of particular qualitative criteria, such as the P.Q.L.I. for example, but it is assumed that a certain amount of comparison will be made between countries on whatever measure of assessment that a State chooses. For human rights studies using such data *see e.g.*, Park H., "Human Rights and Modernization: A Dialectical Relationship", 2 *Uni.H.R.*, 85 (1980); Dasgupta P., "Well-Being and the Extent of its Realization in Poor Countries", 100 *The Economic Rev.*, No.400, 1 (1990).

<sup>200</sup> *See e.g.* Ratray, E/C.12/1989/SR.19, at 7, para.41.

<sup>201</sup> *See above*, note 59.

<sup>202</sup> Such a view has been criticised by Alston and Quinn, *supra*, note 6, at 178-9.



provided for the purpose.<sup>203</sup> The evaluation of what resources are considered to be available was thus an objective one. The non-absolute nature of State's discretion in this regard has been underscored by the approach of the Committee which has concerned itself to an extent with issues of government expenditure.<sup>204</sup> There is some evidence that members of the Committee will evaluate whether a State is complying with its obligations by assessing whether the proportion of G.N.P. or G.D.P. spent on public services is adequate.<sup>205</sup> However the various demands for public expenditure obviously have to be carefully weighed, a process in which the Committee would seem reluctant to interfere.<sup>206</sup> Its policy has been centred more upon promoting democratic participation in the decision-making process and the prioritisation of action in favour of the vulnerable and disadvantaged.<sup>207</sup>

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<sup>203</sup> A US proposal (E/CN.4/L.54/Rev.1) was to include the words "for their purpose" after "maximum of available resources", to stress that a State is only expected to use "the maximum which could be expended for a particular purpose without sacrificing essential services". Roosevelt (USA), E/CN.4/SR.271, at 3 (1952). The amendment was rejected primarily because of its narrow scope in that it might give governments room to argue that minimal allocations are sufficient. *See e.g.* Santa Cruz (Chile), E/CN.4/SR.271, at 4 (1952).

<sup>204</sup> That the Committee has not made any really clear statement on this point is perhaps due to the extremely sensitive nature of the issue. As the Danish representative said in the drafting of the Covenant, "It would be unrealistic to attempt to dictate to States how they should allocate their resources in that respect". E/CN.4/SR.236, at 20 (1951).

<sup>205</sup> For example one member of the Committee intimated that he felt that an expenditure of only 5% of a State's G.N.P. on social security was inadequate. Neneman, E/C.12/1988/SR.12, at 11, para.52. Comparative analysis is often used to assess the adequacy of expenditure. *See e.g.* Neneman, E/C.12/1989/SR.8, at 9, para.51; *ibid*, 1990/SR.44, at 11, para.51.

<sup>206</sup> *See e.g.* Wimer Zambrano, E/C.12/1991/SR.15, at 3, para.6. It was suggested by an expert from UNDP that if a State allocated 20% of its budget to military expenditure and only 5% to education, there were grounds for thinking that there was a violation of the Covenant, Schulenburg (United Nations Development Programme), E/C.12/1991/SR.21, at 11, para.56. Indeed the UNDP stresses in its 1990 report that "many countries spend a high proportion of their budgets and GDPs on defence, offering great potential for switching resources towards the social sectors", UNDP, Human Development Report 1990, at 76 (1990). Committee members have suggested that this is an area in which the Committee might progress in future, Alston, E/C.12/1991/SR.21, at 11, para.56.

<sup>207</sup> Limburg principle 28 reads:

"In the use of the available resources due priority shall be given to the realisation of rights recognized in the Covenant, mindful of



More clearly, cases where the proportion of a particular State's G.D.P. spent on social and economic services has declined, have been critically examined by the Committee.<sup>208</sup> It has questioned the increase in spending in other sectors such as defence<sup>209</sup> and has implied that where there is no apparent justification for such a reduction the State might be considered to have violated its obligations under the Covenant.<sup>210</sup> Although this may be an appropriate approach, it must be stressed that evaluating State performance solely by input would be misconceived as it fails to take account of the extent to which it was received by the needy. As noted above, the Committee has recognised the need for resources to be utilised in an effective manner.<sup>211</sup>

When assessing the amount of money available it is clear that the Committee is prepared to take into account not only domestic resources but also any international resources that may be used by the State concerned.<sup>212</sup> In addition it is considered that a State is under an obligation to seek international assistance in times of crisis.<sup>213</sup> The issue remains nonetheless as to the circumstances in which a State may refuse international aid.

The Committee however is careful not to allow States to overplay the problems of development.<sup>214</sup> It has adopted the

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the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services."

Supra, note 54, at 26.

<sup>208</sup> See e.g., Alston, E/C.12/1988/SR.17, at 7, para.44.

<sup>209</sup> See e.g., Alston, E/C.12/1988/SR.13, at 2, para.25.

<sup>210</sup> *Ibid.* It is unlikely that the Committee will accept the argument that a government wishes to decrease public expenditure to improve the economy. This might well lead it into collision course with governments that espouse such a philosophy.

<sup>211</sup> See above, text accompanying notes 176-9.

<sup>212</sup> See e.g. Alston, E/C.12/1990/SR.7, at 3, para.7; Simma, *ibid*, SR.11, at 3, para.11. This conforms to paragraph 26 of the Limburg Principles which states:

"'Its available resources' refers to both the resources within a State and those available from the international community through international cooperation and assistance."

Supra, note 54, at 26.

<sup>213</sup> See e.g., Badawi El Sheikh, E/C.12/1988/SR.17, at 9, para.55. Alston argues that this is particularly the case where widespread starvation would otherwise occur. Alston P., "International Law and the Human Right to Food", in Alston P. and Tomasevski K.(eds), The Right To Food, 9, at 43 (1984).

<sup>214</sup> See e.g. Marchan Romero, E/C.12/1990/SR.46, at 8, para.36.



philosophy that economic hardship should bring considerations of economic, social and cultural rights into particular focus. This approach has been forcefully argued by one member of the Committee:

"The Covenant had sometimes been described as a 'good weather instrument' which was a product of the exaggerated optimism of the 1960's about the possibility of sustained economic growth. It was stated to be losing importance because of current world-wide economic conditions. That attitude was based on false reasoning: just as conditions of political unrest constituted the decisive test for the relevance of the International Covenant on Civil and Political Rights, so, in time of economic crisis, the International Covenant on Economic, Social and Cultural Rights should assume its most important function- that of a last ditch defence for the most vulnerable."<sup>215</sup>

As such the Committee has stressed that debt-servicing problems,<sup>216</sup> austerity programmes,<sup>217</sup> economic recession,<sup>218</sup> or simple poverty,<sup>219</sup> although to be considered, can not exempt a State from its obligations under the Covenant. Indeed some members have gone so far as to say that the Committee does not concern itself with matters of economic development.<sup>220</sup> Such an approach has been characterised by two main principles.

First, as was stated by the Committee in its General Comment:

"...even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances."<sup>221</sup>

The assumption that underlies such a position is that in cases such as these, there still remains scope to improve the position of the disadvantaged by more effective and equitable use of existing

<sup>215</sup> Simma, E/C.12/1990/SR.15, at 3, para.7.

<sup>216</sup> *See e.g.*, Texier, E/C.12/1990/SR.21, at 9, para.33.

<sup>217</sup> *See e.g.*, Alston, E/C.12/1990/SR.17, at 7, para.31.

<sup>218</sup> *See e.g.*, Sparsis, E/C.12/1990/SR.15, at 3, para.10.

<sup>219</sup> E/C.12/1990/CRP.1/Add.7, at 12.

<sup>220</sup> *See e.g.*, Alston, E/C.12/1988/SR.10, at 11, para.59.

<sup>221</sup> General Comment No.3, *supra*, note 5, at 86, para.11.



resources.<sup>222</sup> Thus members of the Committee have advocated methods such as taxation<sup>223</sup> and agrarian reform<sup>224</sup> to combat poverty in countries experiencing economic hardship.<sup>225</sup> Indeed one member of the Committee argued that a State could only absolve itself of its responsibility for improving the well-being of the disadvantaged by claiming special circumstances and invoking article 4.<sup>226</sup> Outside the achievement of any substantive progress, the Committee still expects States, as a minimum, to undertake the basic procedural obligations of monitoring the situation, and devising strategies and programmes for the realisation of the rights as provided in General Comment No.1.<sup>227</sup> Undertaking such basic obligations have been considered necessary to demonstrate good faith on the part of the State concerned.<sup>228</sup>

This principle reflects a particular approach to the question of economic development. It seems to be the position of the majority of the Committee that the process of economic growth

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<sup>222</sup> The Committee has expressed significant interest in the question of equality as one of the objectives of the Covenant. *See e.g.* Sparsis, E/C.12/1988/SR.12, at 12, para.63; E/C.12/1990/SR.18, at 13, para.75.

A State experiencing economic difficulties would equally be expected to secure those rights that are not contingent on resources.

<sup>223</sup> *See*, Butragueno, E/C.12/1990/SR.13, at 9, para.43.

<sup>224</sup> *See*, Texier, E/C.12/1990/SR.13, at 9, para.33.

<sup>225</sup> The question of redistribution on a large scale is quite controversial. As a method for realization of economic, social and cultural rights on its own it is criticised on the basis that it "might produce disincentives to production and attendant dislocations to the point where the position of the least advantaged might in fact be lowered instead of raised towards the full-scale implementation of socio-economic rights." Andreassen B-A., Skalmes T., Smith A. and Stokke H., "Assessing Human Rights Performance in Developing Countries: The Case for a Minimum Threshold Approach to the Economic and Social Rights", in Andreassen B-A. and Eide A.(eds), Human Rights in Developing Countries 1987-88, 333 at 342 (1988). Other commentators, recognizing the political sensitivity of full scale redistribution, have argued for a hybrid strategy of redistribution during growth to be implemented in an incremental fashion. *See*, Donnelly J., "Human Rights and Development: Complementary or Competing Concerns?", in Shepherd G. and Nanda V.(eds), Human Rights and Third World Development, 27, at 42-44 (1985).

<sup>226</sup> He continued to remark that the implementation of an austerity programme could not "exempt the government from its responsibility to promote the well-being of the poorest". Alston, E/C.12/1990/SR.17, at 7, para.31.

<sup>227</sup> General Comment No.3, *supra*, note 5, at 86, para.11.

<sup>228</sup> *See*, Alston, E/C.12/1989/SR.3, at 3, para.7. Underdevelopment is not the only cause for special treatment, other cases can be natural disasters and wars. Fofana, E/C.12/1989/SR.4, at 5, para.22.



should be combined with the realisation of human rights.<sup>229</sup> The idea that certain "trade offs" can be made is implicitly rejected.<sup>230</sup> For example in the process of development it is held that economic, social and cultural rights cannot be sacrificed in favour of economic growth.<sup>231</sup> That the Committee has adopted much of this thinking is evident in its General Comment No.2 where it remarked that:

"Adjustment programmes will often be unavoidable and that these will often involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to

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<sup>229</sup> A certain number of the Committee have however questioned whether the protection of economic, social and cultural rights is indeed compatible with economic development. One member, for example commented that:

"The solutions designed to ensure that States fulfilled their obligations under the Covenant were not always suited to the needs of individual countries: in some cases, for instance, the over-protection of economic rights might make the debt problem even worse."

Muterahejuru, E/C.12/1989/SR.2, at 5, para.20. *Cf. also*, Rattray, E/C.12/1989/SR.17, at 17, para.90.

<sup>230</sup> Donnelly identifies "needs", "equality" and "liberty" trade-offs. Simply speaking, the "needs trade-off" is one which justifies high levels of absolute poverty in the short run to minimize the economic and human cost in the long run. The "equality trade-off" recognizes the economic benefits of maintaining income inequality during periods of growth. Finally the "liberty trade-off" sees the suspension of various civil and political rights as being helpful to the establishment of an effective development policy. He argues that such "categorical trade-offs of the conventional wisdom are not merely unnecessary but often harmful to both development and human rights". Donnelly J., *supra*, note 225, at 27-29. *See also*, Goodin R., "The Development-Rights Trade-Off: Some Unwarranted Economic and Political Assumptions," 1 Uni.H.R., 31 (1979).

<sup>231</sup> The idea that benefits from greater growth might "trickle down" to the disadvantaged sectors of the population has been generally dismissed. *See e.g.*, McChesney A., "Promoting the General Welfare in a Democratic Society: Balancing Human Rights and Development", 27 Neth.I.L.R., 283 (1980); Tomasevski, *supra*, note 22, at 153.

The Committee noted in its General Comment No.2 (1990) that "no specific development co-operation activity can automatically be presumed to constitute a contribution to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of "development" have subsequently been recognized as ill-conceived and even counter productive in human rights terms." *Supra*, note 17, para.7.



the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as "adjustment with a human face" requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment."<sup>232</sup>

According to this approach, it is indefensible that the poorer segments of society should suffer most during economic crises.<sup>233</sup> It does operate on the assumption however that economic growth can be achieved without such sacrifices.<sup>234</sup>

The second basic principle underlined by the Committee, which relates closely to the first, is that States are required to provide, as a minimum, for the basic needs of the population.<sup>235</sup> In its General Comment No.3, the Committee stated:

"... the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant."<sup>236</sup>

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<sup>232</sup> General Comment No.2, *supra*, note 17. See also, General Comment No.3, *supra*, note 5, at 86, para.12.

<sup>233</sup> See e.g., Sparsis, E/C.12/SR.15, at 3, para.10.

<sup>234</sup> See, UNICEF Adjustment with a Human Face, Protecting the Vulnerable and Promoting Growth, Cornea G.A., Jolly R., and Stewart F.(eds), (1987). The Committee also implicitly denies the need for a "liberty trade-off". Its recognition of the interdependence of the two categories of rights would lead one to assume that it is no more justifiable to sacrifice civil and political rights for the purpose of development. Thus in its General Comment No.2 it stressed that UN agencies involved in development issues should "do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights". For an analysis of the role of civil and political rights in development see, Howard R., "The Full-Belly Thesis: Should Economic, Social and Cultural Rights Take Priority Over Civil and Political Rights? Evidence From Sub-Saharan Africa", 4 Hum.Rts.Q., 467 (1983).

<sup>235</sup> Sparsis has commented that "no State could use its low level of economic and social development as a pretext for failing to respond to the basic necessities of its population". E/C.12/1987/SR.4, at 2, para.3.

<sup>236</sup> General Comment No.3, *supra*, note 5, at 86, para.10.



It is apparent that this "minimum threshold approach"<sup>237</sup> does not entail the division of the rights according to their priority,<sup>238</sup> but rather that each right should be realised to the extent that provides for the basic needs of every member of society.<sup>239</sup> These minimum standards should be achieved by all States, irrespective of their economic situation, at the earliest possible moment.<sup>240</sup> All available means should be utilised including, if necessary, international assistance.<sup>241</sup>

What is less clear is whether these standards are international or State-specific.<sup>242</sup> The universal nature of the rights in the Covenant suggests that a common core should be established for application internationally.<sup>243</sup> The current practice of the Committee, in requiring States to establish benchmarks of poverty for example, and to identify the disadvantaged sectors of the population, suggests that in the short term at least, State-specific minimums are the only viable options.<sup>244</sup> There is some evidence however, that the Committee intends to establish international standards in future.<sup>245</sup>

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<sup>237</sup> See generally, Andreassen B-A. *et al*, *supra*, note , at 340. Eide A., "Realization of Social and Economic Rights and The Minimum Threshold Approach" 10 *H.R.L.J.*, 35, at 43-47 (1989).

<sup>238</sup> There has been some opposition within the Committee to establishing a category of rights that relate to basic needs on the grounds that it undermines the interdependence of civil and political and economic, social and cultural rights. See e.g. Konate, E/C.12/1990/SR.4, at 5, para.19.

<sup>239</sup> See, Mratchkov, E/C.12/1990/SR.46, at 8, para.37.

<sup>240</sup> Alston has endorsed paragraph 25 of the Limburg principles which reads: "States parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all." E/C.12/1987/SR.19, at 8, para.40.

<sup>241</sup> See, Taya, E/C.12/1990/SR.46, at 9, para.42.

<sup>242</sup> Neneman for example, remarked that "it was rather out of place to speak of water, heating and electricity in relation to Masai huts in Africa" and as such it was not possible to have universal indicators when speaking of economic, social and cultural rights. E/C.12/1990/SR.21, at 10, para.42. Andreassen *et al*, speak of country-specific thresholds "measured by indicators measuring nutrition, infant mortality, disease frequency, life expectancy, income, unemployment and underemployment etc." *Supra*, note 225, at 341.

<sup>243</sup> See Tomasevski, *supra*, note 22, at 151.

<sup>244</sup> See above, text accompanying notes 86-7.

<sup>245</sup> See e.g., Sparsis, E/C.12/1990/SR.4, at 9, para.43.



In its General Comment No.3, the Committee implies that failure to provide for the basic subsistence needs of the population may be considered a *prima facie* violation of the Covenant. This points to an interesting and as yet unexplored aspect of article 2(1).<sup>246</sup> The availability of resources has been seen alternatively as a limit on the obligation of the State to implement the rights in full,<sup>247</sup> or as a conditional factor in determining what the State is obliged to achieve.<sup>248</sup> This is of considerable importance with regard to the question of where the "burden of proof" lies in determining whether or not a State has violated its international obligations.<sup>249</sup> The former view conceives of the non-realization of the rights as a *prima facie* violation for which a defence of lack of resources could be pleaded. The latter sees the obligation itself being contingent upon State resources from which a violation can only be said to have occurred if the State has not taken measures consistent with its resources.

The general approach of the Committee, with its utilisation of national benchmarks and its reluctance to establish actual violations,<sup>250</sup> has been to view the obligations themselves as being contingent upon the presence of resources. It would appear however that this approach has been radically revised by the idea of "minimum core obligations". However, in its General Comment, the Committee goes on to state that "any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the

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<sup>246</sup> See also, Muterahajuru, E/C.12/1990/SR.46, at 11, para.51.

<sup>247</sup> See, Fofana, E/C.12/1989/SR.4, at 5, para.22. Badawi El Sheikh, E/C.12/1987/SR.6, at 9, para.35. Alston commented in this vein that the ICESCR "could be ratified and enter into force even at a time when the government was not fully in compliance with the obligations laid down therein". E/C.12/1988/SR.13, at 5, para.19.

<sup>248</sup> Alston and Quinn have remarked that "It is the state of a country's economy that most vitally determines the level of its obligations as they relate to any of the enumerated rights under the Covenant". *Supra*, note 6, at 177.

<sup>249</sup> The difficulties in assessing the realization of the rights has been recognized by Tomasevski. She maintains that they have increased "by the blurring of the distinction between the *inability* of a government to implement its human rights obligations, and its *breach* of them". *Supra*, note 22, at 137.

<sup>250</sup> One member of the Committee has commented in this respect that "The Committee had not yet established any objective yardstick for determining in respect of any particular country whether or not there had been violations of the Covenant". Rattray, E/C.12/1990/SR.15, at 5, para.21.



country concerned".<sup>251</sup> This seems to imply that the question of resources enters into the discussion at the point of determining whether or not the minimum core obligation has been satisfied. Indeed, the debate within the Committee clearly showed that it was not intended to establish a "presumption of guilt".<sup>252</sup>

It is submitted that there is no way of reading the General Comment (in the light of the preceding debate) as anything but contradictory upon this point. The General Comment clearly mentions the fact that failure to provide for the basic needs of the population would amount to a *prima facie* violation of the Covenant. It goes on to state that:

"... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations".<sup>253</sup>

This must be read as establishing a "presumption of guilt" independent of resource considerations. If otherwise, it becomes pointless to speak of either minimum core obligations or *prima facie* violations.

The clear appeal of this approach is that the Committee avoids the problems of measuring progress against resource availability, of speculating as to alternative courses of action, or of acquiring evidence of State responsibility. In cases where significant numbers of people live in poverty and hunger, it is for the State to show that its failure to provide for the persons concerned was beyond its control.

Nevertheless there are a number of problems not yet explored by the Committee. First, there is the obvious problem of establishing minimum thresholds for the rights that may be operated on an international basis. It remains to be seen whether the Committee has the ability to produce standards of sufficient precision and flexibility. Secondly, in placing the emphasis on "minimum" core obligations for the fulfilment of what might be termed "basic needs", the Committee will primarily direct its attention to the actions of developing States. That the developing States will be treated differently from the developed States may open the Committee to the criticism that it is not being entirely

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<sup>251</sup> *Ibid.*

<sup>252</sup> *See*, Alston, E/C.12/1990/SR.48, at 9, para.43.

<sup>253</sup> General Comment No.3, *supra*, note 5, at 86, para.10.



even-handed. Finally, this approach may obscure the fact that much of the responsibility for poverty and deprivation in the world lies with the developed States' approach to trade and development. In that sense, responsibility should be placed upon the international community and not merely confined to the "victim State".

#### **X) "INDIVIDUALLY AND THROUGH INTERNATIONAL ASSISTANCE AND CO-OPERATION, ESPECIALLY ECONOMIC AND TECHNICAL"**

As we have seen, the need for international assistance is already foreseen to some extent by the idea that "available resources" in article 2(1), refers not merely to national resources but also international ones.<sup>254</sup> There seems to be a general understanding that the full realisation of economic, social and cultural rights in developing countries, is to some extent dependent upon the provision of international assistance.<sup>255</sup> Although the primary obligation must be seen to be upon the State to do everything within its power to realise the rights within the

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<sup>254</sup> At a textual level this has parallels with articles 11(1), 11(2), 22 and 23. Article 11(1) provides that States recognize the importance of international co-operation based on free consent in the realisation of the rights to adequate food, clothing, housing and the continuous improvement of living conditions. Article 11(2) requires that States take measures individually and through international co-operation, towards the realization of the right to be free from hunger. Article 22, although primarily a procedural provision, recognises the role of United Nations organs and specialized agencies in the provision of technical assistance to States parties. Finally article 23 provides that the States Parties agree that the achievement of the rights recognised in the Covenant includes *inter alia* the furnishing of technical assistance.

Such provisions specify little beyond the requirements for co-operation and technical assistance referred to in article 2(1). As noted earlier, the reiteration of passages from article 2(1) in the substantive articles following has no specific consequence. On a broad reading of article 2(1) then, it would follow that these references add little to the existing State obligations.

<sup>255</sup> This seems to have been the concern of the drafters in including the provision on international co-operation. Cassin commented in this respect:

"[B]y providing for recourse to international co-operation instead of allowing the enjoyment of certain rights to be put off, it filled the gap between what States could in fact do and the steps they would have to take to meet their obligations under the Covenant."

E/CN.4/SR.216, at 6 (1951).



Covenant,<sup>256</sup> it is recognised that lack of resources might oblige some States to look to the international community for assistance to that end.<sup>257</sup>

Although there seems to be agreement that the rights in the Covenant are contingent to a degree, on the provision of international assistance, the nature, scope and obligatory nature of such assistance is unclear. The Committee, in its General Comment No.3 has done little in the way of elaborating upon the nature of the obligation. It states:

"The Committee wishes to emphasise that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international co-operation for development and thus for the realisation of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognised therein. It emphasises that, in the absence of an active programme of international assistance and co-operation on the part of all those States that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries."<sup>258</sup>

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<sup>256</sup> The Mexican representative noted during the drafting of the Covenant that:

"Economic development had to be based above all on the rational and efficient use of a country's own resources and on the hard work of the people; international economic assistance could only be supplementary and was mainly a means of counter-acting economic maladjustments arising from external causes".

Mexico (Mr De Santiago Lopez), E/CN.4/SR.1204, at 346, para.20, (1962).

<sup>257</sup> The mere lack of international assistance however does not excuse a State from its obligation to take steps towards the realization of the rights. *See above*. The Chilean representative in the drafting of the Covenant, whilst noting that international assistance might be necessary for accelerated development, added that States were "obliged to take steps individually- whether or not international assistance was forthcoming". E/CN.4/SR.1203, at 342, para.11 (1962).

<sup>258</sup> General Comment No.3, *supra*, note 5, at 87, para.14.



Article 55 of the U.N. Charter specifies as one of the purposes of the United Nations the promotion of "higher standards of living, full employment, and conditions of economic and social progress and development".<sup>259</sup> Under article 56, member States pledge themselves "to take joint and separate action in co-operation with the organization" to this end. These principles have been further expanded in the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations".<sup>260</sup> Not only is the Charter vague as to the meaning of international co-operation, but the Declaration does not seem to elucidate much further.<sup>261</sup> All that might be concluded from the provisions of the Charter is that "there is a clear commitment to do something for the achievement of the purposes mentioned in article 55; there is certainly no right to do nothing".<sup>262</sup>

It is apparent from the discussion prior to the adoption of the General Comment, that it was felt mention should be made of the Declaration on the Right to Development<sup>263</sup> as reflecting the context in which economic, social and cultural rights are to be

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<sup>259</sup> Article 1(3) of the Charter similarly states as one of the main purposes of the United Nations "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character".

<sup>260</sup> GA Resn.2625 (XXV), (Oct.24 1970) 25 UN GAOR, Resns, Supp.(No.28), (1970).

<sup>261</sup> Although expanding in greater detail the areas in which co-operation is required, including in particular human rights, it does not elucidate the nature or the scale of co-operation envisaged. Arangio-Ruiz comments that the provisions in the Declaration are purely "reiterations in different words of the statement that States should co-operate." Arangio-Ruiz G., The UN Declaration on Friendly Relations and the System of the Sources of International Law, at 143 (1979). Alston and Quinn conclude that the Declaration "attests implicitly to the absence of any consensus among States as to the precise meaning of the duty to co-operate." Alston and Quinn, *supra*, note 6, at 188.

<sup>262</sup> Verwey W., The Establishment of a New International Economic Order and the Realization of the Right to Development and Welfare, at 22 (1980). *See also*, Van Hoof F., "Problems and Prospects with Respect to the Right to Food", in Van Dijk P. *et al.* (eds), Restructuring the International Economic Order: The Role of Law and Lawyers, 107, at 117 (1987).

<sup>263</sup> *See*, The Declaration on the Right to Development, GA Resn.41/128, (Dec.4 1986), . For recent studies on the right to development *see*, Van Boven T., "Human Rights and Development- Rhetorics and Realities", in Nowak M., Steurer D. and Tretter H.(eds), Festschrift für Felix Ermacora, 575 (1988); Türk D., "The Human Right to Development", in Van Dijk P., Van Hoof F., Koers A. and Mortelmans K.(eds), Restructuring the International Economic Order: The Role of Law and Lawyers, 85 (1986); Rich R., "The Right to Development: A Right of Peoples?", in Crawford J., The Rights of Peoples, 39 (1988).



achieved.<sup>264</sup> The Committee would thus appear to be concerned about the international structural constraints that impede the full realisation of all human rights, and recognises the existence of a link between the requirement of international assistance in the Covenant, and the demands for a New International Economic Order.<sup>265</sup> As was remarked by one member of the Committee, "such phenomena as extreme poverty were not produced in a vacuum but reflected a particular international economic situation".<sup>266</sup> However, beyond being a broad indication of the Committee's general approach, the reference to the Right to Development does little to elucidate the precise obligations incumbent upon States parties pursuant to the duty to co-operate internationally.

Article 2(1) speaks of "international assistance and co-operation, especially economic and technical". It is not clear whether the terms "assistance" and "co-operation" have discrete meanings. Neither is it obvious whether the terms "economic and technical" refer to both forms of international action or merely to "co-operation". The Committee has not attempted to explain the phrase. It is submitted that "co-operation" is the wider term providing for mutual action directed towards a common goal (including mutual-assistance), whereas "assistance" implies the provision or transfer of some "good" from one State to another. Action, whether co-operation or assistance, in the economic and technical fields, would appear to be desirable but does not exclude the possibility of other forms of international co-operation.

Article 23 provides an indicative definition of the international action foreseen by article 2(1). It includes "the

<sup>264</sup> See e.g. Mratchkov, E/C.12/1990/SR.46, at 8, para.39.

<sup>265</sup> The Mexican representative commented for example, during the drafting process, that what was required of international co-operation was "permanent international machinery for preventing sudden and excessive fluctuations in the prices of primary commodities, which could be disastrous for the developing countries". Santiago Lopez (Mexico), E/CN.4/SR.1204, at 346, para.20 (1962). See generally, Ferrero R., The New International Economic Order and the Promotion of Human Rights, E/CN.4/Sub.2/1983/24/Rev.1.

Paragraph 3 of the Declaration on the Establishment of a New International Economic Order reads:

"The political, economic, and social well-being of present and future generations depends more than ever on co-operation between all the members of the international community on the basis of sovereign equality and the removal of the disequilibrium that exists between them".

GA Resn.3201 (S-VI), (May 1 1974),

<sup>266</sup> Konate, E/C.12/1990/SR.21, at 4, para.3.



conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study".<sup>267</sup> Although all of these matters are of relevance to article 2(1) (especially the need for technical assistance), there is no mention of the most fundamental form of action, namely economic assistance.

The precise nature of the obligations in this field may be usefully analysed by reference to the tripartite typology shown above.<sup>268</sup> It may be seen that the obligations to respect, protect and ensure operate at the international level just as they do at the national level.<sup>269</sup> Thus States could be said to have an initial duty to restrain themselves from any action that might impede the realisation of economic, social and cultural rights in other countries.<sup>270</sup> The Committee has underlined such an obligation,<sup>271</sup> particularly in relation to the work of the international lending agencies. Thus, in its General Comment No.2, the Committee addressed itself to the issue of the adverse effects of structural adjustment programmes, imposed by the international lending agencies, on the realisation of human rights. In particular it commented in paragraph 9 that "international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, *inter alia*, international co-operation".<sup>272</sup> In as far as the international community as a whole has an obligation to take cognisance of human rights in its interactions, it is axiomatic that States Parties have a similar duty to respect the realisation of the rights in other countries.

With regard to the duty to protect, States would have a duty to ensure that all other bodies subject to its control, respect the

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<sup>267</sup> Other references to international action may be found in articles 11(2) and 23.

<sup>268</sup> See above, text accompanying notes 20-46.

<sup>269</sup> Eide, *supra*, note 14, at 40; Alston, *supra*, note , at 43-45.

<sup>270</sup> This might operate at the level of respecting the self-determination of other peoples and their sovereignty over natural resources. Eide also includes respect for shared resources and access to a global pool of scientific endeavour. *Ibid*, at 41-42.

<sup>271</sup> A duty to respect the realization of the rights in other countries was mentioned by Mr Eide in his address to the Committee at its third session. E/C.12/1989/SR.20, at 10, para.41. It was endorsed by at least one member of the Committee. See e.g. Alvarez-Vita, E/C.12/1989/SR.21, at 8, para.30.

<sup>272</sup> General Comment No.2, *supra*, note 17, at 88-89, para.9.



enjoyment of rights in other countries. Thus it has been suggested that States have a duty to regulate the action of domestically-based corporations to ensure respect for the rights in other countries.<sup>273</sup> Although the Committee has paid little attention to the activities of such corporations,<sup>274</sup> it has recognised this form of obligation as regards the international lending agencies. In its General Comment No.2, where the Committee stressed the need for lending agencies to respect the basic rights of the population, it addressed not just the lending agencies themselves, but also the States parties to the Covenant that participate in, and support the work of those agencies.<sup>275</sup> Similarly, in its reporting guidelines, the Committee requests States to indicate whether any effort is made to ensure that when participating in development co-operation, it is used to promote the realisation of economic, social and cultural rights.<sup>276</sup>

By far the most controversial issue with regard to the issue of international co-operation is that which relates to the obligation to fulfil. This is often posited in terms of whether there exists an obligation on the part of the more wealthy States to give aid to the less affluent countries. During the drafting of the Covenant, Chile claimed that "international assistance to under-developed countries had in a sense become mandatory as a result of commitments assumed by States in the United Nations".<sup>277</sup> This was almost universally opposed by the other representatives of all the groupings involved.<sup>278</sup> The agreed sense of the provision on

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<sup>273</sup> Alston, *supra*, note , at 44. For the effect of such corporations *see*, Andersen-Speekenbrink C., "The Legal Dimension of socio-cultural effects of private enterprise", in De Waart P., Peters P. and Denters E.(eds), International Law and Development, 283 (1988).

<sup>274</sup> *But see*, Wimer Zambrano, E/C.12/1989/SR.21, at 8, para.32.

<sup>275</sup> General Comment No.2, *supra*, note 17.

<sup>276</sup> Reporting Guidelines, *supra*, note 195.

<sup>277</sup> E/CN.4/SR.1203, at 342, para.10 (1962).

<sup>278</sup> *E.g.* Greece, U.N. Doc. A/C.3/SR.1204, at 346, para.14 (1962); USSR, U.N. Doc. A/C.3/SR.1203, at 342, para.14 (1962); Saudi Arabia, U.N. Doc.A/C.3/SR.1203, at 341, para.5 (1962); France, U.N. Doc. A/C.3/SR.1205, at 352, para.12 (1962). A similar debate arose over the Declaration on the Right to Development. Many of the Western States voted against or abstained from voting *inter alia* because of the implication that development was to be achieved through the transfer of resources from the developed to the developing world. *See e.g.* statement of the U.K. on behalf of the European Community:

"While the circumstances of the developing countries have prompted many aid initiatives on their behalf, this does not at



international economic co-operation was that developing States were entitled to ask for assistance but not claim it as a legal right.<sup>279</sup> The text of article 11 bears out this conclusion. In recognizing the role of international co-operation in the realization of the rights, it stipulates that it should be based upon "free consent".<sup>280</sup>

Nevertheless, members of the Committee have stressed that it was not enough for States to refrain from action that injured other States, they should also make positive efforts to promote the realization of economic, social and cultural rights.<sup>281</sup> This does not mean that developed States are required to meet the needs of the poorer States,<sup>282</sup> but rather that they are under a duty to provide some form of assistance to the developing world.

In practice, questions have been asked of Sweden,<sup>283</sup> Norway,<sup>284</sup> the Netherlands<sup>285</sup> and Czechoslovakia<sup>286</sup> as to the extent of their co-operation with other countries. Members of the Committee have also questioned the adequacy of some aid programmes.<sup>287</sup> There is no evidence, however, that the Committee expects a specific form of aid to be given, nor does it

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present confer to them a "right" in the strict sense of the word. Instruments such as the international development strategy provide a framework for international action but constitute guidelines rather than legally binding obligations".

UN Doc.A/41/536, at 16, para.13 (1986).

<sup>279</sup> Paragraph 33 of the Limburg principles maintains that international co-operation and assistance should be based on the sovereign equality of States.

<sup>280</sup> There is sound reasoning behind this position. On the one hand it would be a breach of sovereignty on the part of the wealthy State to be required to provide aid to a particular country. On the other hand the recipient State should not be obliged to accept aid if the aim of the donor country was to exploit the relationship to its own economic advantage. This point was made by the representative of the Congo during the drafting of the Covenant. U.N. Doc.A/C.3/SR.1181, at 237, para.30 (1962).

<sup>281</sup> See, Alvarez Vita, E/C.12/1989/SR.21, at 8, para.30.

<sup>282</sup> See, Alston, E/C.12/1990/SR.22, at 14, para.87; Muterahjuru, E/C.12/1990/SR.46, at 11, para.52.

<sup>283</sup> See, Muterahjuru, E/C.12/1988/SR.10, at 7, para.28.

<sup>284</sup> See, Alston, E/C.12/1988/SR.13, at 12, para.69.

<sup>285</sup> See, Muterahjuru, E/C.12/1989/SR.14, at 15, para.62.

<sup>286</sup> See, Muterahjuru, E/C.12/1987/SR.14, at 12, para.38.

<sup>287</sup> See e.g. Muterahjuru, E/C.12/1989/SR.12, at 12, para.67.



prescribe to whom that aid should go.<sup>288</sup> More attention seems to have been placed upon the utilisation of aid once it is received.<sup>289</sup> Indeed the reporting guidelines merely request information as to the role of international assistance in the full realisation of the rights (with the exception of article 8).<sup>290</sup>

It is apparent that the current practice in the provision of aid to developing countries is quite unsatisfactory from the point of view of the realisation of economic, social and cultural rights. First, in terms of the quality of aid, considerable proportions of world aid go to middle- and high-income countries; many "aid programmes" have a tenuous link with development; and much aid is "tied" to the donor country either in the sense of being conditional upon the operation of a trade agreement or being linked to the donor country's own firms and exporters.<sup>291</sup> Secondly, in terms of the quantity of aid, few developed States have actually achieved the widely accepted ODA target of 0.7% of GNP. In fact in a number of developed countries official aid is less than half that figure.

Whilst there would appear to be considerable scope for strengthening States' external obligations in light of these facts, it is an area in which States are unlikely, in the foreseeable future, to agree to specific demands on the amount or distribution of aid to third countries. It is considered, nevertheless, that the Committee should begin by looking in more detail at the amount of aid provided, and at the manner in which it is distributed. It does not have to do so with a view to setting immediate standards but rather as an indication of its concern. If it does wish to start imposing indicative criteria as to the amount of aid that should be provided by developed states, note could be made of the comments of the World Bank in its 1990 report:

"Real growth in aid of only 2 percent a year is an unacceptably weak response to the challenge of global poverty. The international community needs to do better- much better. At a minimum, it should ensure

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<sup>288</sup> Shelton argues however, by reference to human rights instruments and general principles of law, that there is a duty on States to provide famine assistance and contribute to a global food reserve system in the long run. Shelton D., "The Duty to Assist Famine Victims", 70 *Iowa L.Rev.*, 1279 (1984-5). Cf. MacCalister-Smith P., *International Humanitarian Assistance*, 67-9 (1985).

<sup>289</sup> See e.g., Taya, E/C.12/1990/SR.46, at 9, para.42.

<sup>290</sup> Reporting guidelines, *supra*, note 195, at 91, 94, 96, 99, 103, 106, 107, 108, and 110.

<sup>291</sup> World Bank (IBRD), *World Development Report 1990*, 127-8 (1990).



that aid does not fall as a proportion of the donors' GNP."<sup>292</sup>

Indeed, even given the vague nature of the obligation to co-operate internationally, it would be a clear signal to the Committee that a State was not committed to its obligation to assist other States, if the amount of aid it provides to other States declines over a number of years.

## **XI) CONCLUSION**

Article 2(1) was adopted principally as a compromise proposal satisfying those who wished to establish binding State obligations as regards the economic, social and cultural rights in the Covenant, whilst having the necessary flexibility to take into account the resource constraints that might impede the immediate full realisation of the rights. It is, however, a fairly unsatisfactory article in so far as the convoluted nature of its phraseology, in which clauses and sub-clauses are combined together in an almost intractable manner, makes it virtually impossible to determine the precise nature of the obligations. It is hardly surprising that most commentators focus merely upon the phrase "with a view to achieving progressively the full realisation of the rights", whilst ignoring for the most part, the other phrases that accompany it.

However, given that article 2(1) is central to the definition of State obligations with respect to the rights in the Covenant, it is the key, not only to the implementation of the substantive articles but also to the role of the Committee as a supervisory body. Any progress made by the Committee in developing the value of the Covenant as a human rights guarantee is conditional upon a clear understanding of the precise nature of the State obligations found in article 2(1).

The Committee was quick to recognise this fact and fairly early on, with the assistance of the influential Limburg principles, came to an understanding as to the broad obligations found in article 2(1). This interpretation, which has been encapsulated in its General Comment No.3, has provided the framework for all of its work since. The general comment states a number of important principles upon which State action should be based.

In summary, the Committee has considered that States are required to take immediate, deliberate, concrete and targeted steps towards the realisation of the rights. Whilst legislation is often highly desirable and sometimes indispensable, it is not sufficient in itself to dispose of State obligations with respect to the Covenant.

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<sup>292</sup> *Ibid*, at 136.



In particular, emphasis should be placed upon the provision of judicial remedies at the national level. States will, however, be given a degree of discretion in the deciding what steps are deemed to be appropriate. Notwithstanding the progressive nature of the obligation, States are required to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights. Similarly, in times of resource scarcity, States are under an obligation to strive for the widest possible enjoyment of the relevant rights with particular emphasis being placed upon the position of vulnerable members in society. Finally the Committee has emphasised the obligation upon States to co-operate internationally towards the full realisation of the rights.

Whilst the General Comment provides a useful textual analysis and draws a conceptual picture of the state obligations as regards the rights in the Covenant, the principles remain generalised and require considerable more detail for it to be possible to predict, in a given situation, whether or not a State is complying with its obligations under the Covenant. It is clear that the Committee should not be unduly prescriptive, but it needs to be in a position whereby it is able to evaluate whether or not a State has taken the appropriate course of action, and whether it has done so to the utmost extent of its resources.

Particular problems that are immediately apparent are those of defining and enforcing the minimum core content of the rights and determining when a State has taken sufficient measures to dispose of its obligations under the Covenant. First, as regards the minimum core content of the rights, it remains to be seen whether the Committee has the ability to produce standards of sufficient precision and flexibility to take into account the different situations world-wide. It might also be questioned whether instituting such a standard will not, in fact, serve to focus the Committee's attention on the activities of the less affluent countries whilst at the same time ignoring the position of the wealthy States.

Secondly, the Committee faces considerable technical difficulties in evaluating whether or not a State has taken the appropriate course of action. Not only does it have to find a way of accurately measuring progress as regards the enjoyment of the rights (particularly at the individual level), but it also has to determine whether or not that progress was adequate. It is clear that to intervene at this stage, the Committee will have to consider the possible alternative courses of action open to the State (including the allocation of resources) and weigh up the competing priorities without becoming entirely prescriptive.



## CHAPTER THREE: THE DOMESTIC VALIDITY AND DIRECT EFFECT OF THE COVENANT

### D) INTRODUCTION

The fundamental aim of all human rights treaties is to ensure the operation of the standards they contain within the municipal legal orders of the States parties. Although much emphasis is commonly placed upon the international supervisory mechanisms, as far as the individual is concerned, the primary consideration will be the extent to which the treaty has effect within the domestic legal system.<sup>1</sup> Ideally, international treaty standards should operate within the domestic legal system, and should be enforceable through judicial remedies.<sup>2</sup> However, in many cases, the principle of legislative sovereignty interposes between the ratification and implementation of treaty obligations with the effect of limiting the degree to which the individual may rely upon those international standards in domestic courts. State practice illustrates that the supremacy of the legislative body is ensured either through rules which restrict the operation of international law in domestic courts *ab initio*, or through rules that distinguish between treaty obligations that require further legislative implementation and those that may be relied upon by the courts directly. Whereas the former rules relate to the domestic validity of treaties, the latter relate to the direct effect of treaty provisions.<sup>3</sup> Each matter will be dealt with separately below.

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<sup>1</sup> Brudner A., "The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework", 35 Uni.Toronto L.J. 219, at 220 (1985); Opsahl T., "Human Rights Today: International Obligations and National Implementation", 23 Scand.Stud.L., 149, at 153 (1979); Leary V., International Labour Conventions and National law, 36 (1982).

<sup>2</sup> As Tomuschat has commented:

"...the standards elaborated at the international level should be conveyed without any substantial loss to the national level where human beings are in need of the kind of protection which the relevant international instruments purport to provide to them. Failing reliable channels and devices for such a transmission, human rights risk being reduced to purely political rhetoric".

Tomuschat C., "National Implementation of International Standards on Human Rights", Can.H.R.Y., 31, at 32 (1984/5).

<sup>3</sup> For a distinction between these concepts see, Winter J.A., "Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law", 9 C.M.L.R., 425 (1972).



## II) DOMESTIC VALIDITY

### A) DOMESTIC VALIDITY GENERALLY

According to the principle of *pacta sunt servanda*, States parties are under a legal obligation to perform their treaty obligations in good faith.<sup>4</sup> The requisite changes to domestic law therefore should be made on, or prior to, ratification of the treaty concerned. This is an obligation of result which allows each State a measure of discretion as to the means by which the treaty obligations are to be given effect in domestic law.<sup>5</sup> The State may not, however, invoke domestic law as an excuse for avoiding its international obligations.<sup>6</sup>

If a treaty becomes international law for a State upon ratification of or accession to that treaty, it does not necessarily become domestic law. That ratification or accession may be "only one condition of its validity".<sup>7</sup> There are a number of methods by which a treaty might be given domestic effect, but little accepted terminology with which to describe each one. Perhaps the clearest typology is that adopted by Van Dijk who identifies three basic means of giving effect to treaties on the domestic plane: adoption, incorporation and transformation.<sup>8</sup>

In States that operate a system of "adoption" (otherwise known as "automatic incorporation"<sup>9</sup>), international law is treated as part of the same legal order as national law in accordance with the "monist view".<sup>10</sup> Accordingly, treaty provisions automatically become operative in domestic law through the operation of some constitutional provision,

<sup>4</sup> See, article 26, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969). See also, Exchange of Greek and Turkish Populations Case (Advisory Opinion), P.C.I.J.Rep., Series B, No.10, 20-21 (1925).

<sup>5</sup> Van Dijk P., "Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary- The Dutch Case", in Nowak M., Steurer D. and Tretter H.(eds), Progress in the Spirit of Human Rights, 634 (1988); Schachter O., "The Obligation to Implement the Covenant in Domestic Law", in Henkin L.(ed), The International Bill of Rights, 311 (1982).

<sup>6</sup> Article 27, Vienna Convention.

<sup>7</sup> Holloway K., Modern Trends in Treaty Law, 248 (1967).

<sup>8</sup> Van Dijk, *supra*, note 5, at 634.

<sup>9</sup> Sorensen M., "Obligations of a State Party to a Treaty as Regards its Municipal Law", in Robertson A.(ed), Human Rights in National and International Law, 11, at 14 (1968).

<sup>10</sup> On "monism" and "dualism" in international law see, Brownlie I., Principles of Public International Law, 32-34 (4th Ed 1990).



yet maintain their international character.<sup>11</sup> This is to be seen in the case of France,<sup>12</sup> Belgium,<sup>13</sup> the Netherlands<sup>14</sup> and the US<sup>15</sup>.

A number of other States (Germany<sup>16</sup> and Italy<sup>17</sup> for example), operate a similar system of adoption but require, in addition, the approval of the legislative body or an "order of execution" prior to ratification. This is often referred to as a system of "quasi-automatic incorporation".<sup>18</sup> The legislative approval has been seen to have two functions: it authorises the government to commit the State to the treaty obligations, and it simultaneously transforms or incorporates the terms into the domestic legal system.<sup>19</sup> As in States applying the system of adoption, whether or not those provisions will be applied as domestic

<sup>11</sup> It has to be noted however, that even in cases of "adoption", certain treaties may nevertheless require legislative implementation to be put into effect. These are commonly called "non-self-executing" treaties.

<sup>12</sup> See, de la Rochère J., "France", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 39 (1987).

<sup>13</sup> Maresceau M., "Belgium", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 1 (1987).

<sup>14</sup> See generally, Schermers H.G., "Netherlands", in Roberts S. and Jacobs F.(eds), The Effect of Treaties in Domestic Law, at 109 (1987); Van Dijk, *supra*, note 5, at 631; Erades L. and Gould W., International Law and Municipal Law in the Netherlands and in the United States, 297 (1961).

<sup>15</sup> See generally, Jackson J., "United States of America", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 141 (1987); Iwasawa Y., "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis", 26 V.J.I.L., No.3, 627 (1986); Burke K., Coliver S., De La Vega C. and Rosenbaum S., "Application of International Human Rights Law in State and Federal Courts", 18 Tex.I.L.J. 291 (1983); Erades and Gould, *supra*, note 14, at 297; Leary, *supra*, note 1, at 55.

<sup>16</sup> Frowein J., "Federal Republic of Germany", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 63 (1987).

<sup>17</sup> Gaja G., "Italy", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 87, at 103 (1987); La Pergola A. and Del Duce P., "Community Law, International Law and the Italian Constitution", 79 A.J.I.L., 598 (1985).

<sup>18</sup> Leary, *supra*, note 1, at 37. It should be noted that such States are principally "dualist" in their approach, yet operate very similarly to States with "monist" systems. See, Morgenstern F., "Judicial Practice and the Supremacy of International Law", 27 B.Y.I.L., 42 (1950).

<sup>19</sup> Van Dijk, *supra*, note 5, at 635; Frowein, *supra*, note 16, at 65. Seidl Hohenveldern notes however that the approval of a treaty before ratification cannot give the treaty domestic validity as "that treaty obviously cannot produce effects in the municipal sphere before it becomes valid internationally". Seidl Hohenveldern I., "Transformation or Adoption of International Law into Municipal Law", 12 I.C.L.Q., 88, at 105 (1963).



law (in other words have "direct effect"), will depend upon their "self-executing" character.

In the case of States that act strictly upon a "dualist view" of international law, treaties as such have no validity in domestic law, although they might be relevant to the interpretation of statutes or the development of the common law.<sup>20</sup> The treaty provisions must be either incorporated or transformed into the domestic legal system and applied as national law. Whereas in cases of incorporation, the treaty provisions become part of domestic law as they stand,<sup>21</sup> in cases of transformation the treaty provisions are translated into terms of domestic law. This may be done by amending or supplementing existing legislation without specific reference to the relevant treaty provisions.<sup>22</sup> In States that operate on this basis, such as the UK<sup>23</sup> or Denmark,<sup>24</sup> consideration will be given to the nature and effects of the treaty concerned in deciding whether it should be incorporated or transformed.<sup>25</sup>

The theoretical issues encompassed by the monist-dualist debate have given rise to a tendency to overstate the differences between the

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<sup>20</sup> In the UK *see*, Garland v. British Rail Engineering Ltd., [1983] 2 A.C. 751, at 771, Diplock L.J.:

"The words of a statute passed after the treaty has been signed and dealing with the subject matter of the international obligation of the United Kingdom are to be construed, if they are capable of bearing such a meaning, as intended to carry out the obligation, and not to be inconsistent with it."

The Courts will thus presume that Parliament intended to legislate in conformity with the UK's international obligations. However, they will only have recourse to the text of the treaty concerned, in cases where domestic legislation is ambiguous. *See*, R v. Sec. of State for the Home Department, ex Parte Brind, [1991] 1 A.C. 696, at 747-748 (Lord Bridge).

<sup>21</sup> *See e.g.*, The UK Merchant Shipping (International Labour Conventions) Act, 1925, 15 & 16 Geo.5 c.57, which reproduces two International Labour Conventions in its Schedules.

<sup>22</sup> *See e.g.*, The UK Maritime Conventions Act, 1911, 1 & 2 Geo.5 c.57, which was entitled "An Act to amend the law relating to Merchant Shipping with a view to enabling certain Conventions to be carried into effect".

<sup>23</sup> Mann F., Foreign Affairs in English Courts, (1986); Higgins R., "United Kingdom", in Jacobs F. and Roberts S. (eds), The Effect of Treaties in Domestic Law, 123 (1987); Roodt C., "National Law and Treaties: An Overview", 13 S.A.Y.I.L., 72, at 82 (1987/8).

<sup>24</sup> Gulmann C., "Denmark", in Jacobs F. and Roberts S., The Effect of Treaties in Domestic Law, 29 (1987).

<sup>25</sup> The language and form of the agreement, and the coverage of existing domestic law will be of importance.



various means of giving effect to treaties.<sup>26</sup> On the one hand, in systems of adoption, if the treaty is considered to be non-self-executing, implementing legislation will be essential. On the other hand, even in dualist systems where transformation may be the norm, it is not uncommon for treaties to be incorporated wholesale into domestic law. An incorporated treaty will only differ from one that is adopted in so far as it will take the form of domestic law.<sup>27</sup>

It would appear that for the implementation of a treaty, the constitutional approach of a particular State may pose a significant obstacle. The system of transformation has been specifically criticised in this respect. It is asserted that the transformation process allows the State to avoid implementing the provisions of the treaty concerned and as such is "incompatible with good faith in international treaties".<sup>28</sup> Moreover, transformation may in effect render international guarantees negligible through distorting the nature and purpose of the treaty provisions, and by leaving the implementation to the vicissitudes of domestic rules that may, or may not, give the individual the exact legal position which the treaty intended to grant him or her.<sup>29</sup> It has been noted, in the context of international human rights law, that domestic implementation assumes importance principally when a disparity exists between international law and municipal law. As such, the process of transformation "seems to render international guarantees powerless precisely when they are needed most".<sup>30</sup>

However, as Leary has pointed out, "national governments have been slow to perceive that automatic incorporation does not guarantee effective national application of treaties".<sup>31</sup> Even where a treaty has been adopted, its judicial enforcement will remain dependent upon the

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<sup>26</sup> See e.g., Jacobs F., "Introduction", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, at xxiv-xxvi, (1987).

<sup>27</sup> This might have significance with respect to human rights treaties in that the supervisory bodies may seek to develop the substantive content of the treaties themselves.

<sup>28</sup> Pescatore P., "Conclusion", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 282, (1987).

<sup>29</sup> Winter, *supra*, note 3, at 431.

<sup>30</sup> Brudner, *supra*, note 1, at 223. States may repair such incompatibility through the enactment of further amending legislation. A case in point would seem to be the UK Contempt of Court Act 1981, which was introduced, in part, as a response to the European Court of Human Right's finding in the Sunday Times Case, Eur.Court H.R., Series A, Vol.30, Judgement of 26th Apr.1979, (1979-80) 2 EHRR 245. It might be noted however that subsequent changes in the law do nothing to remedy the initial violation.

<sup>31</sup> Leary, *supra*, note 1, at 3.



attitude of the courts. Only in cases where the treaty is seen to be self-executing or directly-effective, will the individual be able to rely upon its provisions to seek judicial remedies. The role of the courts is also crucial in cases of transformation. There, it is open to the courts to interpret national legislation in light of the State's international obligations to the degree that the deficiencies of the transformation process may largely be overcome. That this has not occurred in practice is principally due to the conservatism of the courts concerned.<sup>32</sup>

Notwithstanding the State-specific nature of the implementation systems, it is apparent that States may commit themselves to a particular method of incorporation with respect to a particular treaty or a particular system of international law. Thus, according to the European Court of Justice, the relationship between Community law and the legal orders of Member States, is of a monist nature.<sup>33</sup>

## B) THE DOMESTIC VALIDITY OF THE COVENANT

The Covenant does not provide for any specific means by which it should be given the force of law in the domestic legal system. Attempts to include a specific provision in the draft Covenant (when it was a single document) providing that it should be considered non-self-executing, were resoundingly defeated.<sup>34</sup> This did not mean that there was an obligation to incorporate the Covenant, rather "[i]t simply confirmed the prevalent view that the question of incorporation *vel non* should be left to national law subject only to the requirement that parties fulfil their obligations under the Covenant".<sup>35</sup> Commentators are almost unanimous in their opinion that the ICCPR entails no obligation

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<sup>32</sup> For example in the Brind Case, the UK House of Lords were arguably unduly restrictive in deciding that the ECHR could not control the exercise of executive discretion. *Supra*, note 20.

<sup>33</sup> See, Van Gend En Loos, Case (26/62), [1963] E.C.R., 1 at 12.

<sup>34</sup> See, Jhabvala F., "Domestic Implementation of the Covenant on Civil and Political Rights", Neth.I.L.R., 461, at 463-4 (1985); Schachter O., *supra*, note 5, at 313-314.

<sup>35</sup> Schachter, *supra*, note 5, at 314.



to incorporate its provisions in domestic law.<sup>36</sup> There is nothing in the terms of the ICESCR to suggest that it should be any different.

The practice of States in giving effect to the Covenant's provisions in domestic law is mixed.<sup>37</sup> In a number of States, such as Sweden,<sup>38</sup> Canada,<sup>39</sup> the UK,<sup>40</sup> the Covenant has been "transformed" by amending and supplementing, if necessary, existing legislation prior to ratification. In other cases however, the Covenant, as an international treaty, has been adopted into domestic law. This appears to be the situation *inter alia* in Afghanistan,<sup>41</sup> Costa Rica,<sup>42</sup> Ecuador,<sup>43</sup>

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<sup>36</sup> See e.g., Schachter, *supra*, note 5, at 313; Jhabvala, *supra*, note 34, at 463; Tomuschat, *supra*, note 2, at 39; Graefrath B., "How Different Countries Implement International Standards on Human Rights", *Can.H.R.Y.*, 3, at 8 (1984/5). The position seems to be the same with respect to the European Convention on Human Rights. Thus in the Swedish Engine Drivers' Case, Eur.Court H.R., Series A, Vol.20, Judgement of 6 Feb.1976, (1979-80) 1 EHRR 637, the Court stated: "...neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention".

<sup>37</sup> In the majority of cases, States have not provided sufficient information to answer even this very basic question.

<sup>38</sup> In Sweden, the courts or other judicial authorities can only apply international instruments if they have been incorporated into Swedish law by an act of Parliament or, in rare cases, by a special law. However, the normal method is to amend or rectify the legislation in force to ensure that it is in conformity with the instrument in question. The ICESCR had not been incorporated as such, and on ratification, the relevant legislation had been reviewed and no major adjustments had been deemed necessary since the provisions of the Covenant were already basically in conformity with Swedish legislation. Danielsson (Sweden), E/C.12/1988/SR.10, at 2, para.4.

<sup>39</sup> See, de Montigny Marchand (Canada), E/C.12/1989/SR.8, at 2, para.2.

<sup>40</sup> The UK representative commented before the Committee: "...it was not the practice of the United Kingdom to give the force of law to the provisions of international treaties to which it was a party. Its approach was rather to ensure that domestic legislation was consistent with those treaties and would enable it to perform the obligations which it had undertaken by signing them and, if necessary, to adopt legislation to that effect". Britton (UK), E/C.12/1989/SR.17, at 5, para.17.

<sup>41</sup> See, Wahidi (Afghanistan), E/C.12/1991/SR.4, at 4, para.21.

<sup>42</sup> See, Rhenan Segura (Costa Rica), E/C.12/1990/SR.38, at 15, para.85.

<sup>43</sup> See, Apunte (Ecuador), E/C.12/1990/SR.39, at 2, para.6.



Luxembourg,<sup>44</sup> Argentina,<sup>45</sup> Colombia,<sup>46</sup> Mexico,<sup>47</sup> Cyprus,<sup>48</sup> and Zaire.<sup>49</sup>

One commentator has argued that the ICESCR is not "suited" to incorporation, as it "confines itself to stating promotional obligations which are not intended to confer subjective rights".<sup>50</sup> Quite apart from the practice of States (outlined above) which seems to contradict such an assertion, the statement may be criticised on two counts. First, whether or not a treaty is "suited" to incorporation depends more upon the approach of domestic courts in distinguishing between self-executing and non-self-executing treaties than upon the nature of the obligations themselves. In those States where treaties are commonly adopted or incorporated, the courts will generally apply strict standards for giving the provisions direct-effect. It is thus only in those States that do not operate such a "vetting" system that stringent criteria will be imposed in determining whether or not a treaty will be incorporated. Secondly, even in the latter case, it cannot be maintained that the Covenant, being a human rights treaty by name, was not intended to confer subjective rights.<sup>51</sup>

Given the discretion open to States as to the method by which they may give effect to the Covenant in domestic law, it would follow that the Committee should concern itself with those procedures only in so far as it affects the realisation of the rights. The Committee has generally made no comment on failure to incorporate the Covenant wholesale into domestic legal systems,<sup>52</sup> but rather has limited itself to enquiring as to the degree to which the rights are protected in the relevant State's law.

However, in the case of Chile, although the Covenant had been ratified, it had not been duly published in the Official Gazette which appeared to be a condition for giving treaties their domestic validity.<sup>53</sup> This was criticised by one member of the Committee, who commented

<sup>44</sup> See, Weitzel (Luxembourg), E/C.12/1990/SR.33, at 8, para.29.

<sup>45</sup> See, Regazzoli (Argentina), E/C.12/1990/SR.18, at 4, para.14.

<sup>46</sup> See, Rivas Posada (Colombia), E/C.12/1990/SR.12, at 9, para.62.

<sup>47</sup> See, Gonzalez Martinez (Mexico), E/C.12/1990/SR.6, at 4, para.15.

<sup>48</sup> See, Markides (Cyprus), E/C.12/1990/SR.2, at 3, para.9.

<sup>49</sup> See, Ngimbi (Zaire), E/C.12/1988/SR.19, at 2, para.6.

<sup>50</sup> Tomuschat, *supra*, note 2, at 40.

<sup>51</sup> See below, text accompanying notes 114-127.

<sup>52</sup> But see, Alvarez Vita, E/C.12/1990/SR.35, at 11, para.43.

<sup>53</sup> Texier, E/C.12/1988/SR.12, at 9, para.45.



that there was "no justification for delaying formal implementation of the Covenant".<sup>54</sup> It is possible that Chilean law might be entirely consistent with its obligations under the Covenant, in which case the Committee's criticism might be considered to be premature. However, Chile's failure to comply with its own procedures for giving effect to international treaties does appear to be a breach of good faith. In particular this would be so if an individual were to be deprived of a domestic law remedy that could potentially exist if the Covenant were given full domestic validity.

### III) DIRECT EFFECT

#### A) DIRECT EFFECT GENERALLY

In assessing the effective implementation of a human rights treaty, the means by which a treaty has been given effect in the domestic legal system is only of indirect interest. As has been commented:

"...the formal domestic status of the Convention is not of decisive importance for its effective implementation; what really matters is the attitude of the judiciary towards the Convention and their opinion about the division of powers between the legislature and the judiciary."<sup>55</sup>

It is essentially the degree to which international treaty norms are given effect by the municipal courts that is of primary importance. Here the notion of "directly effective" or "self-executing" treaties has some significance. There has been little common agreement over the use of the terms "directly effective", "directly applicable", or "self-executing".<sup>56</sup> It is important, however, to distinguish between a treaty's domestic validity and the degree to which it is capable of being invoked before the courts.<sup>57</sup> The fact that a treaty provision has validity in the domestic legal system does not necessarily mean that it is enforceable in the courts. As noted above, where treaties are adopted into domestic law (the provisions of which can be said to be directly applicable), the

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<sup>54</sup> Alston, E/C.12/1988/SR.13, at 5, para.19.

<sup>55</sup> Van Dijk, *supra*, note 5, at 631-2. *See also*, Leary, *supra*, note 1, at 37.

<sup>56</sup> *See*, Bossuyt M., "The Direct Applicability of International Instruments on Human Rights", 15 R.B.D.I., 317, at 318-9 (1980).

<sup>57</sup> Winter, *supra*, note 3, at 425; Lasok D. and Bridge J., "Law and Institutions of the European Communities", 301-2 (1987 4th Ed).



courts will look to whether the provisions are "self executing" to determine whether or not to rely upon them.

In the following pages, the term "directly applicable" will be used to mean that the treaty provision has been adopted into domestic law, and therefore has the force of law in the domestic legal system.<sup>58</sup> The terms "directly effective" and "self-executing" will be used, as appropriate, to mean that the treaty, or relevant provisions, are capable of being enforced in the courts without further legislative or administrative intervention.<sup>59</sup>

It would appear that direct effect is not confined to cases where treaties are adopted into domestic law. Even in cases where a treaty is incorporated into domestic law, the question of whether or not the provisions are self-executing might arise.<sup>60</sup> Indeed the experience of Germany and Italy does show that the concept of direct effect is relevant even to States with a dualist approach to international law.<sup>61</sup> Certainly, it would seem appropriate for courts, when faced with an incorporated treaty, to decide whether the provisions are suited to judicial determination. The fact that this is not common practice in some States, such as the United Kingdom, probably reflects their general preference for transformation rather than incorporation.

## B) THEORETICAL AND PRACTICAL CONSIDERATIONS

In so far as the object of human rights treaties is to guarantee the individual some form of protection from the excesses of government, the provision of domestic law remedies would appear to be highly desirable. In the case of directly effective treaty provisions, not only are judicial remedies instantly available, but they also relate specifically to the international norm rather than to a domestic norm which may not be the same either in form or content.

It would be rather too easy, however, to jump to the conclusion that endowing human rights treaty provisions with

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<sup>58</sup> Iwasawa makes the distinction referred to above, but uses the term "domestic applicability" as meaning that the provision is capable of being applied without the need of further measures. Iwasawa, *supra*, note 15, at 632.

<sup>59</sup> This is a wider definition than that offered by Bossuyt for example. He defines a self-executing provision as being one which has been "adopted" (although he does not define that term closely) and is "self-sufficient". Bossuyt, *supra*, note 56, at 319.

<sup>60</sup> Iwasawa, *supra*, note 15, at 640; Tomuschat, *supra*, note 2, at 42. Clearly this is not the case with respect to treaties that have been "transformed".

<sup>61</sup> See, Morgenstern, *supra*, note 18, at 57; Gaja, *supra*, note 17.



direct effect is necessarily beneficial. From an international standpoint, direct effect encourages the domestic interpretation of international norms. There is nothing to guarantee that the interpretation adopted by a domestic court would coincide with either that of the treaty supervisory body<sup>62</sup> or with those of other courts in other States. This may undermine the universal nature of the norm, and serve to weaken its content.<sup>63</sup>

At the domestic level, if a treaty is adopted or incorporated, national courts may have difficulty dealing with the concepts used by the treaty concerned which may be foreign to the legal system concerned.<sup>64</sup> As Leary has pointed out:

"Legal scholars have pointed out the complications of introducing foreign legal concepts and techniques into a national legal system. The problem is particularly acute in the application of human rights treaties where the language used in the treaties may differ from the language employed in constitutional provisions concerning human rights".<sup>65</sup>

More seriously however, the direct application of human rights standards (especially in the field of economic, social and cultural rights) may involve the courts in matters of public policy. Certainly, in so far as the treaty provisions are of a general nature a certain amount of judicial activism will be inevitable. This could undermine the independence of such courts, make the appointment of their members a matter of political interest, and lead to questions as to the undemocratic control of decision-making.<sup>66</sup>

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<sup>62</sup> Alkema E., "The Application of Internationally Guaranteed Human Rights in the Municipal Order", in Kalshoven F., Kuyper P. and Lammers J. (eds), Essays on the Development of the International Legal Order, 181, at 196 (1980).

<sup>63</sup> See, Myjer E., "Dutch Interpretation of the European Convention: A Double System?", in Matscher F. and Petzold H.(eds), Protecting Human Rights in the European Dimension, 421, at 428-9 (1988).

<sup>64</sup> It is also relevant to note that treaties generally have more than one official language which might have considerable bearing upon the interpretation adopted.

<sup>65</sup> Leary, *supra*, note 1, at 103.

<sup>66</sup> See, Jacobs F., "The Convention and the English Judge", in Matscher F. and Petzold H.(eds), Protecting Human Rights in the European Dimension, 273, at 279 (1988). Such arguments are similar to those opposing a Bill of Rights in the United Kingdom, *see generally*, Zander M., A Bill of Rights?, (3rd ed. 1985); Wallington P. and McBride J., Civil Liberties and a Bill of Rights, (1976).



Moreover, practice would seem to suggest that it is not necessarily the case that treaties will be implemented more effectively through direct effect. It has been noted that in the case of the Netherlands, ICERD has been applied more effectively through the process of transformation than the ECHR has through direct effect.<sup>67</sup> Certainly, where judges have a choice between implementing domestic legislation and a constitutional-style human rights treaty, the legislation will be preferred, not least because it is likely to be more specific.<sup>68</sup>

It is submitted, however, that such arguments are outweighed by the benefits of direct effect for the promotion and protection of human rights. First, as noted above, the application of human rights standards in domestic courts clearly provides for the most direct and effective form of remedy. Indeed, national courts would appear to be in a better position than their international counterparts to apply the provisions in their domestic context, and in doing so may generate a more realistic and suitable interpretation of the norms themselves. Additionally providing for domestic remedies in this manner would demonstrate good faith on the part of the State concerned; reduce the amount of publicity in cases of violation; and increase legislative and executive knowledge of their international obligations.

As far as the role of the courts is concerned, it can only be said that legal guarantees of human rights, by their nature, presuppose judicial scrutiny of government action.<sup>69</sup> A principal rationale for the drafting of human rights treaty obligations following the Second World War, was to prevent the arbitrary infringement of the fundamental human rights of the individual under the pretext that it was the will of the majority as expressed in the instrument of government. On this basis, there can be little opposition to the protection of those rights by the judiciary. Whereas there might be objections to the judiciary undertaking a "legislative function" in the context of those treaty guarantees of rights that are excessively general, this is mitigated to some extent by the very nature of the self-executing doctrine which seeks to safeguard the legislative competence of parliament. In a number of situations, legislation will not only be appropriate, but also necessary, to give full effect to the treaty provisions.

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<sup>67</sup> Alkema, *supra*, note 62, at 188.

<sup>68</sup> See, Tomuschat, *supra*, note 2, at 48.

<sup>69</sup> Jacobs, *supra*, note 66, at 279.



### C) DIRECT EFFECT AND THE COVENANT

As part of the Committee's reporting guidelines, it specifically requests information as to whether the provisions of the Covenant "can be invoked before, and directly enforced by, the courts, other tribunals or administrative authorities...".<sup>70</sup> Very little information has been provided in response to this request and thus far no cases have been reported in which provisions of the Covenant have been given direct effect. All discussions with the Committee on the issue have centered merely upon the potentiality of direct effect.

A number of those States that have adopted the Covenant into domestic law, have stressed before the Committee, that that fact alone does not mean that the Covenant may be relied upon by an individual in the courts. Some States, whilst noting that certain rights are "operational" (such as the right to education), have considered that others (like the right to housing) require intervention by public authorities and therefore could not be invoked as individual rights.<sup>71</sup> Other States, however, have denied the direct-effect of the Covenant as a whole. In those cases it has been argued that the nature of the rights<sup>72</sup> and the object and purpose of the Covenant,<sup>73</sup> affirmed its non-self-executing character.

In the case of Luxembourg however, a number of members of the Committee were dissatisfied with the explanation offered by the government representative as to why the Covenant was not self-executing in domestic law. The representative referred *inter alia* to the intentions of the drafters, the purpose and subject-matter of the Covenant,<sup>74</sup> the nature of the obligations,<sup>75</sup> and the view of the Council of State at the time of accession to the Covenant.<sup>76</sup> Members of the Committee argued that the Covenant was more than merely a series of reciprocal obligations, and should be seen

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<sup>70</sup> Reporting Guidelines, ESCOR, Supp.(No.3), Annex IV, at 89, UN Doc.E/C.12/1990/8, (1991).

<sup>71</sup> See e.g. Strassera (Argentina), E/C.12/1990/SR.19, at 3, para.9; Gonzalez Martinez (Mexico), E/C.12/1990/SR.9, at 5, para.14.

<sup>72</sup> See, Walkate (Netherlands), E/C.12/1989/SR.14, at 3, para.8.

<sup>73</sup> See, Weitzel (Luxembourg), E/C.12/1990/SR.33, at 8, para.29.

<sup>74</sup> See, Weitzel (Luxembourg), E/C.12/1990/SR.35, at 2, para.4.

<sup>75</sup> *Ibid*, at 11, para.44.

<sup>76</sup> See, Weitzel (Luxembourg), E/C.12/1990/SR.33, at 8, para.29.



to represent an objective standard containing individual rights,<sup>77</sup> a number of which were self-executing.<sup>78</sup>

This debate encouraged the Committee, in its General Comment No.3 (1990), to assert that certain provisions within the Covenant (it cited in particular articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3)) were capable of immediate application. It concluded:

"Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain".<sup>79</sup>

On the face of it, the Committee would not seem to be in a position to make decisions as to the degree to which the provisions in the Covenant are self-executing. In contrast to the question of the domestic validity of treaties, as a rule,<sup>80</sup> it is for the national authorities themselves to decide whether or not a provision is self-executing.<sup>81</sup>

However, as will be shown below, national courts generally have considerable lee-way in deciding what provisions may be given direct effect. In so far as those courts have to examine the provisions of the Covenant in the exercise of their discretion, the

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<sup>77</sup> See, Simma, E/C.12/1990/SR.34, at 9, para.64.

<sup>78</sup> See, Mratchkov, E/C.12/1990/SR.34, at 7, para.46; Simma, E/C.12/1990/SR.34, at 9, para.64; and E/C.12/1990/SR.36, at 9, para.37.

<sup>79</sup> General Comment No.3, E/1991/23, Annex III, at 84, para.5, UN ESCOR, Supp.(No.3), (1991).

<sup>80</sup> In the exceptional case of the European Communities the direct effect of provisions is provided by the treaty itself. Moreover the ECJ itself is competent to decide whether a provision is directly applicable or not through its preliminary ruling procedure under article 177 of the EEC Treaty. 298 U.N.T.S. 150. Human rights treaty bodies do not have this power to make preliminary rulings and therefore cannot intervene in the process. With regard to the ECHR see, Bossuyt, *supra*, note 56, at 321-322.

<sup>81</sup> As one commentator stated:

"The definition of self-executing treaties, which is essentially a problem of the enforcement of treaties, is a matter to be determined by the municipal law of a given state, interpreted with due consideration of the constitutional history of the State, the organisation of its government, and, indeed, of the political currents of a given period".

Evans A.E., "Self-Executing Treaties in the United States of America", 30 *B.Y.I.L.* 178, at 193 (1953). See also, Winter, *supra*, note 3, at 428; Iwasawa, *supra*, note 15, at 650; Leary, *supra*, note 1, at 39.



Committee may provide its own interpretation of the provisions as a means of assisting and influencing the national courts.<sup>82</sup>

#### D) THE CRITERIA FOR DIRECT EFFECT

That the question whether or not a treaty provision has direct effect is one for the domestic courts to decide has meant that different criteria are utilised in different countries. Nevertheless, the intention here is to analyse some of the common criteria in relation to the Covenant provisions to determine whether, in principle at least, those provisions may be directly relied upon by domestic courts.

In general, domestic courts have looked to whether the provision confers a right upon private citizens that may be applied by the courts directly without recourse to further implementation through legislative or administrative intervention. To some extent this seems to suggest that the degree to which a provision will be considered self-executing is dependent upon the presence of an existing "cause of action": *ubi remedium, ibi jus*. Although criticised by certain commentators,<sup>83</sup> it does mean that a human rights treaty provision is only likely to be considered self-executing if a similar constitutional or legislative right is already guaranteed by judicial remedies.

From the practice of a number of States and institutions, including the US, the Netherlands, Belgium, Italy, Switzerland, Germany and the EEC the following criteria seem to have been utilised: whether the provision relates to private citizens; whether the provision is capable of judicial enforcement; the purpose of the treaty; the intentions of the creators of the treaty; the existence of domestic procedures for enforcement; the nature of the obligations; the availability of alternative enforcement procedures; the necessity of further implementation; the precision and detail of the text; the language of the agreement; the class and subject matter of the agreement; and the amount of discretion given to the means of implementation.

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<sup>82</sup> Tomuschat comments with regard to the ICCPR:

"Since the Human Rights Committee, the body primarily entrusted with responsibility for ensuring compliance with the CCPR, sees no obstacle against inferring directly enforceable obligations from the CCPR, national authorities would lack any justification for adopting a more reluctant attitude".

Tomuschat, *supra*, note 2, at 42. Such arguments would apply equally to the Committee on Economic, Social and Cultural Rights.

<sup>83</sup> *E.g.*, Iwasawa, *supra*, note 15, at 648, note 98.



A number of the more commonly utilised criteria will be considered in the following section. Reference will be made to US and EEC practice despite having little direct relevance to the Covenant, on the basis that it demonstrates a fairly well-developed approach to the concept of direct-effect.<sup>84</sup> Particular emphasis will, however, be placed upon the case-law of the Netherlands which is the State in which the courts have paid most attention to economic and social rights in general, and the Covenant in particular.

### 1) The Intention of the Parties

In the United States, the courts have frequently looked to the intent of the treaty-drafters in determining the direct-effect of the provisions. Thus, in Sei Fujii v. California,<sup>85</sup> Judge Gibson commented:

"...in order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts".<sup>86</sup>

Although there is a tendency for courts to look to the intent of the contracting parties as to whether or not the provision should be self-executing,<sup>87</sup> it is very rare for treaties to indicate either positive or negative intent in this regard. Certainly as far as the Covenant is concerned there is no explicit provision that refers to its domestic application, nor was the matter considered during the drafting of the Covenant. Indeed, whether or not States parties were actually concerned about the domestic application of the

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<sup>84</sup> The concept of the self-executing and non-self-executing treaty was first developed in the US in Foster and Elam v. Neilson, 27 US (2 Pet.) 253 (1829). Since then, the US has developed a considerable body of jurisprudence. Similarly, the notion of direct effect has been a key concept in the evolution of the EEC.

<sup>85</sup> Supreme Court of California, 38 Cal.2d 718, 242 P.2d 617, (1952).

<sup>86</sup> *Ibid*, at 620. This is also the case in Belgium. There, in Thonon v. Belgian State [Cass. April 21, 1983, 1985 R.C.J.B. 22], the Belgian Court of Cassation referred *inter alia* to the intentions of the contracting parties as a determinant of the treaty's direct effect. *Cited in*, Maresceau, *supra*, note 13, at 16.

<sup>87</sup> Jackson, *supra*, note 15, at 151.



treaty,<sup>88</sup> it would be highly unusual for trenchantly "dualist" States such as the UK to have specifically agreed to the direct effect of the Covenant's provisions.<sup>89</sup>

In the absence of explicit statements of intent, the US courts have generally looked to objective indications in the text itself.<sup>90</sup> In particular note has been made of the purpose of the agreement and the language used. Given the uncertainty of actual intent, it would seem to be a rather fictitious pursuit to infer such intent from the wording of the Covenant itself.<sup>91</sup> The Dutch Supreme Court has adopted a more realistic approach in considering intent only in so far as it is manifest in the text or the travaux préparatoires. Thus in Netherlands Railways v. Transport Union of the Federation of Netherlands Trade Unions<sup>92</sup> the Supreme Court held:

"Whether or not the contracting parties intended Article 6(4) of the ESC to have direct effect is not important since it cannot be inferred either from the text or from the history of the Charter that they agreed that Article 6(4) could not have direct effect".<sup>93</sup>

Accordingly, in absence of any manifest intention, the court went on to analyse the content of the provision to determine its effect.

Occasionally, courts look to the intent of the executive in ratifying the treaty concerned. Thus in one case, the Dutch Supreme Court referred to a Government statement made in Parliament during the process of approval of the Covenant, to the effect that the Covenant's provisions were not to be considered self-executing.<sup>94</sup> Nevertheless, practice suggests that it is unlikely that

<sup>88</sup> One commentator at least considers that States were not concerned about the domestic application of the ICESCR. *See*, Iwasawa, *supra*, note 15, at 654.

<sup>89</sup> *See*, Reisenfeld S., "The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgement", 65 A.J.I.L., 548 at 550 (1971).

<sup>90</sup> *See e.g.*, Frovlova v. U.S.S.R. 761 F.2d, 370 (7th Cir. 1985).

<sup>91</sup> *Cf.* Iwasawa, *supra*, note 15, at 655.

<sup>92</sup> Supreme Court, 30 May 1986, RvdW (1986) No. 120, *in*, 18 Neth.Y.I.L., 389 (1987).

<sup>93</sup> Neth.Y.I.L., *ibid*, at 392.

<sup>94</sup> The State of the Netherlands v. L.S.V.B. [The National Union of Students], Supreme Court, 14th April, 1989, AB, at 207 (1989), *in* 21 Neth.Y.I.L., 362 at 369 (1990). *See also*, Heringa A., "Social Rights in the Dutch Legal Order", Working Paper at 4, (1991).



courts in most States will consider such executive statements as conclusive.<sup>95</sup>

## 2) The Precision and Detail of the Language Employed.

In Sei Fujii<sup>96</sup> and later in the Frovlova Case<sup>97</sup> the Supreme Court of the United States found articles 55 and 56 of the UN Charter to be too broad and general to be considered self-executing. Similar considerations have been decisive in Swiss<sup>98</sup> Italian,<sup>99</sup> Belgian,<sup>100</sup> and Dutch<sup>101</sup> cases. It is clear that in theory, the generality of a legal norm does not impede judicial decision-making per se. The decision so made might require the courts to indulge in a certain amount of "judicial legislation" in the interpretation of the norm, but it is a decision nevertheless. The justiciability of a particular issue depends, not upon the generality

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<sup>95</sup> See generally, Iwasawa, *supra*, note 15, at 666-669. With respect to a US Department of State proposal that if the Covenants were to be ratified they should be said to be non-self-executing see, Craig M., "The International Covenant on Civil and Political Rights and U.S. Law: Department of State Proposals for Preserving the Status Quo", 19 I.C.L.Q., 845 (1978).

<sup>96</sup> Judge Gibson stated that the provisions of the Charter "lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification". Sei Fujii, *supra*, note 85 at 621-622.

<sup>97</sup> *Supra*, note 90, at 74.

<sup>98</sup> See, Banque de Credit Internationale c. Conseil D'Etat du Canton de Geneve Chambre de Droit Administratif, 13 Oct. (1972), ATF 98 I b 385. *Cited (and translated) in*, Leary, *supra*, note 1, at 68. There the court stated that the direct effect would be given if the treaty provision "is sufficiently precise to be applied as such in a particular case and to provide the basis for a concrete decision". The court went on to comment that "this is not the case with a treaty provision which announces a programme or lays down general principles which should guide the legislation of contracting states".

<sup>99</sup> See, Leary, *supra*, note 1, at 70. In re Laglietti, 69 Rivista di Diritto Internazionale, 143 at 145 (1986), the Court of Cassation stated:

"...the norms of the European Convention on Human Rights- apart obviously from those provisions the content of which, after the use of the habitual methods of interpretation, is to be considered so general that it does not express sufficiently specific rules- are directly applicable in Italy".

*Cited (and translated) in*, Gaja, *supra*, note 17, at 104.

<sup>100</sup> See, Verhoeven J., "Traité-Applicabilité Directe", 24 R.B.D.I. 306 (1991).

<sup>101</sup> In The Netherlands v. L.S.V.B., the court rejected the claim that article 2(1) ICESCR had direct effect *inter alia* because it was too general (by the fact it covered all the rights granted under the Covenant). *Cited in*, 21 Neth.Y.I.L., 362, at 369 (1990).



of the norm concerned, but rather upon the authority of the body making the decision. Thus it is apparent that in a number of cases, national courts have undertaken to apply constitutional provisions of an exceedingly broad and general nature.<sup>102</sup>

The perceived jurisdictional authority of the courts is of crucial importance. It is commonly considered that the judiciary should not attempt to usurp the function of the legislature by applying provisions that would normally require further legislative implementation.<sup>103</sup> Certainly, if legislation already exists, the Courts will not be obliged to take on such a creative role. To a great extent, the degree to which courts will apply general provisions is dependent upon the amount of existing legislation and the traditional role of the courts in the constitutional system.

It has to be accepted that certain provisions of the Covenant are very general, such as article 11 (the right to an adequate standard of living). However this is not exclusively so: domestic court practice has shown (albeit in different contexts) that the basic principles contained in article 7(a)(i) (equal remuneration for work of equal value), article 8(1)(a) (the right to form and join trade unions), and article 8(1)(d) (the right to strike), for example, are capable of direct application. Moreover, as the Committee continues to develop the substantive content of the rights, an increasing number of elements within the rights may be found to be sufficiently precise to be self-executing.

An important question is raised here, namely the extent to which domestic courts will apply a single element of a provision where other elements are clearly not self-executing. An example might be the right to work, found in article 6 of the Covenant. This is read not merely as imposing an obligation to achieve full

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<sup>102</sup> See e.g., The 14th Amendment of the US Constitution (equal protection of the law). See, Schachter O., "The Charter and the Constitution: The Human Rights Provisions in American Law", 4 Vand.L.R., 643 (1951).

Tomuschat comments:

"It is the current tendency in many countries for judges not to hesitate to base their decisions on the most general and abstract principles of their legal order".

Tomuschat, *supra*, note 2, at 44. Zander argues that rights which are phrased in vague and general terms are "more an advantage than a disadvantage". He maintains that detailed solutions have to be left to the courts to work out. Whilst recognising that general terminology might lead to a degree of uncertainty, he considers that it gives people a chance to argue their case and allows the rights to be interpreted in a dynamic manner. Zander, *supra*, note , at 38.

<sup>103</sup> Cf. The Brind Case, *supra*, note 20.



employment, but also as containing a prohibition of forced labour.<sup>104</sup> Whereas the former element would clearly seem to require implementing policies on the part of the government, there is nothing, outside the imposition of penalties, to prevent the courts enforcing the prohibition of forced labour directly. Commentators have found no objection to applying elements of a provision separately:

"Simply because a provision requires future negotiation or legislative action does not, however, render it non-self-executing if the provision also creates specific obligations or proscribes certain acts".<sup>105</sup>

The matter is less clear where the two elements are not specifically defined in the text itself, but are to be found merely in the jurisprudence of the Committee. Again with reference to article 6, this could be the case with respect to the prohibition of arbitrary dismissal. It is indisputable that the Committee's interpretations of the provisions of the Covenant are not legally binding on the States parties. However, to the extent they might come to reflect the agreement of the States parties as to the meaning of the provisions, they could be seen to have some legal significance in international law.<sup>106</sup>

### 3) The Necessity of Legislation

It is a universally accepted principle that a treaty provision will not be self-executing if further implementing legislation is required by the authorities concerned.<sup>107</sup> By implication, this

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<sup>104</sup> See below, Chapter 5.

<sup>105</sup> Burke *et al*, *supra*, note 15, at 302. See also, Iwasawa, *supra*, note 15, at 668. In the case of Gabrielle Defrenne v. Sabena (No.1), (Case 43/75), [1976] E.C.R., 455, the European Court of Justice distinguished between direct and indirect discrimination under article 119 of the EEC Treaty. Whereas the former was capable of being detected "on the basis of a purely legal analysis of the situation", the latter required in certain cases "the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and National level".

<sup>106</sup> See, Meron T., Human Rights Law-Making in the United Nations, 10 (1986).

<sup>107</sup> Paust J., "Self-Executing Treaties" 82 A.J.I.L. 760, at 764 (1988); Winter, *supra*, note 3, at 429; Jackson, *supra*, note 15, at 150.



would mean that treaties may be self-executing where existing legislation is adequate for their enforcement by the courts.<sup>108</sup>

It has often been argued accordingly that a provision calling for domestic implementation (through legislation) indicates that the treaty is not to be considered directly applicable.<sup>109</sup> Thus, as under article 2(1) of the Covenant, States Parties are called upon to take the necessary measures "including particularly the adoption of legislative measures", the Covenant could be considered non-self-executing. However, it would seem that the matter is not quite so simple. First, as one commentator has noted:

"A domestic implementation clause merely reinforces the customary international rule that a State which has contracted a valid treaty is bound to take every measure necessary to give full effect to the treaty".<sup>110</sup>

Such references to legislation could thus be interpreted to refer to the domestic validity of the treaty rather than its domestic application.<sup>111</sup> Certainly as far as the ICESCR is concerned, there is no reason to assume that legislation is required in every case. Rather, the provision should be interpreted to require legislation only to the extent that the rights are not already sufficiently protected and where legislation is the appropriate means for ensuring that protection.<sup>112</sup> As the Committee comments in its General Comment No.3:

"Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable".<sup>113</sup>

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<sup>108</sup> Evans, *supra*, note 81, at 186. In the case of Warren v.U.S., 340 U.S., 523 at 526 (1951), the Supreme Court held that article 2(2) ILO Convention No.55 was directly applicable because the general maritime law already recognized the exceptions allowed under the treaty.

<sup>109</sup> *See, Tel Oren v.Libyan Arab Republic Case* 517 F.Supp.542 (D.D.C.1981). Tomuschat argues that the reference to "legislation" in article 2(2) ICCPR was intended "to emphasise that States should play an active role in ensuring the relevant rights, explicitly discarding a naive belief that the CCPR amounted to a self-executing treaty". Tomuschat, *supra*, note 2, at 42.

<sup>110</sup> Iwasawa, *supra*, note 15, at 660.

<sup>111</sup> This would apply in particular to the UK, where treaty provisions are generally "transformed" into domestic law.

<sup>112</sup> *Cf. Craig, supra*, note 95, at 861.

<sup>113</sup> General Comment No.3, *supra*, note 79, at 84.



It cannot be sustained, then, that the reference to legislation in article 2(1) of the Covenant automatically makes the individual provisions non-self-executing.<sup>114</sup> As has been noted, the crucial factor is not the call for implementation, but rather the precision of the rule invoked<sup>115</sup> and the degree to which it is already implemented in the domestic legal system.

#### 4) The Subject Matter of the Treaty

There has been a tendency in the US courts at least, to classify treaties as self-executing or otherwise according to their subject matter.<sup>116</sup> Thus where the subject matter of a treaty falls within the exclusive powers of Congress then that treaty will be considered non-self-executing.<sup>117</sup> However, the crucial question in such cases is not really the subject matter, but rather whether financial appropriations are required.<sup>118</sup> Indeed, it has been asserted that treaties should not be dealt with entirely on the question of their subject matter, rather each provision should be dealt with separately. Numerous examples may be found where although a treaty is generally non-self-executing, a specific provision is considered to be directly effective.<sup>119</sup> Accordingly, the direct effect of provisions of the ICESCR should not be denied merely because they do involve certain questions of public policy (such as the provision of housing); each provision should be considered upon its merits. It cannot be maintained that every provision requires financial appropriations from the treasury.

#### 5) Rights and Duties of the Individual

In a number of cases, courts have looked to the wording of the provision concerned to determine whether it is of a nature such

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<sup>114</sup> It was recognised by the Dutch Supreme Court that the wording of article 2(1) did not automatically imply that the substantive provisions were non-self-executing, D. Hoogenraad v. Organisation for Pure Research in the Netherlands, Supreme Court, 20 April 1990, RvdW (1990) No.88, cited in 22 Neth. Y.I.L. 376 at 378 (1991).

<sup>115</sup> Iwasawa, *supra*, note 15, at 662.

<sup>116</sup> See e.g., Leary, *supra*, note 1, at 57.

<sup>117</sup> See e.g., Evans, *supra*, note 81, at 187.

<sup>118</sup> Craig, *supra*, note 93, at 859; Evans A., "The Self-Executing Treaty in Contemporary American Practice", in De Lege Pactorem: Essays in Honour of Wilson R.R., 3, at 17 (1970).

<sup>119</sup> See below, text accompanying note 127.



that individuals may benefit from it.<sup>120</sup> Clearly, a provision that is addressed to State organs will not provide a basis for individual action in the courts.<sup>121</sup> On the other hand, it has been asserted that where the rules create private rights they will be *prima facie* self-executing.<sup>122</sup> The Dutch Constitution is particularly clear in this case. Under article 93, provisions of treaties "the contents of which may be binding on everyone" have direct effect.<sup>123</sup> Thus obligations directed solely to State organs could not be said to be "binding on everyone".

It might be assumed that human rights treaties would automatically be considered as providing for private rights in this sense. However, that has not always been the case. For example, in Germany the prevailing view is that the European Social Charter is not self-executing as the provisions generally lay down obligations for States and their legislatures rather than individuals.<sup>124</sup> Similarly in the Netherlands, the Supreme Court has taken the view that the European Social Charter is generally non-self-executing by the fact that its provisions require the Contracting Parties to introduce regulations. However, it has found article 6(4) to be an exception in that it provides that States "recognise" the right of workers and employers to collective action in cases of conflicts of interest".<sup>125</sup>

It might be argued that the ICESCR suffers from the same problem. Whereas provisions of the ICCPR refer directly to the rights of the individual, those in the ICESCR are phrased in terms

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<sup>120</sup> See, Reisenfeld, *supra*, note 89, at 552.

<sup>121</sup> See, Iwasawa, *supra*, note 15, at 684.

<sup>122</sup> Jackson, *supra*, note 15, at 150.

<sup>123</sup> See, Van Dijk, *supra*, note 5, at 636; Heringa, *supra*, note 92, at 3; Drzemczewski A., European Human Rights Convention in Domestic Law, 86-92 (1983).

<sup>124</sup> Frowein, *supra*, note 16, at 70. Part III of the Appendix to the European Social Charter (1961) is understood to have specifically excluded the possibility of direct effect. It reads:

"It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided in Part IV thereof."

<sup>125</sup> Netherlands Railways v. Transport Union of the Federation of Netherlands Trade Unions et al. *supra*, note 92, at 392. However Frowein argues that article 6(4) should be seen as non-self-executing otherwise it would be inconsistent with article 5 (freedom of association). Frowein, *supra*, note 16, at 70.



of State obligations.<sup>126</sup> Similarly there are a number of provisions in the latter that specifically outline the process of implementation (such as article 6(2)). On this basis, the Dutch Supreme Court has found the wording of article 8(1)(d)<sup>127</sup> and article 13(1)<sup>128</sup> of the Covenant to be conclusive as to their non-executing character.

Such decisions however, do display a certain prejudgement of the issues involved. It is hard to deny that the object and purpose of the ICESCR and the European Social Charter is to provide for individual rights in the economic and social fields. That those rights are framed in terms of State obligations does not deprive them of that central attribute. Indeed, if provisions of the ICCPR were to be read in conjunction with the general terms of article 2(1), they too could be said to be framed in terms of State obligations. Indeed, this is an inescapable conclusion given the fact that such treaties are primarily inter-State agreements. This has led one commentator to argue that the fact that a provision is grammatically addressed to the States Parties "is not considered a reliable criterion for determining whether a given provision is directly applicable".<sup>129</sup>

That the Dutch courts have demonstrated a particular lack of consistency is apparent in two respects. First, the decision relating to article 6(4) of the European Social Charter could equally apply to many of the rights in the ICESCR in that the pattern of wording is almost identical.<sup>130</sup> Secondly, in a more recent case, the Dutch Central Appeals Court, whilst finding that article 7(a)(i) of the ICESCR (equal remuneration for work of equal value) did not have direct effect in the particular circumstances before it, suggested that if the alleged unequal remuneration occurred in a framework "which has such a clear structure and involves such patently unequal remuneration... the direct effect of Article 7(a)(i)

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<sup>126</sup> See, in particular, articles 10 and 14 which make no mention of "rights" of the individual.

<sup>127</sup> *W.d.K. v. Public Prosecutor*, Supreme Court, 6 Dec. 1983, NJ (1984) No. 557, cited in, 16 *Neth. Y.I.L.*, 526, at 528 (1985).

<sup>128</sup> *Netherlands v. L.S.V.B.*, *supra*, note 101.

<sup>129</sup> Iwasawa, *supra*, note 15, at 684.

<sup>130</sup> Compare for example:

Article 6(4) ESC: "...the Contracting Parties... recognise... the right of workers and employers to collective action..."

Article 7 ICESCR: "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work..."



of the Covenant cannot reasonably be refused".<sup>131</sup> That no mention was made of the wording of the provision, which has been so decisive in other cases, underlines the fact that it is realistic to argue that provisions of the ICESCR may be considered as "binding upon everybody" and therefore self-executing.

#### 6) Negative Obligations

It follows from the rule that self-executing treaty provisions should not require further measures of implementation, that those provisions that establish negative obligations or prohibitions, are *prima facie* good candidates to be directly effective.<sup>132</sup> Even where individual rights and duties are spelt out, it would seem that the courts will sometimes look, in addition, to the positive or negative nature of the obligations to determine their direct effect.<sup>133</sup> This has been evident in both US<sup>134</sup> and EEC<sup>135</sup> case law. More particularly, with the exception of a more recent case,<sup>136</sup> the courts in the Netherlands have tended to discount the possibility of the direct effect of Covenant articles on the basis of a general reading of article 2(1) of the Covenant, which provides that the rights be implemented by positive State action in a progressive manner.<sup>137</sup>

However, to decide upon a provision's direct effect merely on the positive or negative nature of the obligation is somewhat arbitrary. For example, in so far as a prohibition requires horizontal application (that is inter-individual application), there is a necessity for the existence of requisite sanctions and enforcement measures by the State. Moreover, even if a right requires the

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<sup>131</sup> The Board of the Teaching Hospital at the University of Amsterdam v.F.W. and M.C.H.G., Central Appeals Court, 16 Feb.1989, AB (1989) No.164, *cited in*, 21 Neth.Y.I.L. 375, at 377 (1990). *See also*, Heringa, *supra*, note 92, at 4-5.

<sup>132</sup> Leary, *supra*, note 1, at 58.

<sup>133</sup> Jackson, *supra*, note 15, at 152.

<sup>134</sup> Frovlova v.U.S.S.R., *supra*, note 90.

<sup>135</sup> Van Gend en Loos, *supra*, note 33, where the E.C.J., in confirming the self-executing nature of article 12, it mentioned that "The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation...".

<sup>136</sup> *See above*, note 114.

<sup>137</sup> *See e.g.*, S.W.M.B. v.Mayor and Aldermen of Arnhem, Central Council of Appeal, 1 Nov.1983, NJCM-Bulletin, 22 (1983), *cited in*, 16 Neth.Y. I.L., 501, at 504 (1985).



establishment of certain State structures (thus being a positive obligation), but those structures already exist, the right may be safely considered self-executing.

The matter is even less clear if it is accepted that all human rights possess tripartite obligations, namely the obligation to respect, to protect and to fulfil. Under this approach, elements of rights which might be considered *prima facie* progressive in nature, will be capable of immediate implementation to the extent that they contain a prohibition upon the State. As one commentator has noted:

"...there is no qualitative difference between negative and positive provisions. It is merely a difference of degree: the former is more likely to be directly applicable than the latter because it is more likely to be precise".<sup>138</sup>

This has certainly been the approach of the Committee, which has strongly maintained the possibility of immediate implementation of certain provisions, notwithstanding the progressive application clause in article 2(1).<sup>139</sup> Indeed, that there are exceptions to the general rule of progressive application has been recognised by the Dutch courts.

#### IV) CONCLUSION

Although technically it is beyond the competence of the Committee to concern itself with the precise manner in which States give effect to their obligations under the Covenant, it cannot be denied that the modalities of implementation have a significant impact upon the extent to which the individual may enjoy the rights under the Covenant. The most effective method of ensuring the enjoyment of human rights is undoubtedly to provide the individual with appropriate remedies at a national level. The concept of direct effect is of considerable importance in this context in so far as it is a mechanism through which the individual may rely directly upon the terms of the treaty in asserting his or her rights before national courts.

It has to be noted that direct effect is not the only means by which treaty provisions might be given force in domestic courts. A largely unexplored area in this work has been the extent to which treaty provisions might be used in the interpretation of domestic

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<sup>138</sup> Iwasawa, *supra*, note 15, at 675.

<sup>139</sup> *Supra*, note 79.



legislation and in the development of the common law.<sup>140</sup>

Although the use of treaty provisions in the interpretation of domestic norms has considerably potential, it does not provide the individual with an independent cause of action. This is particularly significant in the context of economic, social and cultural rights which are rarely to be found as constitutional rights and even when they are, have generally been deemed incapable of providing the individual with a cause of action in the courts.

This does not augur well for the direct effect of provisions in the Covenant. So long as domestic courts maintain the traditional view that economic, social and cultural rights in general are not "justiciable", they are unlikely to consider the provisions in the Covenant as being self-executing. In turn, it is primarily the failure of national courts to give judicial consideration to economic, social and cultural rights, that has meant that those rights have remained largely inchoate. It is in the Committee's interest, not only from the point of view of ensuring the effectiveness of the guarantees in the Covenant, but also from the point of view of developing the normative content of the rights in the Covenant, that the rights be given direct effect.

Ultimately, the direct effect of the Covenant's provisions will depend upon the extent of existing legislation and the traditional constitutional position of the courts which renders it virtually impossible to predict to what degree a particular provision might be self-executing. Nevertheless, although not all the possible criteria have been analysed here, it is clear that there can be no overriding presumption that the economic, social and cultural rights in the Covenant are not self-executing.

It is arguable that those rights in the Covenant, that are not dependent for their implementation upon State financial resources, are *prima facie* good candidates for being given direct effect. One might cite for example, freedom from forced labour (article 6), freedom from arbitrary dismissal (article 6), the right to join and form trade unions (article 8), the right to strike (article 8), freedom from arbitrary eviction (article 11), the right not to be arbitrarily deprived of food or medical attention (articles 11 and 12), the right to choose schools for one's children (article 13(3)), the right to establish and direct educational institutions (article

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<sup>140</sup> To the writer's knowledge, there are no United Kingdom cases in which the Covenant has been mentioned. It is notable, however, that article 11 of the Covenant was relied upon in two US cases regarding equal access to higher education, *see, Re Alien Children Education Litigation* 501 F.Supp. 544, (S.D.Tex. July 21 1980); *Tayyari v. New Mexico State University*, 495 F.Supp. 1365 (D.N.M. Aug. 29 1980).



13(4)) and freedom for scientific research and creative activity (article 15(3)). In addition, although having certain resource implications, the rights might be generally given direct effect to the extent that they are read in conjunction with article 2(2) which prohibits discrimination in the exercise of those rights.<sup>141</sup>

For those States that do recognise the concept of self-executing treaty provisions, perhaps the greatest obstacle has been the excessively strict manner in which criteria have been applied<sup>142</sup> and the almost summary fashion in which the courts have dealt with economic and social rights in general and the Covenant in particular. A more sophisticated relativist approach would recognise the degree to which such rights are capable of judicial implementation rather than to dismiss them out of hand.

The Committee, whilst not being competent to rule as to the self-executing nature of rights, may exercise some influence on domestic courts in so far as those courts need to interpret provisions of the Covenant. In that sense, bold statements by the Committee are not unwarranted. Nevertheless, if the Committee wishes to influence domestic courts in this manner, it will have to develop a sophistication that is currently lacking. In particular, given that many of the rights within the Covenant have been identified as incorporating a mixture of obligations (respect, protect and fulfil), the Committee will have to be more precise as to what exact right or obligation is to be considered directly effective.

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<sup>141</sup> The rights to equal pay for equal work, and equal remuneration for work of equal value in Article 7(a)(i) are also relevant here.

<sup>142</sup> Van Dijk, *supra*, note 5, at 639.



## **CHAPTER FOUR: NON-DISCRIMINATION AND EQUALITY**

### *Article 2(2)*

*"The States Parties to the Present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".*

### *Article 3*

*"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".*

### **I) INTRODUCTION**

As a human rights instrument, the manifest purport of the Covenant is to protect the fundamental rights of every person by virtue of their humanity. That human rights are seen to derive from the innate and common nature of every human being means that they are possessed by every person to an equal extent. As the Preamble stresses, the Covenant is based upon an idea of the "equal and inalienable rights of all members of the human family". The concept of "equal rights" is confirmed in the Covenant in a general manner by the fact that the rights pertain to "everyone". More specifically however, article 3 makes express reference to the equal rights of men and women.

References to equality may also be found in a number of other provisions in the Covenant. Article 7 refers to "equal remuneration for work of equal value", to "equal pay for equal work" and to "equal opportunity for everyone to be promoted". Similarly, article 13 provides that "higher education shall be made equally accessible to all". However, it follows from the structure of the Covenant that the most important provision as regards the promotion of equality or of equal rights within the Covenant is article 2(2). In that provision, recognition of a concept of equality is to be discovered in a negative formulation prohibiting discrimination.

It could be said that the dual concepts of non-discrimination and equality deriving from article 2(2) "constitute the dominant



single theme of the Covenant."<sup>1</sup> This is true not merely by virtue of the fact that human rights reflect the common innate dignity of every human being, but also by the fact that the implementation of the Covenant is marked by a redistributive philosophy.

## **II) THE CONCEPTS OF NON-DISCRIMINATION AND EQUALITY**

The idea of equality has been peculiarly resistant to definition and, over the centuries, has been attributed with all forms of meanings and characteristics. For example, it is common enough to find references to "equality of treatment", "equality of access", "equality of result or achievement", "equality of opportunity", "absolute equality", "relative equality", "precise equality", "formal equality", "*de facto* equality" and "*de jure* equality". Despite the inconsistencies in terminological usage and the continuing disputes over certain peripheral issues, a number of basic principles are generally accepted.

The idea of human rights assumes that all human beings have some basic commonly shared characteristics and that as a result they should be viewed and judged as members of the human race rather than as members of a particular group. The recognition of these shared qualities gives rise to a principle of equality which requires that all persons be treated with equal respect. Thus "certain forms of state and governmental behaviour which consistently exploit or degrade men and deny both the possession of the shared qualities and 'the moral claims that arise (therefrom)' by certain groups while conceding and indeed recognising them in the case of others should be excluded".<sup>2</sup>

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<sup>1</sup> Ramcharan B., "Equality and Nondiscrimination", in Henkin L.(ed), The International Bill of Rights, 246 (1981). In saying this he was referring to the ICCPR; as we shall see however this is also true for the ICESCR.

<sup>2</sup> Polyviou P., The Equal Protection of the Laws, 11 (1980). Sieghart comments in this vein:

"The primary characteristic which distinguishes 'human' rights from other rights is their universality: according to the classical theory, they are said to 'inhere' in every human being by virtue of his humanity alone. It must necessarily follow that no particular feature or characteristic attaching to any individual, and which distinguishes him from others, can affect his entitlement to his human rights, whether in degree or in kind, except where the instruments specifically provide for this for a clear and cogent reason- for example, in restricting the right to vote to adults, or in requiring special protection for women and children."

Sieghart P., The International Law of Human Rights, 75 (1985).



Recognition has to be paid to the fact that although people have certain common characteristics, they nevertheless possess independent attributes and qualities (whether innate or assumed) which may legitimately be taken into account in the distribution of goods, services and advantages. It is commonly asserted here that equality demands that those who are equal be treated in an equal manner,<sup>3</sup> and that those who are different should be treated differently.<sup>4</sup> The fundamental question here is what considerations are deemed to be legitimate justifications for differential treatment.

One commentator has usefully categorised such justifications into two groups: differentiations based upon "character and conduct imputable to the individual" (such as industriousness, idleness, lawfulness, merit, and carelessness)<sup>5</sup>; and differentiations based upon individual qualities which are relevant to social values (such as physical and mental capacities and talent).<sup>6</sup> However, these criteria do not exhaust all the possible justifications for differential treatment in every circumstance.

The achievement of an equitable balance between identical and differential treatment, however, may be approached from either a positive or a negative vantage point. In positive terms it might be said that everyone should be treated in the same manner unless some alternative justification is provided. On the other hand, in negative terms, it might be said that differences in treatment are legitimate except upon a number of expressly prohibited grounds.

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<sup>3</sup> Ramcharan commented in this light: "Equality... means equal treatment for those equally situated". Ramcharan, *supra*, note 1, at 252. Cf. also, Vickers J., "Majority Equality Issues of the Eighties", Can.H.R.Y., 47 (1980).

<sup>4</sup> This derives essentially from the Aristotelian principle of distributive justice, Aristotle, Nicomachean Ethics, Bk.5, (Trans. Ross W., 1925). See also, Dworkin, who distinguishes between "equal treatment" and "treatment as an equal", Dworkin R., Taking Rights Seriously, xii (1977). Vierdag notes however that an essential element of proportionality exists in determining the extent of different treatment. He therefore concludes that non-discrimination requires:

"Equal treatment of equals and unequal treatment of unequals in proportion to the inequality".

Vierdag E., The Concept of Discrimination in International Law, 7 (1973).

<sup>5</sup> For example a State may legitimately disqualify convicted criminals from the exercise of certain rights on the basis of their own actions.

<sup>6</sup> Ramcharan, *supra*, note 1, at 253. These have been termed by another commentator as "natural endowments". Raphael D., Justice and Liberty, 48 (1980).



The principle of non-discrimination approaches the matter of equality from the negative standpoint.<sup>7</sup> It is primarily a legal technique employed to counteract unjustified inequality.<sup>8</sup> The concept of non-discrimination is, however, only a limited means to pursue equality. First, it operates upon the presumption that differential treatment is legitimate unless based upon a proscribed ground. Even in such a case, differential treatment is only *prima facie* discriminatory. Secondly, the concept of non-discrimination is merely a procedural principle (or an obligation of conduct), governing the treatment of people as equals.<sup>9</sup> It may be conditioned by, but certainly does not recognise itself, a wider concept of equality that may take cogniscence of factual social inequalities.<sup>10</sup> In particular, non-discrimination tends to concentrate upon the prohibition of differential treatment and does not take account of the fact that differential treatment may actually be required in certain circumstances.

The notion that people are "equal" may give rise to claims as to different forms of equality. At one extreme, it might be interpreted as "equality of consideration" recognising merely that

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<sup>7</sup> The most coherent discussion of the notion of discrimination in legal terms is to be found in Judge Tanaka's dissenting opinion in the South West Africa Cases (Second Phase). I.C.J. Rep. 1966, 6 at 284-316.

<sup>8</sup> Partsch comments that the creation of the legal norm of non-discrimination was primarily aimed at avoiding the uncertainties of the notion of equality. He goes on to say:

"The basic consideration in favour of this negative approach is to achieve a higher degree of clarity and certainty in arriving at equality".

Partsch K., "Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination", in Luard E., The International Protection of Human Rights, at 69 (1957). Similarly the P.C.I.J. commented in the Minority Schools in Albania Case, (1935) P.C.I.J., Ser.A/B, no.64:

"Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."

<sup>9</sup> Some commentators see the object of the non-discrimination clauses as being the promotion of "equality of treatment". See e.g. Klerk Y., "Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights", 9 Hum.Rts.Q., 250, at 255 (1987).

<sup>10</sup> Cf. Meron T., "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", 79 A.J.I.L. 283, at 286 (1985). For the view that equality and non-discrimination are merely positive and negative formulations of the same idea see, Dinstein Y., "Discrimination and International Human Rights", 15 Isr.Y.H.R., 11, at 19 (1985); Bayefsky A., "The Principle of Equality or Non-Discrimination in International Law", 11 H.R.L.J., 1, at 1-2 (1990).



everyone should have their claims considered.<sup>11</sup> Essentially this is no more than saying that those claims exist. At the other extreme, equality can be seen as "equality of result",<sup>12</sup> in which there should be a numerically equal distribution of goods, services and advantages. This is universally considered to be neither desirable nor possible.<sup>13</sup>

Between these two extremes may be found claims as to "equality of opportunity". In a weak sense this may be interpreted as allowing everyone to develop their capabilities and pursue their interests without unjustified restrictions. A stronger sense of equality of opportunity, however, requires that opportunity be made meaningful and effective through, in particular, the removal of external barriers that affect the acquisition of benefits and distribution of social "goods", and through the positive promotion of maximum opportunity (for example through training).<sup>14</sup> The notion of equality here demands differential treatment on the basis of initial *de facto* inequality.<sup>15</sup> Efforts to maximise equality of

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<sup>11</sup> Polivou, *supra*, note 2, at 12; Raphael, *supra*, note 6, at 51.

<sup>12</sup> Also referred to as absolute equality, material equality, or equality of satisfaction.

<sup>13</sup> If this approach was taken then the policy of maintaining reasonable differentiations between people in terms of merit or virtue, for example, is untenable. See, Flew A., *Equality in Liberty and Justice*, 177 (1989).

<sup>14</sup> An example of the necessity of different treatment is the provision of special access facilities for the physically disabled in educational facilities. Clearly if they were to be treated "equally" there would be no grounds for building special ramps or lifts. This would effectively deprive them of access to educational opportunities that are open to others. Vickers comments in this respect:

"If we interpret equal treatment as identical treatment regardless of the different needs of individuals, few equality goals will be realized and most equality rights will exist simply on paper."

Vickers, *Supra*, note 3, at 58.

<sup>15</sup> The question of different treatment is particularly problematic with regard to minorities. On the one hand the social disadvantage of such groups might require a long term integrationist stance emphasising equality of treatment. On the other hand, notions of cultural independence and self-determination argue in favour of different treatment. Schachter distinguishes between races and ethnic groups:

"In respect of race, one should follow a "universalist-integrationist" policy (eliminating distinctions) whereas in regard to ethnic groups a pluralist solution, based on the separate but equal doctrine, can be justified and achieved".

Schachter O., "How Effective are Measures Against Racial Discrimination?" 4 *H.R.J.*, 293, at 296 (1971).

Capotorti argues that the essential difference between the protection of minorities



opportunity have commonly involved the imposition of redistributionalist taxation policies to finance social welfare programmes for the advancement of vulnerable and disadvantaged groups in society.

Whereas there is acceptance of the idea that the benefits of individual development may be distributed to reduce material inequality, the idea of utilising "suspect" criteria to direct such a distribution is more controversial. In particular the institution of affirmative action policies which aim to ensure some equalisation of result has been subject to considerable criticism.<sup>16</sup>

### III) EQUALITY IN THE COVENANT

#### A) THE TEXT OF THE COVENANT

It is very much apparent that a notion of equality runs through the heart of the Covenant. In so far as the Covenant demands the creation of State-welfare institutions and benefits (for example for the provision of housing, food, clothing and social security), it is openly redistributionalist.<sup>17</sup> Certainly the Covenant does not envisage an absolute equalisation of result in the sense of achieving an equal distribution of material benefits to all members of society, but it does recognise a process of equalisation in which social resources are redistributed to provide for the satisfaction of the basic rights of every member of society.<sup>18</sup> As an ideal then, an

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and non-discrimination is that the former requires the maintenance of certain differential treatment to allow them to continue developing their own characteristics. Capotorti F., Study On the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/384/Rev.1, at 41, para.242 (1979). However he seems not to recognize that failure on the part of the State to protect the right to cultural identity of minorities is also a question of discrimination.

Indeed, Sigler confounds the argument further by asserting that the definition of a minority as:

"any group category of people who can be identified by a sizable segment of the population as objects for prejudice or discrimination or who, for reasons of deprivation, require the positive assistance of the State. A persistent nondominant position of the group in political, social, and cultural matters is the common feature of the minority".

Sigler J., Minority Rights: A Comparative Analysis, 5 (1983).

<sup>16</sup> See below, text accompanying notes 203-231.

<sup>17</sup> It is arguable that all the rights (possibly with the exception of articles 9 and 13) are achievable in a purely free-market setting through economic growth.

<sup>18</sup> As Raphael stated:

"...differential distribution according to need implies a belief in a right to a certain kind of equality. The man who is said to be in



uneven distribution of material benefits is only tolerable in so far as the satisfaction of the basic economic, social and cultural rights of every member of society is already achieved.<sup>19</sup> On a broad view, the objectives of the Covenant are underlined by the idea of equality of opportunity in its strongest sense.

Both the text of the Covenant and the intentions of the drafters appear to bear out this conclusion. The idea of equality of opportunity is specifically recognised in articles 7(c) and 13(2)(c). Article 7(c) in particular, specifies that the only legitimate considerations in achieving equality of opportunity for promotion are seniority and competence.<sup>20</sup> States would thus appear to be under an obligation to eliminate all other barriers to promotion that might exist both *de jure* and *de facto*. In particular this might require the adoption of positive measures to promote the opportunities of groups in society that are under-represented in higher management positions. That positive measures may (and indeed should) be taken on behalf of certain groups in society is confirmed by the text of articles 10(2) and 10(3) of the Covenant which provide for special measures of protection to be accorded to mothers before and after childbirth and to children especially in the workplace.

Article 3 itself is not so clear in this respect. It provides for the "equal right" of men and women to the enjoyment of all rights in the Covenant. This might be interpreted as saying no more than that men have no greater claim to the enjoyment of the rights than women. However, it is clear that the drafters intended the provision to have more substance. Although article 3 did not require absolute equality of treatment or result,<sup>21</sup> there was

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need falls below a level of benefits which is taken to be the right of all. When special provision is made for him, this is an attempt to bring him, so far as possible, up to the level of what is due equally to all."

Raphael, *supra*, note 6, at 85.

<sup>19</sup> The principle of non-discrimination would, however, still operate in this field.

<sup>20</sup> Article 13(2)(c) requires that higher education be "equally accessible to all, on the basis of capacity". It is not as specifically stated here that capacity should be the only consideration.

<sup>21</sup> McKean comments:

"Some representatives considered that the paragraph might be taken to decree an 'absolute' or 'precise' equality or 'identity of treatment' but others urged that what was being sought was an effective equality in fact- not the abolition of differences between the roles of men and women in marriage, but rather the equitable



certainly a feeling that factual equality should be increased. As the USSR representative commented, the Third Committee was "elaborating principles of *de jure* equality; from these principles would arise the *de facto* equalization of human rights".<sup>22</sup> He continued, "...equality of rights went further than mere non-discrimination; it implied the existence of positive rights in all the spheres dealt with in the draft Covenant".<sup>23</sup>

It might be argued from the presence of article 3 that the concept of equal rights only applies in relation to the position of women. However, there is no reason to approach article 3 in such a restrictive manner. Not only is the scope of the non-discrimination provision considerably wider, the presence of article 3 merely reflects the preoccupation of the United Nations at the time of drafting, with the issue of sexual equality.<sup>24</sup>

## B) THE APPROACH OF THE COMMITTEE

The approach of the Committee towards the realisation of the rights in the Covenant is marked by its insistence upon a process of equalisation. Thus the Committee has recognised that the first step in the realisation of the rights in the Covenant is the identification of disadvantaged sectors of the population.<sup>25</sup> Those groups should be the focus of positive State action aimed at securing the full realisation of their rights. That the Committee considers that action should be prioritised in favour of the vulnerable and disadvantaged groups in society affirms that it considers that the full realisation of the rights will not be achieved merely through economic growth, but rather through providing for a more equal enjoyment of the rights.<sup>26</sup> Indeed, to the extent that the Committee relies upon State-specific benchmarks or indicators, the definition of disadvantage becomes a relative,

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distribution of rights and responsibilities".

McKean W., Equality and Discrimination under International Law, 182 (1983).

<sup>22</sup> USSR, UN Doc.A/C.3/SR.1183, para.10, (1962).

<sup>23</sup> *Ibid.*

<sup>24</sup> Klerk, *supra*, note 9, at 256.

<sup>25</sup> This is stated as being one of the aims of the reporting process. *See*, General Comment No.1, UN Doc.E/1989/22, Annex III, at 87, UN ESCOR, Supp.(No.4), (1989).

<sup>26</sup> For a criticism of such an approach *see*, Flew, *supra*, note 13, at 182-209. He argues instead for the issue of poverty, for example, to be dealt with through a process of economic growth.



as opposed to a universal, or absolute, definition. In such a situation, measures to combat disadvantage may be seen to be openly redistributionalist in nature.<sup>27</sup>

If a process of equalisation is considered to be a means by which States should achieve the full realisation of the rights, it is difficult to assess the degree to which the Committee is really concerned with the question of equality. For example, if a State builds special homes for persons with physical disabilities, that might alternatively be seen as a step towards the realisation of the right to housing, or as a measure aimed at achieving real equality of access to adequate housing.

Nevertheless, the concept of equality is relevant outside the achievement of specific levels of enjoyment of economic, social and cultural rights. Thus it might be considered that even where the minimum core content of the rights is achieved for all persons, the State is under an obligation to ensure that everyone has equality of opportunity or access to higher levels of enjoyment of the rights concerned.<sup>28</sup>

In addition to its action in relation to discrimination, which will be dealt with below, members of the Committee have made numerous references to equality of access and opportunity.<sup>29</sup> In doing so, Committee members have tended to rely upon the factual situation in dealing with the question of discrimination.<sup>30</sup> Members have further enquired as to State policies designed to remedy

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<sup>27</sup> The rejection by the Committee of development approaches that stress growth over poverty alleviation reinforces the conclusion that a link between disadvantage and equality underlies its methodology.

<sup>28</sup> This is relevant to the discussion of whether article 2(2) is subordinate or autonomous, *see below*, text accompanying notes 158-175.

<sup>29</sup> *See e.g.*, Alston, E/C.12/1990/SR.31, at 3, para.10; Jimenez Butragueno, *ibid*, SR.43, at 8, para.4; Rattray, E/C.12/1991/SR.11, at 8, para.45.

<sup>30</sup> For example it was commented that a higher proportion of unemployed women in a State suggested a certain amount of inequality in education and training, *see e.g.*, Muterahajuru, E/C.12/1987/SR.5, at 10, para.4; Neneman, E/C.12/1988/SR.3, at 7, para.29. Similar concern has been expressed over situations where the number of girls in education is lower than that of boys, *see e.g.*, Texier, E/C.12/1988/SR.14, at 7, para.40; Alston, E/C.12/1988/SR.17, at 8, para.48; Rattray, E/C.12/1990/SR.31, at 4, para.13; Jimenez Butragueno, E/C.12/1991/SR.3, at 11, para.51.



situations of *de facto* inequality,<sup>31</sup> and have looked for improvements in the position over time.<sup>32</sup>

However, to determine the extent of equality of opportunity in terms of the result achieved, seems to confuse the notion of equality of opportunity or access with equality of result.<sup>33</sup> As Nickel comments:

"Success in providing equal opportunities will have to be judged in ways that... require reference to the presence of quality programs to educate and protect against discrimination. Statistical measures of outcomes may be useful as practical guides, but they will not serve as criteria of success".<sup>34</sup>

It is clear that the Committee does not countenance the creation of a situation of absolute equality of result. It has emphasised, in particular, the necessity of some autonomy for ethnic minorities to ensure the enjoyment of their own culture,<sup>35</sup> and has placed emphasis on the individual right to pursue his or her own development.<sup>36</sup> As one member stated:

"Full' realisation of the economic, social and cultural rights recognised in the Covenant did not mean equalling out for all persons in the areas concerned but the fact that everyone was entitled, *de facto*, to the equal opportunity to enjoy his rights with dignity".<sup>37</sup>

However, although the Committee does attempt to draw a distinction between the concepts of equality of opportunity and equality of result, the problem essentially lies in the means by

<sup>31</sup> See e.g., Sviridov, E/C.12/1987/SR.20, at 2, para.2; Alston, E/C.12/1990/SR.31, at 3, para.10.

<sup>32</sup> See e.g., Jimenez Butragueno, E/C.12/1988/SR.11, at 2, para.5.

<sup>33</sup> Some commentators have taken the view that the full realization of equality of opportunity is to be determined by whether "the allocation of the good in question in fact works out unequally or disproportionately between different sections of society; if the unsuccessful sections are under a disadvantage which could be removed by further reform or social action". Williams B., "The Idea of Equality", in Williams B.(ed), Problems of the Self, (1973).

<sup>34</sup> Nickel J., "Equal Opportunity in a Pluralistic Society", in Paul E., Miller F., Paul J., and Ahrens J.(eds), Equal Opportunity, 115 (1987).

<sup>35</sup> See e.g., Alvarez Vita, E/C.12/1991/SR.11, at 10, para.54.

<sup>36</sup> Indeed one member, in stressing the necessity of protective action for women during and after pregnancy, commented that "they should not be excessively protected in every sphere of activity". Jimenez Butragueno, E/C.12/1987/SR.7, at 16, para.25.

<sup>37</sup> Taya, E/C.12/1990/SR.46, at 9, para.42.



which former is to be measured.<sup>38</sup> The Committee already does take note of legislative and educational programmes to combat discrimination in addition to statistical data,<sup>39</sup> but it is doubtful whether analysis of this information alone would take it any closer to assessing real equality of opportunity and access.<sup>40</sup>

It would appear then that the Committee must, as it does at present, take cogniscence of material inequality between groups in society as evidenced in statistical data. It should, however, be aware that the ultimate objective is not to establish some numerical distribution in the enjoyment of the rights, but rather to ensure that there is sufficient equality of opportunity.<sup>41</sup> Accordingly, not every difference in the distribution of benefits will necessarily be evidence of inequality of opportunity. The Committee will have to exercise some discretion in establishing causality.

#### IV) ARTICLE 2(2): NON-DISCRIMINATION

The only indication as to the precise meaning of non-discrimination in the drafting of the Covenant was provided by a discussion over whether the term "discrimination" or the term "distinction" should be used. There, an overwhelming majority<sup>42</sup> endorsed a three-power amendment (Argentina, Italy and Mexico) to replace the word "distinction" with the word "discrimination".<sup>43</sup> The stated purpose was to confirm that certain distinctions may be justified to promote the position of certain backward and underprivileged sectors of the population.<sup>44</sup> The word

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<sup>38</sup> This is partially due to the fact that "equality of opportunity and access" is a form of equality of result in its widest sense: it does envisage an ideal situation towards which non-discrimination policy should aim.

<sup>39</sup> See e.g., Neneman, E/C.12/1987/SR.5, at 10, para.49. Rattray, E/C.12/1987/SR.6, at 12, para.66; Alston, E/C.12/1990/SR.42, at 11, para.50.

<sup>40</sup> Indeed the problem facing the Committee is not one of access to information regarding State policy and legislation, but rather the way in which such policies are carried out.

<sup>41</sup> There is some evidence that certain members of the Committee are aware of the shortcomings of statistical evidence in the determination of discrimination. E.g. Neneman, E/C.12/1987/SR.7, at 7, para.29.

<sup>42</sup> 76-2, 13 abstentions. UN Doc.A/5365, at 22, 17 UN GAOR, Annex, (Ag.Item 43), (1962).

<sup>43</sup> UN Doc.A/C.3/L.1028/Rev.2 (1962).

<sup>44</sup> There were also fears that the guarantee of rights without distinction would also prevent States from place any restrictions *inter alia* on the rights of aliens to take up employment in a country. The replacement of the word distinction by discrimination was intended to avoid such ambiguity. UN Docs.



discrimination seemed to convey more accurately the requirement that the distinction be of an unjustified nature or arbitrary. That this decision was not of any decisive importance is borne out by the fact that during the drafting of the ICCPR the term distinction was not altered.<sup>45</sup> In that case it was made clear that not all distinctions would be forbidden.<sup>46</sup> Similarly, in the drafting of article 3 there is some evidence that not all differences in treatment would be considered illegitimate. McKean comments:

"Some representatives considered that the paragraph might be taken to decree an 'absolute' or 'precise' equality or 'identity of treatment' but others urged that what was being sought was an effective equality in fact- not the abolition of differences between the roles of men and women in

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A/C.3/SR.1182, at 241 (1962); A/C.3/SR.1202, at 338 (1962); and A/C.3/SR.1203, at 341 (1962).

<sup>45</sup> The representative of Italy in particular held out in favour of the term discrimination because:

"There were cases in which the law was justified in making distinctions between individuals or groups, but the purpose of the article was to prohibit discrimination, in any sense of unfavourable and odious distinctions which lacked any objective or reasonable basis".

Italy, A/C.3/SR.1099, para.10 (1961).

<sup>46</sup> UN Doc.A/C.3/SR.1258, paras.244-245 (1963); UN Doc.A/C.3/SR.1259, para.249 (1963). *See also*, Klerk, *supra*, note 9, at 252. McKean comments that the change in attitude from that taken with regard to the ICESCR was largely due to the change in composition of the Committee in the intervening time. McKean, *supra*, note 21, at 149. The use of the word "distinction" is also surprising considering article 4 ICCPR refers to "discrimination".

An important exchange of views took place over the meanings of "distinction" and "discrimination" with regard to article 26 ICCPR (draft article 24). It was pointed out that the law was justified in making reasonable differentiations in the treatment of certain groups of individuals such as minors, aliens or persons of unsound minds. *See*, UN Docs.A/C.3/SR.1097-1102, (1962). Discrimination in this sense did not mean distinctions of a favourable kind (negative discrimination), nor did it include private individual preferences. McKean, *supra*, note 21, at 139-140.

McKean comments that article 2(1) ICCPR "does not prevent the drawing of distinctions on the grounds of merit or capacity, nor does the equality principle require identical treatment for all, or forbid relevant and reasonable distinctions". Indeed article 25 ICCPR seems to recognize that it is only "unreasonable restrictions" that qualify as discrimination. Similarly, objections to the phrase "equality before the law" in article 26 ICCPR, were dispelled by the argument that it was a procedural and not substantive equality that was sought, which did not preclude reasonable differentiations between individuals or groups of individuals.



marriage, but rather the equitable distribution of rights and responsibilities".<sup>47</sup>

It would appear that the drafters understood the term "discrimination" to mean an unjustified differentiation in treatment. Indeed this point has been emphasised by the European Court of Human Rights in the Belgian Linguistic Case.<sup>48</sup> Here the French text of article 14 used the term "distinction". The Court held that the article "does not forbid every difference in treatment in the exercise of the rights and freedoms recognized".

However, during the drafting of the Covenant, a number of references were made to "discrimination in its classical juridical meaning"<sup>49</sup> and to "discrimination... in international usage".<sup>50</sup> It seems to have been suggested that there existed a specific juridical meaning of the term "discrimination" as used in the Covenant.<sup>51</sup> It is possible that reference was being made to the ILO Convention Concerning Discrimination in Respect of Employment and Occupation (ILO No.111)<sup>52</sup> and the UNESCO Convention Against Discrimination in Education<sup>53</sup>, both of which contain definitions of discrimination. Certainly, if a clear international test for discrimination in all fields were

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<sup>47</sup> McKean, *supra*, note 21, at 182.

<sup>48</sup> Case "Relating to certain aspects of the laws on the use of languages in education in Belgium"(Merits), Eur.Court H.R., Series A, Vol.6, Judgement of 23 July 1968, (1979-80) 1 EHRR 578.

<sup>49</sup> Pakistan, A/C.3/SR.1102, para.4, (1961)

<sup>50</sup> Argentina, A/C.3/SR.1184, para.7 (1962).

<sup>51</sup> Ramcharan argues with regard to the provisions of the ICCPR, that the status of the concept of non-discrimination in international law has effect both as to the permissibility of derogations from the principle in the Covenant, but also to the determination of State compliance with its obligations under the Covenant. Ramcharan, *supra*, note 1, at 250.

<sup>52</sup> Adopted 25 June 1958, entered into force 15 June 1960, 362 U.N.T.S. 32. Article 1(1) reads:

"For the purposes of this Convention the term "discrimination" includes: a. Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

<sup>53</sup> Adopted 14 Dec. 1960, entered into force 22 May 1962, 429 U.N.T.S. 93. Article 1(1) reads:

"For the purposes of this Convention the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education".



established, it would have considerable relevance to the interpretation of article 2(2).<sup>54</sup>

The definitions of discrimination provided in the above mentioned Conventions may also be compared with those in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>55</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>56</sup> Their similarities have led certain commentators to conclude that a universal "composite concept" of discrimination can be discerned in the various instruments<sup>57</sup>:

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<sup>54</sup> This is particularly so if the principle of non-discrimination is thought to have the status of customary international law.

In the Barcelona Traction Case the ICJ included among the obligations of states *erga omnes* "the principles and rules concerning the basic rights of the human person including protection from slavery and racial discrimination". ICJ Rep., (1970), at 3. Similarly in its Advisory Opinion on Namibia (1971) the ICJ stated that "to establish... and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national origin... constitutes a denial of fundamental human rights" and "is a flagrant violation of the purposes of the Charter". Advisory Opinion, I.C.J.Rep., (1971), at 16.

Reference to other international instruments is also suggested in paragraph 41 of the Limburg Principles which states:

"In the application of article 2(2) due regard should be paid to all relevant international instruments including the Declaration and Convention on the Elimination of all Forms of Racial Discrimination".

9 Hum.Rts.Q., 122, at 127, (1987).

<sup>55</sup> Adopted 21 Dec. 1965, entered into force 4 Jan. 1967, 660 U.N.T.S., 195. Article 1(1) reads:

"In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

<sup>56</sup> Adopted 18 Dec. 1979, entered into force 3 Sept. 1981. GA Resn. 34/180, 34 UN GAOR, Resns, Supp.(No.46) at 193, (1980), 1249 U.N.T.S. 243. Article 1 reads: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

<sup>57</sup> The outline of such a definition has been accepted by the Human Rights Committee in its General Comment on article 2(1) ICCPR where it stated that the term discrimination:

"Should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."

General Comment No.18 (37), UN Doc.A/45/40, at 174, para.7, 45 UN GAOR,



- 1) a difference in treatment,
- 2) which is based upon certain prohibited grounds,
- 3) and has a certain purpose or effect,
- 4) in selective fields.<sup>58</sup>

The Committee on Economic, Social and Cultural Rights however, has not as yet established its own definition of the term "discrimination" in a General Comment. The only definition to be found in its work is in the reporting guidelines on the subject of article 6. There, the Committee requests States to provide it with information as to:

"...any distinctions, exclusions, restrictions or preferences, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, colour, sex, religion, political opinion, nationality or social origin, which have the effect of nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity or treatment in employment or occupation".<sup>59</sup>

The similarity between this definition and that adopted in other human rights contexts suggests that the Committee will approach the question of discrimination in the same manner.

The four elements of discrimination will be dealt with separately below.

#### A) DIFFERENTIAL TREATMENT

The Committee utilises the common terms to describe differential treatment. They are "distinctions", "exclusions", "restrictions" or "preferences". Clearly any one of these terms would suffice to establish an action for the purpose of discrimination. The inclusion of the term "preferences" suggests that the action does not necessarily have to be directed against the group alleging discrimination, but may be effected through unreasonable promotion of one group at the expense of others.<sup>60</sup> The crucial aspect is that these terms are all relative, presuming a

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Supp.(No.40), (1990).

<sup>58</sup> Schwelb E., "The International Convention on the Elimination of All Forms of Racial Discrimination", 15 *I.C.L.Q.*, 996, at 1001 (1966).

<sup>59</sup> Reporting Guidelines, UN Doc.E/1991/23, Annex IV, at 91, para.3, UN ESCOR, Supp.(No.3), (1991).

<sup>60</sup> It has to be pointed out that from the point of view of equality of opportunity, differential treatment may actually be required in certain circumstances. It is particularly in this respect that the principle of non-discrimination falls short of providing for equality.



one commentator has noted, "the discriminatory or equal treatment of one person must be measured by the relative treatment of somebody else".<sup>61</sup>

As was established during the drafting of the Covenant, differential treatment, although being a pre-requisite, is not in itself sufficient to establish a case of discrimination. The Committee's definition goes on to speak of actions that have the effect of "nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity...".<sup>62</sup> Accordingly, differentiations in treatment are not to be considered discriminatory as long as they do not negatively affect the equal opportunities of other individuals or groups. This might be read as not preventing justifiable differentiations. However, by defining "discrimination" in terms of "equality of opportunity" does little to clarify the complex of issues. In the context of employment, for example, it has to be accepted that certain job requirements may indirectly limit the access to employment of certain groups (such as women in jobs that require heavy manual labour).<sup>63</sup> Similarly in some cases, preference may be legitimately given to members of specific racial groups for the purpose of authenticity.<sup>64</sup>

This matter has been underlined in other human rights fora. In the Mauritian Women's Case<sup>65</sup> the Human Rights Committee in finding a violation of articles 2(1) and 3 ICCPR, considered that a distinction based on sex was not in itself conclusive. The determining factor was that no "sufficient justification" had been given for such a distinction.<sup>66</sup> Similarly, the European Court found in the Belgian Linguistics Case<sup>67</sup> that the principle of equality of treatment is violated "if the distinction has no objective and reasonable justification." It went on to define what it considered to be reasonable:

"The existence of such a justification must be assessed in relation to the aim and effects of the measure under

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<sup>61</sup> Dinstein, *supra*, note , at 11.

<sup>62</sup> *Supra*, note 59.

<sup>63</sup> *See below*, Chapter 5.

<sup>64</sup> For example a theatrical production might require an actor of a specific racial background.

<sup>65</sup> HRC Resn.9/35, UN Doc.A/36/40, at 134, 36 UN GAOR, Supp.(No.40), (1981).

<sup>66</sup> *Ibid*, para.9.2 (b) 2(ii) 3

<sup>67</sup> *Supra*, note 48.



consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."<sup>68</sup>

That consideration is given to "principles that normally prevail in democratic societies" is underlined by the approach of the European Court of Human Rights in allowing a "margin of appreciation" to be given to States in the determination of "to what extent differences in otherwise similar situations justify a different treatment in law".<sup>69</sup> It has commented in this respect that "the scope of this margin will vary according to the circumstances, the subject-matter and its background".<sup>70</sup>

As far as the Committee is concerned, it has not readily addressed such issues. However, it has exercised a certain amount of restraint in making determinations of violations in relation to article 2(2). For example, in both the cases of Iran and of Afghanistan the Committee gave the State concerned some leeway as regards the compatibility of certain laws and practices, with the requirement of non-discrimination.<sup>71</sup> In particular, despite the failure of the Iranian delegate to answer the questions of the Committee as to the access of Bahai's to university education in Iran,<sup>72</sup> the Committee failed to make any specific finding of violation. Whether or not the restraint in such cases is a result of lack of sufficient information or in anticipation of some justification, it does suggest that the Committee in fact allows States a "margin of appreciation" in this regard.

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<sup>68</sup> *Ibid.*

<sup>69</sup> That this may give rise to overemphasis of public interest in the determination of what is a justified distinction has been criticised by Van Dijk and Van Hoof. They admit nevertheless that the requirement of reasonableness deprives this objection of much of its force. Van Dijk P. and Van Hoof G., Theory and Practice of the European Convention on Human Rights, 396 (4th Ed, 1991).

<sup>70</sup> Inze v. Austria, Eur.Court.H.R., Series A, Vol 126, Judgement of 28 Oct.1987, para.41. However there has been little articulation of what constitutes those circumstances, subject-matters or backgrounds in which the margin of appreciation will operate. Bayefsky, *supra*, note 10, at 18.

<sup>71</sup> For Afghanistan *see*, Jimenez Butragueno, E/C.12/1991/SR.8, at 5, para.21; For Iran *see*, Jimenez Butragueno, E/C.12/1990/SR.45, at 3, paras 10-11.

<sup>72</sup> *See*, Alston, E/C.12/1990/SR.42, at 13, para.70.



## B) PURPOSE OR EFFECT

The Committee's definition of discrimination, refers, like the ILO Convention to the "effect" of that differential treatment. ICERD, CEDAW and the UNESCO Convention refer, in addition, to discrimination that has the "purpose" of impairing or nullifying the enjoyment of the rights concerned.<sup>73</sup> Although the Committee makes no reference to "purpose" this does not affect State responsibility for intentional but ineffective discriminatory measures. Thus the presence of discriminatory legislation would amount to a breach of the Covenant even if it were not enforced. Accordingly, members of the Committee criticised a legal provision in Zaire which required women to seek the permission of their husbands in order to work outside the home. The fact that permission was rarely denied was immaterial.<sup>74</sup>

In practice, the actual intention of the State concerned seems to be of little importance. It is clear that in the majority of States some form of discrimination is inherent in the civil, political, social, economic, and cultural traditions of that country.<sup>75</sup> A particular government at any given juncture cannot be considered to have willed that situation whether expressly or impliedly.<sup>76</sup> The necessity of eliminating discrimination requires that the government take action to remedy circumstances for which it is not itself responsible. This is particularly clear in so far as States are obliged to eliminate discrimination between private individuals.<sup>77</sup> Thus, although discriminatory intention might be determined merely by the existence of discriminatory policies and

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<sup>73</sup> As regards the ICCPR, there is some evidence that the practice of the Human Rights Committee suggests that a notion of foreseeability has been incorporated in which some results would not be considered as the true consequences of discriminatory rules. Bayefsky, *supra*, note 10, at 10.

<sup>74</sup> See e.g. Alvarez Vita, E/C.12/1988/SR.17, at 2, para.3.

<sup>75</sup> See, Alston, E/C.12/1990/SR.31, at 3, para.10.

<sup>76</sup> There is the possibility that the "State" is to be considered in an a-historical manner, unlike the notion of government. In this way the "State" could be said to have intentioned past discriminatory practices. However the confusion that might entail in the case of newly independent States suggests that this approach is probably not the most effective.

<sup>77</sup> See below, text accompanying notes 232-245.



legislation,<sup>78</sup> the Committee has not refrained from criticising governments on the basis of the *de facto* situation alone.<sup>79</sup>

The emphasis on the "effect" of policies rather than their intention also means that neutral measures will be considered "discriminatory" if in fact they negatively affect a group in society that may be deemed to be singled out for protection. As Judge Tanaka commented in the South West Africa Cases (Second Phase), 1966<sup>80</sup> with regard to racial discrimination:

"The arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to ... motive or purpose".<sup>81</sup>

This form of discrimination, as found in certain jurisdictions,<sup>82</sup> has often been termed "indirect discrimination".<sup>83</sup> Although a certain amount of recognition has been paid, by Committee members, to the notion of indirect discrimination,<sup>84</sup> no effort has been made to define the concept as yet. As a general principle, however, indirect discrimination is not established if only one person is adversely affected by the provision concerned; it must affect the group concerned preponderately or in a disproportionate manner.

<sup>78</sup> This is not conclusive in itself however as discrimination may operate as an unfortunate side-effect of a piece of legislation. In such a case a test of foreseeability would have to be made to impute discriminatory intention. In this respect, it is difficult to concur with Meron's assertion that discriminatory intention is easy to establish. Meron, *supra*, note 10, at 287.

<sup>79</sup> See e.g., Simma, E/C.12/1990/SR.16, at 7, para.32. The P.C.I.J. advocated a similar conclusion in its advisory opinion relating to German Settlers in Poland (1923), P.C.I.J., Ser.B, No.6: "There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law";

<sup>80</sup> *Supra*, note 7.

<sup>81</sup> *Ibid*, at 293.

<sup>82</sup> It has been defined and most fully developed in the United States following the case of Griggs v.Duke Power Co. 401 U.S. 424 (1971). In the UK see, Race Relations Act 1976, sect.1(1)(b), Sex Discrimination Act 1975 sect.1(1)(b).

<sup>83</sup> The Commission of the EEC describes indirect discrimination as follows: "There is a presumption of indirect discrimination as soon as an apparently neutral regulation in fact preponderantly touches the workers of one of the sexes and this without the need to indicate the intention to discriminate."

European Commission Intermediate Report on Application of Directive No.79/7, (Com.83), 793 (1984).

<sup>84</sup> See e.g., Jimenez Butragueno, E/C.12/1989/SR.5, at 10, para.58; Simma, E/C.12/1989/SR.8, at 8, para.46.



An emphasis on the discriminatory "effect" of policies and programmes does raise two important points about the Committee's approach. First, it places some emphasis upon what might be termed "equality of result" as opposed to procedural equality. In effect, the principle of non-discrimination has been given a broad interpretation to embody ideas of equality of opportunity. Secondly, in so far as indirect discrimination may be established by reference to effects upon a particular group (for example a racial group), it might be said to give rise to a notion of collective rights.<sup>85</sup>

### C) GROUND'S UPON WHICH DISCRIMINATION IS PROHIBITED

Most non-discrimination provisions proscribe discrimination on a specified number of grounds, such as sex, race, or ethnic origin "to make clear that certain factors are unacceptable as grounds for distinction".<sup>86</sup> As seen above, this does not mean that all distinctions made upon those grounds will necessarily be discriminatory, rather that they are "suspect classifications". At most, distinctions made upon these suspect grounds could be said to amount to *prima facie* discrimination, depending upon whether or not there is any reasonable justification.

The list of "prohibited" or "suspect" grounds tends to vary from one treaty to another. It might be the purpose of the treaty for example, to deal with a specific type of discrimination, in which case, the grounds on which discrimination is prohibited are more restricted.<sup>87</sup> It is clear that the ICESCR, in containing a list of ten prohibited grounds, was not intended to be limited in such a way. Nevertheless, the question of whether the enunciated grounds are the only ones on which distinctions are prohibited, is not specifically addressed.

#### 1) Exhaustive or Illustrative

The ten illegitimate grounds for discrimination, parallel those found in the UDHR. Additional grounds found in other Conventions are notably "association with a national minority",<sup>88</sup> "ethnic origin",<sup>89</sup> and

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<sup>85</sup> It cannot be said to be a fully-fledged "collective right" however, as the group identity merely acts as a condition for the protection of the individual. It does not, for example, give rise to claims for a specific benefit to be granted to that group.

<sup>86</sup> Ramcharan, *supra*, note 1, at 252.

<sup>87</sup> Examples of this type of treaty are the Racial Discrimination Convention which is limited to distinctions made on the basis of "race, colour, descent, or national or ethnic origin", and the Discrimination against Women Convention which relates to distinctions "on the basis of sex".

<sup>88</sup> Article 14, European Convention on Human Rights (1950), 213 U.N.T.S. 221. It is unlikely that this adds much to the prohibition of discrimination on the ground of national origin. See e.g., Dinstein, *supra*, note , at 12.



"disability".<sup>90</sup> It seems unlikely, however, that the drafters wished to exclude these as possible grounds for discrimination.

It could be argued on the basis of the principle *expressio unius est exclusio alterius*, that the specification of some prohibited grounds for discrimination automatically excludes the possibility of adding other grounds. Indeed, the reference to discrimination "of any kind", found in the UDHR was dropped in the drafting of the ICESCR leading a commentator at the time to conclude that the enumerated grounds were intended to be exhaustive.<sup>91</sup>

Nevertheless, during the drafting of the ICCPR, certain proposals for grounds of discrimination were deemed unnecessary because they fell into the ambit of the expressions "discrimination on any ground" and "other status".<sup>92</sup> It would be logical to read the term "other status" in the ICESCR as having a similar open-ended meaning. Moreover, it has been asserted that, even though a three power amendment replaced the words "such as"<sup>93</sup> with the phrase "as to", the lack of discussion that took place over the change indicates that the enumeration was intended to remain merely illustrative.<sup>94</sup>

If the grounds for discrimination are not seen as being exhaustive it might be suggested that any distinction can bring into operation the non-discrimination principle.<sup>95</sup> It would thus fall to the Committee to develop a rationale to justify under what circumstances and on what grounds different treatment is legitimate. The Committee has not in fact gone so far in its treatment of article 2(2). However, it has arguably extended its scrutiny of differential treatment to grounds other than those specifically enumerated.

<sup>89</sup> Article 2(1) Convention on the Rights of the Child, 28 I.L.M. 1448 (1989).

<sup>90</sup> *Ibid.*

<sup>91</sup> Bayefsky, *supra*, note 10, at 5.

<sup>92</sup> UN Doc.A/2929, para.181, 10 UN GAOR, Annexes, (Ag.Item 28), Pt.II, (1955).

<sup>93</sup> This phrasing is still to be found in article 2 UDHR and article 2(1) ICCPR.

<sup>94</sup> Klerk, *supra*, note 9, at 256. For the opinion that article 2 UDHR is illustrative see, Verdoot A., Naissance et Significance de la Déclaration Universelle des Droits de l'Homme, 95 (1964).

<sup>95</sup> This was the position adopted by the European Court of Human Rights in Rasmussen v. Denmark Eur.Court H.R., Series A, Vol.87, Judgement of 28 Nov.1984. The Human Rights Committee does not seem to have adopted this approach with regard to article 26 however. Bayefsky, *supra*, note , at 6-7.



In addition to asking questions on the status of ethnic minorities,<sup>96</sup> natural children,<sup>97</sup> women<sup>98</sup> and men,<sup>99</sup> or discrimination on the basis of religious belief,<sup>100</sup> alternative political philosophies<sup>101</sup> and class bias,<sup>102</sup> it has directed itself to the situation of those in particular regional areas,<sup>103</sup> aliens,<sup>104</sup> (including the stateless,<sup>105</sup> migrant workers,<sup>106</sup> and

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<sup>96</sup> *E.g.* Taya, E/C.12/1987/SR.16, at 4, para.14; Alvarez Vita, E/C.12/1988/SR.14, at 6, para.32; Muterahajuru, E/C.12/1990/SR.18, at 13, para.78; Simma, E/C.12/1990/SR.40, at 10, para.42. This could be seen to include indigenous populations, *cf.* Neneman, E/C.12/1989/SR.8, at 9, para.49; Konate, E/C.12/1990/SR.7, at 4, para.13; Bonoan-Dandan, E/C.12/1991/SR.3, at 10, para.44.

These groups should accordingly have the right to express themselves in their own language and enjoy their own culture. Texier, E/C.12/1988/SR.13, at 9, para.39. The maintenance of a separate identity is considered essential to indigenous populations. Assimilationist policies are therefore considered illegitimate. Alston, E/C.12/1988/SR.13, at 13, para.71.

<sup>97</sup> *E.g.* Fofana, E/C.12/1987/SR.7, at 8, para.39; Texier, E/C.12/1987/SR.9, at 6, para.27; Badawi El Sheikh, E/C.12/1988/SR.8, at 2, para.3; Fofana, E/C.12/1989/SR.7, at 3, para.6.

<sup>98</sup> The Committee have asked numerous questions as to the position of women. As regards the legal situation of women *see e.g.*, legal prohibition against discrimination against women, Jimenez Butragueno, E/C.12/1987/SR.7, at 6, para.23.; *de jure* and *de facto* differences between men and women, Alvarez Vita, E/C.12/1987/SR.8, at 7, para.29.; equality under the law, Jimenez Butragueno, E/C.12/1987/SR.8, at 8, para.33.; different marriageable ages for men and women, Rattray, E/C.12/1987/SR.9, at 9, para.41.; Legislative measures to prevent dismissal of pregnant women, Mrachkov, E/C.12/1988/SR.10, at 6, para.25.

<sup>99</sup> Especially in relation to paid leave to look after children, *e.g.* Jimenez Butragueno, E/C.12/1987/SR.12, at 4, para.14. Texier, E/C.12/1987/SR.19, at 10, para.47; or the enjoyment of parental benefits, Jimenez Butragueno, E/C.12/1988/SR.18, at 3, para.12. Also in respect to widower's pension, *e.g.* Alvarez Vita, E/C.12/1988/SR.10, at 6, para.23.

Unlike the Discrimination Against Women Convention, the prohibited ground of "sex" is not confined to the position of women. The presence of articles 3 and 10 confirm however, that the position of women is of primary importance.

<sup>100</sup> *E.g.* Simma, E/C.12/1987/SR.11, at 10, para.48.

<sup>101</sup> *E.g.* Konate, E/C.12/1987/SR.11, at 12, para.58. This includes the expression of opposition to the established political views, Simma, E/C.12/1987/SR.13, at 8-9, para.40; Alston, E/C.12/1987/SR.19, at 9, para.45..

<sup>102</sup> Rattray, E/C.12/1990/SR.7, at 5, para.16.

<sup>103</sup> *E.g.* The treatment of populations in overseas and dependent territories: Daudi, E/C.12/1987/SR.5, at 4, para.15 (Netherlands Antilles); Badawi, E/C.12/1988/SR.8, at 2, para.3 (Greenland and Faroe Islands); Mrachkov, E/C.12/1989/SR.12, at 13, para.73 (French Overseas Territories). The position of rural populations: Mrachkov, E/C.12/1988/SR.7, at 6, para.43; Sparsis, E/C.12/1988/SR.7, at 2, para.2; Muterahajuru, E/C.12/1990/SR.2, at 11, para.67. Poor urban populations: Texier, E/C.12/1989/SR.12, at 10, para.50.



refugees,<sup>107</sup>) unmarried couples and parents,<sup>108</sup> people with AIDS,<sup>109</sup> the physically<sup>110</sup> and mentally disabled,<sup>111</sup> homosexuals,<sup>112</sup> the poor,<sup>113</sup> and the elderly.<sup>114</sup>

It has to be borne in mind, however, that the Committee, in asking questions on the situation with regard to such groups, is not necessarily attempting to discover elements of discrimination, but rather merely assessing the enjoyment of economic, social and cultural rights. Thus *de facto* differences in the enjoyment of rights between different regions would not normally be considered a matter of discrimination. Nevertheless, in centering its attention on these social groups, the Committee appears to consider that possible additional grounds exist under which discrimination is prohibited, such as health, nationality, disability, poverty, age and sexual orientation.

Of these possible grounds, there would seem to be little reason to object to the inclusion of grounds such as health,<sup>115</sup> disability,<sup>116</sup> or

<sup>104</sup> See below, text accompanying notes 121-140.

<sup>105</sup> E.g. Texier, E/C.12/1988/SR.10, at 12, para.66; Badawi El Sheikh, E/C.12/1988/SR.11, at 3, para.15.

<sup>106</sup> E.g. Mratchkov, E/C.12/1987/SR.6, at 12, para.61; Simma, E/C.12/1990/SR.34, at 4, para.22.

<sup>107</sup> E.g. Taya, E/C.12/1988/SR.3, at 6, para.27; Texier, E/C.12/1989/SR.8, at 5, para.22; Texier, E/C.12/1990/SR.7, at 2, para.5.

<sup>108</sup> E.g. Wimer Zambrano, E/C.12/1987/SR.11, at 12, para.60; Texier, E/C.12/1989/SR.14, at 16, para.70; Muterahjuru, E/C.12/1987/SR.12, at 3, para.8.

<sup>109</sup> E.g. Rattray, E/C.12/1987/SR.20, at 3, para.10; Alston, E/C.12/1988/SR.9, at 5, para.25; Texier, E/C.12/1990/SR.2, at 10, para.56; Simma, E/C.12/1990/SR.34, at 5, para.25.

<sup>110</sup> E.g. Deaf children, Jimenez Butragueno, E/C.12/1990/SR.8, at 11, para.52.

<sup>111</sup> See e.g., Jimenez Butragueno, E/C.12/1987/SR.20, at 4, para.13.

<sup>112</sup> E.g. Simma, E/C.12/1989/SR.16, at 18, para.95.

<sup>113</sup> E.g. Neneman, E/C.12/1988/SR.3, at 9, para.43; Texier, E/C.12/1990/SR.16, at 9, para.44.

<sup>114</sup> E.g. Butragueno, E/C.12/1988/SR.14, at 3, para.13; Simma, E/C.12/1988/SR.6, at 4, para.18; Jimenez Butragueno, E/C.12/1990/SR.40, at 5, para.71.

<sup>115</sup> Reaction to the discovery of HIV/AIDS has entailed many instances of discrimination in the field of economic, social and cultural rights. It is considered that denials of education, marriage, social services and employment go far beyond those measures necessitated by the nature of the infection. See e.g., UN Doc. E/CN.4/Sub.2/1990/9, at 6-8, paras.30-40; "AIDS and Discrimination", 41 *I.C.J.Rev.*, 35-49 (1988); Center for Human Rights, Report of an International Consultation on AIDS and Human Rights, (1989).



age.<sup>117</sup> Clearly, this does not mean that all differences in treatment based upon such grounds are discriminatory. For example, it is accepted in a number of States that the elderly might be deprived of their right to work through compulsory retirement.<sup>118</sup> It does mean that differences justified on such grounds will be subjected to a stricter level of scrutiny than others.

On the other hand, the posited grounds of sexual orientation, poverty and nationality all present difficulties with respect to their inclusion which will be discussed below:

#### a) Sexual Orientation

The acceptance of equality with regard to those with alternative sexual orientations is clearly subject to a great deal of controversy. It is submitted that, in principle, there is no conceivable reason why the extent of a person's enjoyment of economic, social and cultural rights should depend, in any respect, upon their sexual orientation. However, the fact that homosexuality is still illegal in a number of countries suggests that there is, as yet, no agreement as to the moral position in this regard.<sup>119</sup>

It is open for the Committee to make its own view of the matter clear, but it would undoubtedly encounter difficulties if it attempted to bind States to ensuring non-discrimination on the grounds of sexual orientation. Nevertheless, if the Covenant were to be interpreted as a "living instrument" with dynamic standards that reflect the moral and legal developments within the States parties,<sup>120</sup> it might be possible for sexual orientation to be established as a prohibited ground for discrimination at some stage in the future.

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<sup>116</sup> The Committee's interest in disability issues is underlined by the proposal of Mr Despouy, the Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, that the Committee monitor legal standards to protect disabled persons. E/C.12/1990/SR.49, at 3, paras.10-11.

<sup>117</sup> Vickers, *supra*, note 3, at 52. *See also*, UN Doc.E/C.12/1991/WP.1.

<sup>118</sup> On this point *see*, Alston, E/C.12/1991/SR.9, at 6, para.24.

<sup>119</sup> The European Court of Human Rights however has recognised an increased tolerance of homosexual behaviour in the European context. Accordingly, it found the imposition of criminal sanctions to be in breach of the right to privacy under article 8 of the ECHR. Dudgeon v. United Kingdom, Eur.Court H.R., Series A, Vol.45, Judgement of 22 Oct.1981, (1981) 4 EHRR 149.

<sup>120</sup> *Cf.* Tyrer v. United Kingdom, Eur.Court HR, Series A, Vol.26, Judgement of 25 Apr.1978, (1979-80) 2 EHRR 1.



### b) Nationality

With regard to nationality as a prohibited ground for discrimination, it should be noted that article 2(2) rules out discrimination on the grounds of national origin but not on the basis of nationality.<sup>121</sup> Indeed article 2(3) specifically allows limitations to be placed upon the enjoyment of the rights of non-nationals in the case of developing States.<sup>122</sup> Lillich draws the conclusion that the ICESCR "does not embody a general norm of non-discrimination against aliens".<sup>123</sup>

However, an interesting "interpretative declaration" was made by Belgium upon ratification:

"With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The terms should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable

<sup>121</sup> Whereas "nationality" refers to the position of aliens and migrant workers, "national origin" seems to relate to the ethnic or racial origin of the individual irrespective of their nationality. For a discussion of the differences between the terms *see*, comments of Lord Simon in Ealing London Borough Council v. Race Relations Board [1972] AC 342, at 362-3. Cf. Kartashkin V., "Economic, Social and Cultural Rights" in Meron T.(ed), Human Rights in International Law, 111, at 131 (1985). Schwelb concurs in this view in commenting that "national origin" relates to present and past "nationality" in an ethnographic sense. He also comments that with respect to the term "nationality" in its legal sense, only previous nationality is a prohibited ground for discrimination. Schwelb, *supra*, note 58, at 1007.

<sup>122</sup> It might be argued on the basis of article 2(3) that this does not entitle developed countries to discriminate in such a manner and that in any case differentiations may not be made with regard to non-economic rights, Lillich R., The Human Rights of Aliens in Contemporary International Law, 47 (1981).

The definition of economic rights in itself is unclear. It is assumed that they are rights "that enable a person to earn a living or that relate to that process". Dankwa E., "Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights", 9 Hum.Rts.Q., 230, at 240 (1987). McKean comments with respect to article 2(3):

"the term 'developing country' is not defined, and the language used is unconscienably vague. It must therefore be regarded as an unfortunate inclusion in a covenant of this nature and likely to cause invidious and unreasonable distinctions to be made against aliens on the ground of their foreign nationality".

McKean, *supra*, note 21, at 201.

<sup>123</sup> Lillich, *ibid*, at 48. He continues however:

"It must be emphasised that this conclusion is not tantamount to stating that international law now authorises discrimination against aliens in these areas. All one may conclude is that this particular instrument is not in and of itself the source of such a general norm of non-discrimination."



considerations, in conformity with the principles prevailing in democratic societies."<sup>124</sup>

Whilst overtly being intended to limit the scope of obligations as regards non-nationals, the declaration in fact confirms that the term "national origin" is to be read in a wide sense to include non-nationals. It then merely reiterates the idea that not all differences in treatment will necessarily amount to discrimination.

Some members of the Committee however have tended to assume that any differentiation in treatment between nationals and non-nationals is principally illegitimate.<sup>125</sup> One member's interpretation of article 2(3) reinforces the view that the only exception to this rule is to be found in relation to economic rights in developing countries.<sup>126</sup> At times individual Committee members have limited their attention to the provision of social benefits, health care and education,<sup>127</sup> but often they have gone further to include employment rights.<sup>128</sup>

Criticism of such differential treatment has gone to the extent of violations being found in a number of cases. For example with regard to the French report, one member considered the fact that a disabled adults' allowance was only payable to French nationals was contrary to article 2.<sup>129</sup> Similarly it was considered

<sup>124</sup> Multilateral Treaties Deposited with the Secretary-General as of 31 Dec.1991. UN Doc.ST/LEG/SER.E/10, at 123 (1991).

<sup>125</sup> The Limburg Principles state:

"As a general rule the Covenant applies equally to nationals and non-nationals".

Limburg Principles, *supra*, note 54, at 127, para.42.

<sup>126</sup> It was commented with respect to a provision in the Austrian report (E/1984/6/Add.17, para.49(b)) that if foreigners in Austria did not receive the same benefits as nationals, it would be contrary to article 2(3) as it was not a developing country. Alvarez Vita, E/C.12/1988/SR.3, at 4-5, para.13; Badawi El Sheikh, E/C.12/1988/SR.4, at 8, para.45.

<sup>127</sup> See e.g., Texier, E/C.12/1987/SR.12, at 5, para.16.

<sup>128</sup> One member commented thus that measures taken under Jordanian law to restrict the employment of foreigners were contrary to the non-discrimination clauses of the Covenant. Konate, E/C.12/1987/SR.7, at 10, para.51.

<sup>129</sup> Alvarez Vita, E/C.12/1989/SR.12, at 12, para.61. This conclusion in itself was somewhat suspect given the French declaration on ratification regarding restrictions on aliens' rights to social security and employment. It was argued that the provision should be considered in light of articles 9 and 2 read together; as there was no declaration in respect to article 2, there was a breach of the provisions of the convention. Alvarez Vita, E/C.12/1989/SR.13, at 9, para.38. That this did not represent the view of the Committee as a whole is



that the restrictions upon the trade union rights of non-nationals in Costa Rica constituted a violation of the Covenant.<sup>130</sup> It is notable however that such statements do not represent a Committee consensus,<sup>131</sup> and that certain members feel the question has not been debated sufficiently in the Committee.<sup>132</sup>

The general reluctance of the Committee to commit itself to defending the equal treatment of aliens would seem to be a result of the force of State practice.<sup>133</sup> For example, many States reporting to the Committee operate different systems of social security in relation to non-nationals,<sup>134</sup> particularly where reciprocal agreements are in force.<sup>135</sup> In addition it is somewhat unlikely that States would consider themselves bound by a provision forcing them to eliminate any restrictions on the employment of aliens.<sup>136</sup>

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reflected in the Committee's concluding observations which merely state that "the observation was made...". UN Doc.E/1989/22, at 35, para.160 (1989).

<sup>130</sup> See, Alvarez Vita, E/C.12/1990/SR.40, at 12, para.52.

<sup>131</sup> This was made particularly clear in the Costa Rican case. Alston, E/C.12/1990/SR.50, at 4, para.28.

<sup>132</sup> Mr Simma commented that he hesitated to concur with Mr Alvarez Vita regarding the Costa Rica question "since the Committee had not debated the point sufficiently". He continued, "It should be made clear that the view was not that of the Committee as a whole". E/C.12/1990/SR.50, at 4, para.29.

<sup>133</sup> It might also be noted that the Committee on the Elimination of Racial Discrimination has tended to allow the differential treatment of non-nationals. Meron, *supra*, note 10, at 312.

During the drafting of article 26 ICCPR, it would seem that States were not ready to accept that aliens should have equal rights as citizens. See, Ramcharan, *supra*, note 1, at 263.

<sup>134</sup> See e.g. Luxembourg, E/C.12/1990/CRP.4/Add.4, at 5, para.16. Netherlands, E/C.12/1989/5, E/1989/22, at 4.

<sup>135</sup> Cf. Mahalic D. and Mahalic J., "The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination", 9 *Hum.Rts.Q.*, 74, at 78 (1987). It might be difficult to establish then that a State must not discriminate against a particular nationality even if that were to be considered inequitable. See *contra*, Lerner N., The Convention on the Elimination of All Forms of Racial Discrimination, 30 (1980).

<sup>136</sup> It might be noted that Article 1(2) of the Racial Discrimination Convention provides that its non-discrimination provisions do not apply to distinctions, exclusions or restrictions made by a State party between citizens and non-citizens.

Whereas restrictions are usually accepted on the employment of aliens, this is not so with respect to the conditions of employment. A number of ILO Conventions operate in this area: e.g. the Migration for Employment Convention (Revised) of 1949 (No.97), 120 U.N.T.S. 71; and the Migrant Workers



However, these facts alone do not necessarily imply that the application of the principle of non-discrimination is totally irrelevant. For example, in the majority of cases, differential treatment is justified on the basis of economics.<sup>137</sup> It is open for the Committee to determine the validity of the differential treatment of aliens by assessing whether it is motivated by sound economic reasons or mere prejudice.<sup>138</sup> In this respect one member of the Committee commented that the Jordanian report:

"seemed to indicate that foreigners were penalized solely because they were foreigners, rather than because they threatened the employment opportunities of Jordanian nationals -in short, that foreigners were the object of discrimination".<sup>139</sup>

If this approach is adopted by the Committee, it could be said that even though equality of treatment is not necessarily prescribed, discrimination on the basis of nationality is by no means legitimate. The question for the Committee is to what extent differential treatment is legitimate.

Moreover, even if non-nationals are not entitled to equal treatment in all respects, it is important to stress that this does not deprive them of all rights under the Covenant. Certainly, in so far as the Covenant establishes the rights of "everyone" non-nationals would have a right to the enjoyment of the minimum core content of those rights. Thus in practice, the Committee will censure situations where aliens enjoy few rights and are the object of exploitation.<sup>140</sup>

### c) Wealth

The general limitations upon the poor to equality of access or opportunity with regard to employment, education, culture or housing have led some commentators to regard "wealth" as an additional ground

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(Supplementary Provisions) Convention of 1975 (No.143), 1120 U.N.T.S. 77.

<sup>137</sup> See, Lillich, *supra*, note 122, at 123.

<sup>138</sup> It is by no means axiomatic that aliens are prejudicial to the economy of a State. See, Konate, E/C.12/1987/SR.7, at 2, para.2. Meron comments in this light:

"It can perhaps be argued that economic constraints may justify limiting some entitlements (such as welfare or health care) to citizens, but limiting employment-related benefits would not be supportable under this rationale".

Meron, *supra*, note 10, at 312.

<sup>139</sup> Konate, E/C.12/1987/SR.7, at 2, para.2.

<sup>140</sup> Members of the Committee expressed great concern over the position of Haitian workers on sugar plantations in the Dominican Republic. See e.g., Texier, E/C.12/1990/SR.44, at 13, para.54.



upon which discrimination is prohibited. Hence the Czechoslovakian representative commented before the Committee that:

"The fact that some persons might be prevented from enjoying certain rights because they did not have the means to do so could be regarded as *de facto* discrimination".<sup>141</sup>

The Committee does seem to be concerned about extreme inequalities in wealth<sup>142</sup> and inadequate action being taken on the part of the poor.<sup>143</sup> Recognition has also been made of the particular disadvantage of the poor in the area of access to culture.<sup>144</sup> Some members have occasionally made an express recognition of the link between poverty and discrimination.<sup>145</sup>

The major problem with regard to positing "wealth" as an independent ground of discrimination is that the majority of cases of such discrimination will involve a simultaneous violation of article 2(2) and one of the substantive articles of the Convention. The independent utility of the non-discrimination provision becomes apparent only when the State has gone further than it is obliged to under the provisions of the Covenant.<sup>146</sup> A case in point might be the establishment of special schools for the academically gifted. If access to such a school was restricted to males only or members of a minority ethnic group, article 2(2) would quite legitimately be invoked. However, to restrict access to the wealthy by the requirement of fee-payment would rarely be considered discriminatory.<sup>147</sup> The fact that access to many higher social "goods" often depends upon economic wealth suggests that "wealth" itself

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<sup>141</sup> E/C.12/1987/SR.12, at 10, para.40.

<sup>142</sup> Sparsis, E/C.12/1988/SR.12, at 12, para.63; Sparsis, E/C.12/1989/SR.16, at 17, para.92; Simma, E/C.12/1990/SR.8, at 10, para.43. Simma commented in relation to the Columbian report that the Committee had to address itself to the underlying causes of difficulties, mentioning "in particular the lack of equality... and the apparent lack of concern of the upper classes for the problems of the most vulnerable". E/C.12/1990/SR.13, at 11, para.47.

<sup>143</sup> See e.g., Alston, E/C.12/1990/SR.11, at 5, para.24.

<sup>144</sup> See e.g., Texier, E/C.12/1990/SR.16, at 9, para.44.

<sup>145</sup> One member thus commented in regard to the vast disparities in wealth, that "Santiago is a city of apartheid". Texier, E/C.12/1988/SR.12, at 10, para.50.

<sup>146</sup> Assuming that the right is "autonomous" in nature. See below, text accompanying notes 158-175.

<sup>147</sup> It could be attacked on different grounds however. For example if the establishment of such a school drew finances away from projects that were aimed at the relief of poverty and disadvantage, the State might be criticised for confusing its priorities.



is often a legitimate ground for differential treatment and for that reason could hardly be considered "suspect".<sup>148</sup>

## 2) The Suspect Nature of Classifications

Given the emphasis that race,<sup>149</sup> sex<sup>150</sup> and religion<sup>151</sup> have been accorded on the international plane, it might be argued that, in assessing the legitimacy of differential treatment, actions based upon such grounds might be given stricter scrutiny.<sup>152</sup> This might be appropriate given the extraordinary prominence given to racial discrimination in international

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<sup>148</sup> With respect to wealth classifications in the US *see*, Polivou, *supra*, note 2, at 437-444.

<sup>149</sup> For evidence of the international community's interest in Racial Discrimination *see*, The International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Resn.3068, 28 U.N. GAOR, Supp.(No.30), at 166, U.N. Doc. A/9030, (1973), 1015 U.N.T.S. 243; The Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Resn.1904, 18 U.N. GAOR, Supp.(No.15), at 35, U.N. Doc. A/5515, (1964); The Convention on the Elimination of all Forms of Racial Discrimination, *supra* note 55.

<sup>150</sup> Evidence of the interest of the international community in the status of women *see*, The Convention on the Political Rights of Women, GA Resn.640, 7 UN GAOR, Supp.(No.20), at 27, UN Doc.A/2361, (1952), 193 U.N.T.S. 135 (1953); The Convention on the Nationality of Married Women, (1957), 309 U.N.T.S. 65; The Declaration on the Elimination of All Forms of Discrimination Against Women, GA Resn.2263, 22 UN GAOR, Supp.(No.16), at 35, UN Doc.A/6716, (1967); The Convention on the Elimination of all Forms of Discrimination Against Women, *supra*, note 56.

<sup>151</sup> Bayefsky, *supra*, note , at 19. *See generally*, Benito E. (Special Rapporteur), Elimination of all forms of intolerance and discrimination based on religion and belief, (1989).

<sup>152</sup> This appears to be the position under the ECHR. *See*, Abdulaziz, Cabales and Balkandali v. United Kingdom, Eur.Court HR, Series A, Vol.94, Judgement of 28 May 1985, (1985) 7 EHRR 471, where the court stated (para.78):  
 "...the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the grounds of sex could be regarded as compatible with the Convention."



case law,<sup>153</sup> and the emphasis on sexual discrimination in the Covenant.<sup>154</sup>

As far as the Committee is concerned the position of women has been given by far the most consideration. Questions are invariably asked as to equality before the law,<sup>155</sup> equal rights,<sup>156</sup> and factual differences in the position of women in relation to men.<sup>157</sup> To this extent, the Committee could be said to exercise a particularly strict test as to differentiations *de jure* and *de facto* on the basis of sex. That the Committee as a whole has never actually established a State to be in violation of the Covenant on this basis is probably more a reflection of the lack of sufficient information than the weakness of its standards.

The main failing of the Committee thus far is that it has not established any clear test for evaluating differences in treatment upon the

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<sup>155</sup> See above note 98.

<sup>156</sup> See e.g., the right of women to chose their own spouse, Rattray, E/C.12/1987/SR.8, at 7, para.26; Kouznetsov, E/C.12/1990/SR.2, at 12, para.72.; the authority to start a business or open a bank account, Jimenez Butragueno, E/C.12/1989/SR.9, at 6, para.24; differential retirement ages, Sviridov, E/C.12/1987/SR.6, at 5, para.18. Simma, E/C.12/1988/SR.3, at 3, para.8.; the right to administer their own assets, Jimenez Butragueno, E/C.12/1987/SR.8, at 8, para.33.; restrictions on the employment of women, Alvarez Vita, E/C.12/1987/SR.6, at 11, para.53.

<sup>157</sup> See e.g., the number of women unemployed, Rattray, E/C.12/1987/SR.6, at 12, para.66. Neneman, E/C.12/1987/SR.7, at 7, para.29; access of women to social security, Rattray, E/C.12/1987/SR.6, at 13, para.69; the proportion of women receiving technical training, Konate, E/C.12/1987/SR.7, at 2, para.3; the percentage of women employed in the public sector, Muterahajuru, E/C.12/1987/SR.7, at 3, para.7; the proportion of women in higher education, Jimenez Butragueno, E/C.12/1988/SR.3, at 8, para.36; the percentage of women in management positions, Alvarez Vita, E/C.12/1989/SR.5, at 10, para.62; the existence of training and support for women's cooperatives, Simma, E/C.12/1989/SR.6, at 10, para.45.



The main failing of the Committee thus far is that it has not established any clear test for evaluating differences in treatment upon the grounds enumerated in article 2(2). It is submitted that in so far as the list of prohibited grounds is open-ended, virtually any difference in treatment is open to scrutiny by the Committee. The virtue of having specifically stated grounds, however, is not to prevent review of differentiations on other grounds, but rather to establish that certain classifications are *prima facie* suspect and therefore will be subject to more detailed scrutiny. As an initial step then, it would be necessary for the Committee to establish what classifications it sees as falling within the realm of article 2(2), and the test by which State action will be reviewed.

#### D) THE SCOPE OF THE NON-DISCRIMINATION PROVISION

Some guarantees of non-discrimination only operate in relation to specific, narrowly defined areas such as the ILO or UNESCO Conventions.<sup>158</sup> Article 2(2) ICESCR, in contrast, is applicable to a much broader range of rights. It provides that the guarantee of non-discrimination should operate in relation to all the economic, social and cultural rights enunciated in the Covenant. However, by specifically referring to the rights in the Covenant, article 2(2) would appear to be a partially subordinate provision, prohibiting discrimination only in so far as it relates to matters covered by those rights.<sup>159</sup> Indeed, there is little evidence that article 2(2) was intended to be wholly "free-standing" or "autonomous", in the sense of article 26 ICCPR.<sup>160</sup>

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<sup>158</sup> The ILO Convention is limited to discrimination in employment and the UNESCO Convention to discrimination in education.

<sup>159</sup> Article 3 similarly relates to "all economic, social and cultural rights set forth in the present Covenant". As a matter of comparison, it is thought that the ICCPR non-discrimination clause is limited to those rights recognized by that Convention. Ramcharan, *supra*, note 1, at 257. This is also the practice of the European Court of Human Rights. Thus in the Sunday Times Case, Eur.Court H.R., Series A, Vol.30, Judgement of 26 Apr.1979, (1979-80) 2 EHRR 245, the Court reaffirmed that "Article 14 safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the other normative provisions of the Convention and Protocols".

<sup>160</sup> Article 26 ICCPR has been interpreted as operating as an "autonomous right" whose application was "not limited to those rights which are provided for in the Covenant", *see*, General Comment, *supra*, note 57. Thus, in practice, the HRC has dealt with matters outside the strict context of civil and political rights, *see e.g.*, Broeks v.Netherlands, 2 Selected Decisions HRC, 196 (1987). *Cf.* Scott C., "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights", 27 Osg.H.L.J. 769, at 851-859 (1989); Opsahl T., "Equality in Human Rights Law with Particular Reference to Article 26 of the International Covenant on Civil and Political Rights", in Nowak M., Steurer D., and Tretter H.(eds), Progress in the Spirit of Human Rights, 51 (1988).



According to the traditional definition of discrimination adopted by a number of international treaties, the test for whether an action is discriminatory can be determined by whether it has a negative effect on the realization of the rights protected. For discrimination to have occurred, the difference in treatment must have the effect of "nullifying" or "impairing"<sup>161</sup> the recognition, enjoyment or exercise<sup>162</sup> of human rights. As such, a violation of the non-discrimination provision will inevitably involve a simultaneous violation of one of the substantive articles. It might appear, accordingly, that such non-discrimination provisions are essentially superfluous.<sup>163</sup>

Three arguments mitigate against such a conclusion. First, even though there often exists a distinct correlation between covert discriminatory situations and general social stratification of power, wealth, prestige and education, it is important to recognize that discrimination is not merely a consequence of that stratification, but also a cause.<sup>164</sup> As such the recognition and elimination of discrimination is central to the improvement of the well-being of such groups. Secondly, recognition of historical discrimination can serve to justify and even require positive and affirmative action programmes.<sup>165</sup> Finally, to the extent that the principle of non-discrimination may give rise to claims to positive State action in the realisation of equality of opportunity, the fulfilment of basic needs alone would not necessarily sufficiently dispose of State obligations with respect to disadvantaged groups.

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<sup>161</sup> ILO Convention, the Racial Discrimination Convention, and the Discrimination against Women Convention. The UNESCO Convention only includes the term "impairing". On the basis that "nullifying" is the narrower term, meaning not merely a restriction on the enjoyment of a right, but the total denial of that right, "impairment" can be said to cover the same field.

<sup>162</sup> The meaning of all of these three terms is unclear, particularly as to any differences between them. It is presumed that "recognition" refers to the ability of an individual to know or identify his or her rights. If, as can be assumed, States are under an obligation to disseminate information and inform people of their rights, then a failure to do so for an identifiable section of the population could be said to be discriminatory under this leg of the definition.

"Enjoyment" can be said to refer to the *de facto* realization of the rights in the Covenant. Finally "exercise" perhaps relates most closely to the ability of each individual to enforce their rights through judicial or administrative remedies.

<sup>163</sup> Flew argues in this respect that the relief of poverty cannot be achieved through the promotion of equality but solely through growth and the production of wealth. Equality and non-discrimination thus retain little justification in his view. Flew A., *supra*, note 13, at, 182-189.

<sup>164</sup> Schachter, *supra*, note 15, at 296.

<sup>165</sup> *Ibid.* at 295.



The position under the European Convention is interesting in this regard. That a violation can occur merely by the discriminatory exercise of a particular right has been recognised by the European Court in the Belgian Linguistic Case<sup>166</sup> where it held with respect to the ECHR:

"Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions."<sup>167</sup>

The Court appears to want to give the non-discrimination provision a degree of independence without implying that it operates outside the realm of the rights contained within the Convention.<sup>168</sup> Certainly, the Court has been trenchantly opposed to dealing with economic, social and cultural rights.

A number of points suggest that article 2(2) is a strictly "subordinate" non-discrimination clause. First, as a provision that lies in part II of the Covenant, it is not deemed to be a right in itself but a "service provision" outlining obligations in relation to the substantive articles in part III. Secondly, it expressly states that it refers to the

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<sup>166</sup> *Supra*, note 48.

<sup>167</sup> This passage has been interpreted variously by commentators. Dinstein argues that the court implied that the non-discrimination provision was free standing- that there could be a violation of article 14 without there being a corresponding violation of any other article. Dinstein, *supra*, note 10. On the other hand Bayefsky comments that this case underlines the fact that the discrimination clause has no independent existence in that the violation only occurred in conjunction with the substantive articles. Bayefsky, *supra*, note 10, at 4.

It is interesting to note the view of Judge Fitzmaurice in the National Union of Belgian Police Case, Eur.Court HR, Series A, Vol.19, Judgement of 27 Oct.1975, (1979-80) 1 EHRR 578, where he argued that article 14 was subordinate in that it only applied insofar as it related to a State obligation under the ECHR.

<sup>168</sup> This is underlined by its decision in Inze v. Austria *supra*, note , para. 36, where it stated:

"Art.14 complements the other substantive provisions of the Convention and its protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Art.14 does not presuppose a breach of one or more of such provisions- and to this extent it is autonomous- there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter".



"rights enunciated in the present Covenant".<sup>169</sup> However neither of these factors establish whether or not the rather looser form of subordination adopted by the European Court will be operative in the case of article 2(2).

Despite references to articles 2(2) and 3 as independent rights,<sup>170</sup> there is little evidence to suggest that the Committee views article 2(2) as fully autonomous in the sense of article 26 ICCPR.<sup>171</sup> Indeed any reference to violations of civil and political rights has been justified by their impact on economic, social and cultural rights.<sup>172</sup> Given the more extensive supervisory mechanisms of the Human Rights Committee it would be unnecessary and duplicitous for the Committee on Economic, Social and Cultural Rights to enter into a review of discrimination in the field of civil and political rights.

On the other hand, several considerations suggest that the Committee is not ready to assign a strictly subordinate role to article 2(2). First, in dealing with questions of discrimination the Committee has not confined itself to rights explicitly laid down in the Covenant.<sup>173</sup> Secondly, it has clearly interpreted the notion of non-discrimination as one which calls for equality of access and opportunity.<sup>174</sup> It is this notion

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<sup>169</sup> In its General Comment No.18 (37) b/, c/, the Human Rights Committee implies that article 2(1) ICCPR is indeed subordinate. In referring to article 26 it states that it "does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right." As a result "the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant". *Supra*, note 57, at 175, para.12.

<sup>170</sup> This might be inferred from the grouping of such provisions together with the substantive rights in General Comment No.3, ESCOR, Supp.3, Annex III, at 84, para.5, UN Doc.E/C.12/1990/8, (1991).

<sup>171</sup> *See above*, note 160.

<sup>172</sup> *See e.g.*, Simma, E/C.12/1990/SR.42, at 12, para.57.

<sup>173</sup> For example, the Committee has considered questions such as: the authority of women to start a business or open a bank account, Jimenez Butragueno, E/C.12/1989/SR.9, at 6, para.24; differential retirement ages, Sviridov, E/C.12/1987/SR.6, at 5, para.18, Simma, E/C.12/1988/SR.3, at 3, para.8; the right of men to paid leave to look after children, Jimenez Butragueno, E/C.12/1987/SR.12, at 4, para.14, Texier, E/C.12/1987/SR.19, at 10, para.47; persecution of the Bahai's, Alvarez Vita, E/C.12/1990/SR.42, at 11, para.56.

<sup>174</sup> In the Committee's guidelines adopted at its fifth session, reference is made to equality of opportunity in relation to article 6, and equality of access with regard to articles 11 and 13. *Supra*, note 59.

Meron comments that the Committee on the Elimination of Racial Discrimination has dealt with distinctions on the grounds of race in a similar manner. He concludes that "the 'common law' of the Convention is based on the notion of equality, rather than on its definition of racial discrimination". Meron, *supra*, note 10, at 291.



of equality, as noted above,<sup>175</sup> that has coloured the Committee's general approach to the implementation of the rights. To see non-discrimination as an objective as opposed to a procedural principle is to confer upon it an individual status.

The approach of the Committee would seem to be close to that of the European Court. Whilst it will not concern itself with matters that do not fall within the general scope of economic, social and cultural rights, it will not confine itself to combatting discrimination only in those areas where a violation of the substantive rights occurs. It is submitted that this is a suitable and balanced approach. To extend the scope of the provision beyond of economic, social and cultural rights would not only lead to possible conflicts with other human rights organs, but would impose too great a burden of work upon the Committee. On the other hand, to restrict the provision to a subordinate status would deprive it of any substantive value.

## V) STATE OBLIGATIONS

### A) IMMEDIATE OR PROGRESSIVE IMPLEMENTATION?

Whereas the obligation under article 2(1) ICESCR is progressive in nature, this does not seem to be the case as regards article 2(2). The fact of its physical separation from article 2(1) and the inclusion of the word "guarantee" draw one to the conclusion that States are under an obligation to eliminate discrimination immediately.<sup>176</sup> This was the interpretation advocated during the drafting of the Covenant,<sup>177</sup> and has been endorsed in the Limburg principles,<sup>178</sup> and in the practice of the Committee. The Committee expressly stated that it considered articles

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<sup>175</sup> See above, text accompanying notes 29-32.

<sup>176</sup> Klerk argues this point from the fact that the progressive implementation provision of article 2(1), only applies to the substantive articles in Part III. Article 2(2) is not subordinate to the other provisions in part II. Klerk, *supra*, note 9, at 261.

<sup>177</sup> The Lebanese proposal to include the word "guarantee" was preferred to that of the representative of France, which provided for progressive implementation. 8 UN ESCOR (274th mtg), at 13, UN Doc.E/CN.4/SR.274, (1952).

A proposal to amalgamate the first two paragraphs of article 2 [UN Doc.A/C.3/L.1054 and Add.1, (1962)] was considered unacceptable in the Third Committee. 17 UN GAOR, C.3, (1206th mtg), paras. 10-13, 11 UN Doc.A/C.3/SR.1206, (1962).

<sup>178</sup> Paragraph 35 reads:

"Article 2(2) calls for immediate application and involves an explicit guarantee on behalf of the States parties. It should, therefore, be made subject to judicial review and other recourse procedures".

*Supra*, note 54, at 127.



2(2) and 3 as being "capable of immediate application by judicial and other organs in many national legal systems."<sup>179</sup>

It would seem quite apparent that States are capable of eliminating most *de jure* discrimination immediately. There is certainly little justification for introducing new legislation or administrative practices that are discriminatory.<sup>180</sup> The most important factor appears to be the contention that the elimination of *de jure* discrimination does not involve significant economic expenditure. Thus in the case of Zaire, which was criticised for having a law that required women to ask permission from their husbands to work outside the home, it was felt that the question of economic development was irrelevant.<sup>181</sup> Klerk argues, that even in times of economic crisis "the introduction or the continuation of discriminatory practices can never be 'compatible with the nature of these rights'".<sup>182</sup> Accordingly, the promotion of the general welfare can not be achieved at the expense of one section of society.

"Non-discrimination is not a favour that can be granted only in a time of a growing economy".<sup>183</sup>

However, it would be wrong to suggest that the elimination of discrimination will always be capable of being achieved immediately. First, it is undoubtedly true that certain forms of corrective action will inevitably involve considerable financial expenditure. For example, the elimination of discrimination as regards retirement ages or remuneration in employment<sup>184</sup> may involve employees being paid more for longer periods of time. Secondly, a distinction between *de jure* and *de facto* discrimination should be established.<sup>185</sup> Whereas the former may be eliminated by the creation and enforcement of relevant legislation, the existence of *de facto* discrimination, as evidenced through material inequalities and individual prejudice, is a matter that cannot be overcome overnight. Longer-term social and educational programmes are needed to eliminate *de facto* discrimination in a progressive manner. It is

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<sup>179</sup> General Comment No.3, *supra*, note , at 4, para.5.

<sup>180</sup> Klerk, *supra*, note 9, at 262; This was also the conclusion of the Third Committee, 17 UN GAOR, Annex, (Ag. Item 43), para.64, UN Doc. A/5365, (1962).

<sup>181</sup> *See*, Texier, E/C.12/1988/SR.17, at 6, para.36.

<sup>182</sup> Klerk, *supra*, note 9, at 263.

<sup>183</sup> *Ibid*, at 264.

<sup>184</sup> *See below*, Chapter 6.

<sup>185</sup> Cohen has drawn a similar distinction. He sees action to eliminate elements of discrimination in policies, programmes, procedure and criteria as "corrective action"; whereas action to give disadvantaged groups equal standing with the majority he calls "compensatory action". Cohen C., "Affirmative Action and the Rights of the Majority", in Fried L., Minorities: Community and Identity, 353, at 355 (1983).



relevant to note here that the specialised instruments on discrimination all imply that States are entitled to eliminate discrimination gradually.<sup>186</sup> This conclusion is more evident in so far as States are required to combat discrimination by third parties, and to achieve equality of opportunity.

## B) THE TYPE OF ACTION REQUIRED

As regards *de facto* discrimination,<sup>187</sup> legislative action must be considered a necessary first step in any policy. Members of the Committee have looked towards legislative measures as evidence of a State's commitment to eliminating discrimination.<sup>188</sup> Thus one member commented that:

"The Covenant did not automatically imply that legislation was an indispensable component of a policy designed to eliminate discrimination in employment, for example. However, it was evident that, if that were the interpretation adopted by Governments, the burden of proof would lie with those Governments, which would therefore be expected to show that the non-legislative measures that they had taken effectively ensured the elimination of discrimination and that it was not essential to take legislative measures."<sup>189</sup>

It is evident that any legislative measures taken, to be effective, should be accompanied by judicial remedies.<sup>190</sup> The provision of such remedies seems to be particularly appropriate given the duty to "guarantee" the exercise of the rights without discrimination.

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<sup>186</sup> ILO Convention, art. 2; UNESCO Convention arts 3 and 4; and ICEDAW, art 2. ICERD article 2(1) also appears to allow for progressive implementation, but in article 5 requires States parties to "guarantee" equality before the law. Cf. Yilmaz-Dogan v. Netherlands, CERD Report, 43 UN GAOR, Supp.(No.18), at 59 (1988).

<sup>187</sup> Action to combat *de jure* discrimination merely involves repealing the offending legislation or administrative directive. See e.g., Jimenez Butragueno, E/C.12/1990/SR.42, at 16, para.86.

<sup>188</sup> Questions have been asked as to legal prohibition against discrimination against women, Jimenez Butragueno, E/C.12/1987/SR.7, at 6, para.23; and legislative measures taken to prevent dismissal of pregnant women, Mrachkov, E/C.12/1988/SR.10, at 6, para.25.

<sup>189</sup> Alston, E/C.12/1987/SR.6, at 3, para.8.

<sup>190</sup> Members of the Committee have thus asked *inter alia*: what penalties are provided for violations of non-discrimination laws in employment, Simma, E/C.12/1989/SR.15, at 2, para.3; how many decisions have been made regarding discrimination in housing, Rattray, E/C.12/1990/SR.2, at 11, para.63; What effective remedies exist in the courts for women, Jimenez Butragueno, E/C.12/1988/SR.19, at 4, para.12.



Although legislation is certainly important, it will not necessarily be completely effective. As suggested above, those aspects of discrimination which relate to social attitudes can not be eliminated immediately merely through the enforcement of relevant legislation. Here, other measures, particularly educational and social, are more appropriate.<sup>191</sup> It has been suggested in the Committee that States are expected to undertake programmes to combat the discriminatory attitudes and prejudices of the population.<sup>192</sup> In particular, action should be directed towards the elimination of stereotypes whether racial, religious, sexual or other.<sup>193</sup>

The need to take measures beyond legislative action is particularly evident in the pursuit of equality of opportunity. Inequality of opportunity is often the result of inequality in the economic condition of various groups in society, of social and cultural expectations that affect potential development, or of differences that result from the education and training received. Thus action in favour of real equality of opportunity calls for extensive measures in the whole field of economic, social and cultural rights, particularly as regards education, vocational training, and social promotion and protection.<sup>194</sup> As one member of the Committee recognised:

"There was... a need to transcend the formal approach to equality in order to gain insight into the obstacles to equality in daily life, and the arrangements made through education, for instance, to make sure that equality really was achieved".<sup>195</sup>

On the one hand, this requires the removal of any impediments that might stand in the way of equality of opportunity.<sup>196</sup> On the other hand, it also necessitates that certain positive steps are taken to promote the position of vulnerable and disadvantaged groups in society. The degree to which such affirmative action measures are necessary will be discussed

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<sup>191</sup> A memorandum of the Secretary General recognized that: "It is clear that forms of discrimination which deny legal rights may and should be fought by legal measures, while those which comprise merely social treatment must chiefly be fought by education and by other social measures".

UN Doc.E/CN.4/Sub.2/8, at 2 (1947).

<sup>192</sup> See e.g., Alvarez Vita, E/C.12/1988/SR.14, at 6, para.32.

<sup>193</sup> See e.g., Jimenez Butragueno, E/C.12/1990/SR.16, at 8, para.37. See also, Valticos N., International Labour Law, 111 (1979).

<sup>194</sup> *Ibid.*

<sup>195</sup> Rattray, E/C.12/1987/SR.16, at 9, para.40.

<sup>196</sup> See e.g., Jimenez Butragueno, E/C.12/1991/SR.4, at 13, para.67.



below. It is clear nevertheless that legislative measures alone will not be sufficient in such cases.<sup>197</sup>

### C) AFFIRMATIVE AND PROTECTIVE ACTION

A distinction has occasionally been drawn between affirmative and protective measures. Affirmative measures are those taken to enable disadvantaged sectors of the population to assert their right to equality of opportunity.<sup>198</sup> Protective measures, on the other hand, are meant to protect inherently vulnerable groups such as children and those with physical or mental disabilities, whose vulnerability is not temporary in nature.<sup>199</sup> There is some evidence for such a distinction being made in the Covenant itself. Article 10 provides for special measures of protection for the family,<sup>200</sup> mothers before and after childbirth,<sup>201</sup> and children.<sup>202</sup> The legitimacy of affirmative action and of protective action outside the specified contexts however, has to be read into the provisions of article 2(2).

#### 1) The Obligation to take Affirmative Action.

As noted above, the concept of discrimination itself suggests that only those who are situated equally must be treated equally.<sup>203</sup> It is implicit that differential treatment is on occasions legitimate. The principle of equality, however, goes further in requiring differential treatment to combat *de facto* discrimination.<sup>204</sup> Despite no reference to

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<sup>197</sup> See e.g. Texier, E/C.12/1989/SR.10, at 8, para.43.

<sup>198</sup> This is sometimes known as "positive" or "reverse discrimination". Such terminology is most often used by opponents of affirmative action. It will not be used here as it is somewhat contradictory given the definition of discrimination described above.

<sup>199</sup> Dinstein, *supra*, note , at 15. However other commentators do not make such a distinction, see, McKean who notes that article 10 ICESCR provides for protective action for children and mothers. He argues that it recognizes that such measures of protection "in order not to be discriminatory must be temporary". McKean, *supra*, note 21, at 152.

<sup>200</sup> Article 10(1).

<sup>201</sup> Article 10(2).

<sup>202</sup> Article 10(3).

<sup>203</sup> See above, text accompanying notes 3-4.

<sup>204</sup> Capotorti emphasizes that while the questions of non-discrimination and minority protection are distinct in that the former requires uniform treatment and the latter special treatment, they are in fact "two aspects of the same problem: that of fully ensuring the equal rights to all persons". *Supra*, note 15, at 14. See also, McKean, *supra*, note 21, at 142.



affirmative action in the text of the Covenant, it is clear from the travaux préparatoires that such measures were not intended to be considered discriminatory.

In the drafting of the Covenant an Indian proposal suggested the inclusion of an explanatory paragraph reading:

"Special measures for the advancement of any socially and educationally backward sections of society shall not be construed as 'distinction' under this article"<sup>205</sup>

The Indian member argued that the principle of non-discrimination:

"raised certain problems in the case of the particularly backward groups still to be found in many under-developed countries. In his country, the constitution and the laws provided for special measures for the social and cultural betterment of such groups; measures of that kind were essential for the achievement of true social equality in highly heterogeneous societies. He felt certain that the authors of the draft Covenant had not intended to prohibit such measures, which were in fact protective measures... He therefore thought it essential to make it clear that such protective measures would not be construed as discriminatory within the meaning of the paragraph."<sup>206</sup>

The proposal was finally withdrawn, it having been made clear that the

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Goldstein argues that "even in the unusual cases in which equality requires differential treatment, it is still limited to that: ie., differential, not preferential, treatment is required." Goldstein S., "Reverse Discrimination- Reflections of a Jurist", 15 Isr.Y.H.R., 28, at 30 (1985). It is unclear exactly what he means by such a distinction as it might be argued that any difference in treatment involves some form of preference. A more valid distinction could be drawn between differences in treatment that are intended to promote a vulnerable group in a general sense and those that aspire to achieving some numerical representation. The latter aspires to a form of absolute equality, whereas the former may be so constructed to allow for the intercession of individual choice, presenting less of a restriction upon the rights of members of the majority.

<sup>205</sup> UN Doc.A/C.3/SR.1182, para.17 (1962). As an alternative he sought the insertion of an explanatory statement in the report.

Similarly, a Belgian proposal (UN Doc.A/C.3/L.1030, (1962)) to add a clause to article 2(2) explaining that the prohibition did not extend to protective measures taken on the basis of age and sex, was withdrawn on the basis that this was understood in the terms of the Three-Power Amendment. UN Doc.A/C.3/SR.1204, para.29 (1962).

<sup>206</sup> UN Doc.A/C.3/SR.1183, paras.12, 29 (1962). It was clear however in speaking of "protective measures" the Indian representative, in commenting that such measures were essentially temporary, meant affirmative action. UN Doc. A/C.3/SR.1257, para.18 (1963).



Three-Power Amendment implicitly included this understanding.<sup>207</sup> As a matter of comparison, article 1(4) CERD and article 4(1) CEDAW do contain explicit statements to the effect that affirmative action measures may be taken.<sup>208</sup>

Even if the travaux préparatoires do recognise the legitimacy of affirmative action, there is little indication outside the scope of article 3,<sup>209</sup> that such positive measures are in fact required. Facing a similar situation as regards the ICCPR the Human Rights Committee has made a positive statement in this regard. In its General Comment 4/13 it stated in relation to articles 3, 2(1) and 26 of the ICCPR that the prevention of discrimination "requires not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights. This cannot be done simply by enacting laws".<sup>210</sup> On this basis, commentators have argued that States are indeed obliged to take affirmative action for the benefit of disadvantaged groups.<sup>211</sup>

The Committee has directed a number of questions towards the issue to affirmative action especially as regards people with physical disabilities<sup>212</sup> and ethnic or racial minorities.<sup>213</sup> In doing so it seems to accept the legitimacy of such action even if there is a residual concern

<sup>207</sup> This is the import of the discussion over the use of the term "discrimination" as opposed to "distinction". *See above*, text accompanying notes 42-46.

During the drafting of Article 27 ICCPR, relating to the rights of minorities, it was recognized that differential treatment might be granted to them to ensure real equality of status with the other elements of the population. UN Doc. A/2929, *supra*, note , at 181.

<sup>208</sup> The Committee on the Elimination of Discrimination Against Women recommended that "States Parties make more use of temporary special measures such as positive action, preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment". General Recommendation 5, (7th Sess. 1988), at 109, UN Doc.A/43/38, (1988).

<sup>209</sup> *See*, UN Doc. A/C.3/SR.1182, para.11 (1962).

<sup>210</sup> General Comment 4/13, 36 UN GAOR, Supp.(No.40), at 109, UN Doc. A/36/40, (1981). *See also*, ILO Convention, article 2; UNESCO Convention, article 4; CERD, article 2(2); CEDAW, article 3.

<sup>211</sup> *See e.g.*, Ramcharan, *supra*, note 1, at 261.

<sup>212</sup> *See e.g.*, Jimenez Butragueno, E/C.12/1989/SR.15, at 4, para.15; Fofana, E/C.12/1990/SR.11, at 4, para.19; *ibid*, E/C.12/1991/SR.4, at 12, para.64.

<sup>213</sup> Questions have been asked as to: measures taken to ensure ethnic balance in schools, Badawi El Sheikh, E/C.12/1989/SR.10, at 10, para.59; special treatment given to racial minorities in employment, Wimer Zambrano, E/C.12/1987/SR.20, at 10, para.45; special measures taken to ensure respect for cultural life of the gipsy community, Texier, E/C.12/1988/SR.14, at 7, para.41; Alvarez Vita, E/C.12/1991/SR.11, at 13, para.75.



over the effect such action may have on the economy.<sup>214</sup> Nevertheless, it has not explicitly recognised the obligatory nature of affirmative action. It could be argued that the Committee implicitly recognises such an obligation through its requirement that States concentrate upon the situation of vulnerable and disadvantaged groups in society.<sup>215</sup> This is a matter that ideally should be made clear in a future General Comment.

## 2) The Form of Affirmative Action.

It is clear that affirmative action in the field of economic, social and cultural rights can take a number of forms. At one extreme it might involve merely the provision of special benefits to disadvantaged groups such as advice, training, housing or food. At the other extreme affirmative action might take the form of quota systems in public employment, education, or employment training.

As regards the first form of affirmative action, there seems to be little reason to reject policies that involve selective distribution of resources<sup>216</sup> or special facilities for the promotion of disadvantaged groups.<sup>217</sup> However, much criticism has been directed at affirmative action which envisages the distribution of benefits on the basis of "suspect classifications", particularly through the imposition of "quota systems". It is reasoned that it involves a process of discrimination against those who are deprived of employment, for example, as the result of a requirement of numerical representation,<sup>218</sup> for which reason they may engender hostility and resentment.<sup>219</sup> It is also possible that a person from one disadvantaged group may be deprived opportunity as a result of such a system.<sup>220</sup> Perhaps most conclusively, quota systems advocate a form of absolute equality that takes little account of the notion of individual choice.

Members of the Committee have given little indication of what forms of positive measures they consider to be legitimate. Cognisance

<sup>214</sup> See e.g., Neneman, E/C.12/1988/SR.18, at 2, para.5.

<sup>215</sup> As noted above, this conclusion depends upon whether the action is seen to be directed towards the realisation of the rights themselves or at achieving equality of opportunity. See *above*, text accompanying notes 25-28.

<sup>216</sup> Goldstein accedes to this which he considers as an integral part of the political process, *supra*, note 204, at 31.

<sup>217</sup> This is not always viewed as affirmative action in its true sense, as the action may be justified on the basis of present disadvantage rather than past discrimination.

<sup>218</sup> Cohen, *supra*, note 185, at 356; Schachter, *supra*, note 15, at 295.

<sup>219</sup> Schachter, *supra*, note 15, at 305.

<sup>220</sup> Goldstein, *supra*, note 204, at 39.



has been made of a wide range of training and fiscal measures<sup>221</sup> but no objection has as yet been made regarding the imposition of quotas.<sup>222</sup>

It is submitted that the Committee should at least assess the nature and extent of any affirmative action measures by reference to the purpose for which they were instituted. Not only should such action conform to the necessity of promoting equality of opportunity, its extent should also be proportionate to the measure of existing disadvantage. Consideration should thus be given to other possible courses of action that do not involve the apportionment of benefits on the basis of "suspect classifications". The imposition of quotas might be justified as an extreme measure to remedy a particularly urgent situation of disadvantage that is closely associated with *de facto* discrimination against one social group. It should be remembered nevertheless, that such affirmative measures are to be instituted as a temporary expedient, and should not form part of a permanent strategy.

### 3) A Case of Protective and Affirmative Action: Minority Groups.

The question of protective and affirmative action is particularly problematic with regard to ethnic and racial minorities. On the one hand the social marginalisation of such groups might justify affirmative action with a view to integrating them within the State-development process. On the other hand, the need to maintain their cultural independence and self-determination argues in favour of protective measures being taken to ensure development outside that of the majority.<sup>223</sup>

Arguably, the Covenant itself does recognise the different needs of ethnic minorities particularly as regards their cultural identity. Although article 15 merely states that everyone has the right to "take part in cultural life", a recognition of legitimate differences in belief and tradition is to be found in articles 13(3) and (4). Under those articles, parents have the right to establish and choose schools other than those established by the public authorities. Similarly, the reference to self-determination in article 1 of the Covenant might be interpreted as implying that minorities have a right to pursue their own "economic,

<sup>221</sup> Questions have been asked *inter alia* as to: subsidies to allow poor access to cultural life, Neneman, E/C.12/1988/SR.3, at 9, para.43; training and support for women's cooperatives, Simma, E/C.12/1989/SR.6, at 10, para.45.

<sup>222</sup> Quotas referred to have included: measures to ensure ethnic balance in schools, Badawi El Sheikh, E/C.12/1989/SR.10, at 10, para.59; a law reserving two percent of jobs for the disabled, Jimenez Butragueno, E/C.12/1989/SR.15, at 4, para.15.

<sup>223</sup> See generally, Thornberry P., "Self-Determination, Minorities, Human Rights: A Review of International Instruments", 38 *I.C.L.Q.*, 867 (1989); Sohn L., "The Rights of Minorities", in Henkin L.(ed), *The International Bill of Rights*, 270 (1981).



social and cultural development" without excessive interference from the authorities.<sup>224</sup> Although these provisions would appear to stress freedom from State interference in the maintenance of an independent identity, the question remains as to the extent to which the Covenant places positive obligations upon States to promote the cultural rights of minorities.

The Committee quite clearly supports the adoption of positive measures in favour of minorities in so far as they are disadvantaged. In addition however, despite the obvious pitfalls in defining "ethnic minorities" for the purpose of taking protective measures,<sup>225</sup> Committee members have endorsed the idea that ethnic minorities are entitled to some form of independence and consequently protective measures.<sup>226</sup> It is considered that ethnic groups and indigenous populations should accordingly have the right to express themselves in their own language, enjoy their own culture,<sup>227</sup> and establish their own educational institutions if they choose to do so.<sup>228</sup> In addition, members have

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<sup>224</sup> As the Human Rights Committee stated with respect to article 27 ICCPR: "...the rights protected by article 27 include the rights of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong." UN Doc.A/45/40, Vol.II, App.A, para.32.2 (1990).

<sup>225</sup> See, Sigler and Caportati, *supra*, note 34.

It may be noted here that the institution of protective measures in favour of ethnic minorities can be assimilated only as a group right. This is not the case for other actions under article 2(2). A difference can be made between rights that fall upon the individual as a result of his or her membership of a group, and rights that belong to the individual who is to be identified by means of a group membership. Thus one member of the Committee commented with regard to a reply of the representative of Iran:

"The delegation's statement about the definition of minorities raised an interesting legal point but failed to address the real issue. Whether or not minority rights were treated as group rights was irrelevant to the existence of the rights of individual members of those groups."

Alston E/C.12/1990/SR.43, at 8, para.42.

<sup>226</sup> E.g. Taya, E/C.12/1987/SR.16, at 4, para.14. A similar conclusion can be found in analysis of the work of the Human Rights Committee with respect to article 27. Cholewinski R., "State Duty to Ethnic Minorities: Positive or Negative?", 10 *Hum.Rts.Q.*, 344 (1988).

<sup>227</sup> See e.g., Texier, E/C.12/1988/SR.13, at 9, para.39

<sup>228</sup> See e.g., Rattray, E/C.12/1990/SR.16, at 10, para.54. Judge Tanaka commented in respect of minorities that the notion of equality before the law "prohibits a State to exclude members of a minority group from participating in rights, interests and opportunities which a majority population group can enjoy. On the other hand, a minority group shall be guaranteed the exercise of their own religious and education activities. This guarantee is conferred on members of a minority group, for the purpose of protection of



generally been critical of attempts to assimilate such groups into the mainstream,<sup>229</sup> one member going so far as to make note of their right to self-determination.<sup>230</sup> The Committee however, has not made any clear statement as to the obligation of States to take positive action to ensure that that separate cultural identity was maintained.<sup>231</sup>

#### D) THIRD PERSONS

In contrast to article 2(1)(d) ICERD and articles 2(b), (e) and (f) of CEDAW which require the State to bring an end to racial discrimination by any persons, group, or organization, the Covenant makes no reference to discrimination between private individuals. Similarly, the travaux préparatoires make little specific mention of an obligation on the part of States to ensure non-discrimination between private individuals.<sup>232</sup> It is only possible to infer such an obligation from references to *de facto* equality.<sup>233</sup>

That States undertake to "guarantee" the exercise of the rights without discrimination, however, suggests that the obligation does extend beyond merely the control of public bodies. Indeed, to the extent that States are required to control private activity in relation to the substantive articles (for example to ensure safe and healthy working conditions), article 2(2) should also apply. One commentator concludes

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their interests and not from the motive of discrimination itself. By reason of protection of the minority this protection cannot be imposed upon members of minority groups, and consequently they have the choice to accept it or not."

*Supra*, note 7.

<sup>229</sup> See, Alston, E/C.12/1988/SR.13, at 13, para.71; Alvarez Vita, E/C.12/1990/SR.16, at 7, para.29. Recognition of certain problems have been identified however. Thus Mr Wimer Zambrano commented:

"Recognition of indigenous languages, which reflected a concern to respect the traditions and the cultural identity of different indigenous populations, nevertheless ran counter to another objective of equal importance in countries of Latin America, the desire to achieve assimilation"

E/C.12/1990/SR.18, at 14, para.89.

<sup>230</sup> See, Konate, E/C.12/1989/SR.8, at 10, para.52.

<sup>231</sup> Cf. Article 27 ICCPR, which has been interpreted by the Human Rights Committee as obliging States to take positive steps to ensure the enjoyment of the cultural rights of minorities. See, McGoldrick D., "Canadian Indians, Cultural Rights and the Human Rights Committee", 40 *I.C.L.Q.*, 658 (1991).

<sup>232</sup> Klerk, *supra*, note 9, at 266.

<sup>233</sup> See above, text accompanying notes 12-16.



that "under Article 2(2) and 3 states are equally obliged to prohibit others to practice discrimination in public life".<sup>234</sup>

The Committee has expressed some interest in the need to protect the rights of individuals against possible violations by other individuals,<sup>235</sup> and has in particular looked towards control of the private sector. No distinction is made as regards article 2(2). Although there is certainly greater concern as regards the activity of public bodies,<sup>236</sup> members of the Committee have thus looked towards the operation of non-discriminatory norms between private groups and individuals such as in private sector employment<sup>237</sup> and health care.<sup>238</sup>

Even if it is accepted that the obligation in article 2(2) is not restricted to public bodies, some consideration needs to be given to the extent to which States are under a duty to regulate the actions of private individuals. There is clearly a tension here between individual freedom or privacy and the demands of combatting discrimination.<sup>239</sup> As Henkin notes:

"That racial discrimination is often private discrimination means that efforts to eliminate it meet resistance from competing values of individual right which also have attractive claims in human dignity".<sup>240</sup>

During the drafting of article 26 ICCPR it was made clear that individual preferences or the exercise of individual choice, were not to be subject to legal regulation.<sup>241</sup> However matters of everyday life, such as housing, transport, restaurants, and employment were deemed to be capable of

<sup>234</sup> Klerk, *supra*, note 9, at 267.

<sup>235</sup> For the operation of the concept of "drittwirkung", *see above*, Chapter 2, text accompanying notes 28-42.

<sup>236</sup> For example many questions are directed exclusively at public employment, *see e.g.*, Jimenez Butragueno, E/C.12/1991/SR.3, at 11, para.51.

<sup>237</sup> Questions have been directed towards: differences of retirement ages in the private sector, Jimenez Butragueno, E/C.12/1988/SR.10, at 8, para.39; equal access of women to employment in the private sector. Simma, E/C.12/1989/SR.8, at 8, para.46; and maternity leave for women in private sector, Mrachkov, E/C.12/1987/SR.8, at 7, para.30.

<sup>238</sup> *See e.g.*, Rattray, E/C.12/1990/SR.2, at 10, para.61.

<sup>239</sup> Meron interpretes the right of association as restricting the scope of the principle of non-discrimination "so as to protect strictly personal relations from its reach". Meron, *supra*, note 10, at 294.

<sup>240</sup> Henkin L., "National and International Perspectives on Racial Discrimination", 4 *H.R.J.*, 263, at 265 (1971).

<sup>241</sup> Saudi Arabia, UN Doc.A/C.3/SR.1099, para.18 (1961); Pakistan, UN Doc.A/C.3/SR.1102, para.4 (1961).



control by the State.<sup>242</sup> Ramcharan concludes rather generally that "certain types of discrimination by individuals, other than in personal and social relationships, would violate the guarantees of the Covenant and that a state party is under an obligation to take measures against such forms of discrimination".<sup>243</sup> The task is clearly one of defining the threshold between the exercise of individual choice and the control of discriminatory behaviour in public life.

Within the scope of the Covenant there are a number of areas in which the State might be obliged to ensure non-discrimination. For example, access to private employment or training, the rental of private accommodation, admission to trades unions or private educational establishments, access to privately owned cultural facilities (such as theatres or cinemas). Whilst it might be said that there is a *prima facie* case for regulating the activities of all such institutions and individuals, it has to be recognised that there is also a need to protect the intimate and personal activities of individuals in their association with others. For example, it would not be appropriate for the State to intervene in a landlord's choice as to who to have as a lodger in the same house. Meron's conclusion is particularly evident here:

"While certain private and interpersonal, associational relations would be insulated from the reach of the Convention, the activities of large private entities and of basically unselective organisations would be regarded as publicly available goods and services".<sup>244</sup>

According to this view, the degree of intervention should reflect the size and selectivity of the organisation concerned.

The Committee has not, at this stage, made any attempt to rationalise the competing demands in this area. For example, in one case the Austrian representative noted that there was a problem of discrimination in the private sector as "wages were freely agreed between employer and employee and because of the high value attached to the independence of the social partners".<sup>245</sup> Although apparently negating any State responsibility for discrimination in the sphere of private sector employment, this statement was rather superficially accepted by the Committee without comment.

It is submitted that the Committee needs to address these complex problems with more precision with a view to establishing some principle to describe State obligations as regards discrimination between private

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<sup>242</sup> USSR, UN Doc.A/C.3/SR.1098, para.6 (1961).

<sup>243</sup> Ramcharan, *supra*, note 1, at 262-263.

<sup>244</sup> Meron, *supra*, note 10, at 295.

<sup>245</sup> Berchold (Austria), E/C.12/1988/SR.4, at 3, para.11.



individuals and bodies. As a minimum, the Committee needs to ensure that States themselves are aware of the competing principles and have laws and regulations that reflect a balanced approach.

## VI) CONCLUSION

Although the concepts of non-discrimination and equality are arguably central to the implementation of the Covenant, they have been given remarkably little attention either in the drafting of the Covenant or in the practice of the Committee. Given the complexity and controversial nature of the issues involved, there is manifestly a need for the Committee to make some clear statement as to its position. In particular, attention needs to be paid to the notion of equality of opportunity in so far as it is seen as being a relevant objective of the Covenant. This is so not merely by virtue of the fact that it gives rise to claims for affirmative and protective action, but also to the extent that it poses problems of measurement.

In relation to the principle of non-discrimination, the Committee appears to have adopted a position analogous to that of other human rights bodies. It has interpreted article 2(2) in a relatively broad manner both as to its scope *ratio materiae* and *ratio personae*. Although the article is not deemed to be entirely autonomous in the sense of article 26 ICCPR, it covers both direct and indirect discrimination by public authorities and private individuals. Similarly, the article is not limited to those "suspect" classifications specifically enumerated, but may also cover other unreasonable differentiations.

Even here however, there is room for greater specificity. Although it is clearly necessary for article 2(2) to apply beyond the restricted classification of grounds upon which discrimination is prohibited, the Committee needs to establish what additional grounds it considers to be "suspect" and the level of scrutiny with which it will evaluate differentiations. As regards regulation of the activities of private individuals a balance has to be struck between the demands of individual choice and freedom and the necessity of combatting discrimination in the longer-term. As suggested, the Committee should look initially to ensure that States reflect such a balance in their laws and administrative practices.



## **CHAPTER FIVE: THE RIGHT TO WORK**

### *Article 6*

*1. The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take the appropriate steps to safeguard this right.*

*2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.*

### **I) INTRODUCTION**

Despite the statistical existence of unemployment in every country in the world, work continues to be "an essential part of the human condition".<sup>1</sup> For many, it represents the primary source of income upon which their physical survival depends. Not only is it crucial to the enjoyment of "existence rights" such as food, clothing or housing,<sup>2</sup> it affects the level of satisfaction of many other human rights such as education, culture and health. Article 6, however, is not so much concerned with what is provided by work (in terms of remuneration), or the conditions of work, but rather in the value of employment itself. It thus gives recognition to the idea that work is an important element in maintaining the dignity and self-respect of the individual.

### **II) THE TRAVAUX PREPARATOIRES**

The initial idea of including an article on the right to work was discussed in the General Assembly's Third Committee in 1950.<sup>3</sup> The Socialist States argued for the inclusion of such an article on the basis that it formed one of the "cornerstones of modern society"<sup>4</sup> and gave

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<sup>1</sup> Sieghart P., The Lawful Rights of Mankind, 123 (1986).

<sup>2</sup> See, Tomes I., "The Right to Work and Social Security", 8-9 Bull.Czech.L 192, at 196 (1967-8); Van der Ven J., "The Right to Work as a Human Right", 11 Howard L.J., 397, at 405-406 (1965).

<sup>3</sup> UN Docs, A/C.3/SR.289-91, 297-99, 5 GAOR, C.3, 289th-91st and 297th-99th mtgs, (1950).

<sup>4</sup> Hoffmeister (Czechoslovakia), A/C.3/SR.299, para.33 (1950).



other rights "a foundation in reality".<sup>5</sup> In particular it was felt that the right to work was essential in the context of the right to life as providing the "means towards living".<sup>6</sup>

In the following year, a number of proposals were made concerning an article on the right to work in a Working Group of the Commission on Human Rights.<sup>7</sup> These, together with a number of other proposals, were considered by the Commission on Human Rights at its seventh session in 1951.<sup>8</sup> The Commission draft was then reviewed by the General Assembly's Third Committee in 1956 which produced the final version of the article.<sup>9</sup>

#### A) A GUARANTEE OF THE RIGHT TO WORK

The initial proposals fell into three main groups. First, the Socialist States made proposals in which the State would "guarantee" or "ensure" the right to work.<sup>10</sup> Secondly, some Western States proposed that States should "promote conditions" under which the right to work might be realised.<sup>11</sup> Finally, certain other States proposed a compromise formula in which it was merely stated that everyone should have the right to work<sup>12</sup> (a decision on whether or not the obligation should be progressive being deferred until the adoption of a general clause). It became apparent that many States would not accept an obligation to "guarantee" the right to work in the sense of ensuring full employment or eliminating unemployment. In particular, it seems to have been felt that such a guarantee would bind States to a centralised system of government in which labour was under the direct control of the State.<sup>13</sup>

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<sup>5</sup> Panyushkin (USSR), A/C.3/SR.297, para.54 (1950).

<sup>6</sup> Afnan (Iraq), A/C.3/SR.298, para.64, (1950).

<sup>7</sup> E/CN.4/AC.14/2, at 3 (1951).

<sup>8</sup> E/CN.4/SR.205-7 and 216-218, (1951).

<sup>9</sup> UN Doc.A/C.3/SR.709-713 (1956).

<sup>10</sup> *See e.g.*, USSR proposal, E/CN.4/AC.14/2, at 3, (1951).

<sup>11</sup> *Ibid*, proposals of USA, Denmark and Egypt.

<sup>12</sup> *Ibid*, proposal of Yugoslavia. *See also*, proposal of ILO, E/CN.4/AC.14/2/Add.1, (1951).

<sup>13</sup> Roosevelt (USA), E/CN.4/SR.269, at 6, (1952); Later she commented: "...it was difficult to see how democratic States could guarantee absolutely and by their own action the right to work to all persons without becoming totalitarian States." E/CN.4/SR.275, at 11, (1952).



It was made clear that in many countries, the achievement of the right to work was dependent upon the economic climate in which it operated. External constraints relating to the international trade situation or a lack of raw materials<sup>14</sup> made the achievement of the right to work contingent upon international action as well as a particular national economic or social policy.<sup>15</sup> In that light it was generally considered that the right to work could only be achieved in a progressive manner.<sup>16</sup> More extremely, some felt that a guarantee of the right to work was in fact impossible at any stage.<sup>17</sup>

In using the stock formula in which the States Parties "recognise" the right to work the drafters clearly placed article 6 within the compass of article 2(1) which provides for the progressive realisation of the right.<sup>18</sup> However, whilst rejecting the term "guarantee", the delegates seemed to be concerned primarily with the obligation to achieve full employment. It is unclear from the drafting whether it was intended that all aspects of the article, such as the obligation to refrain from imposing forced labour, were intended to be progressively implemented.

## B) OPPORTUNITY TO GAIN HIS LIVING

The majority of proposals that gained broad support utilised the term "opportunity to gain his living by work" in some form.<sup>19</sup> This specific wording was proposed in order to underline the fact that the individual must be able to earn a living wage.<sup>20</sup> It was criticised, however, because it was seen to limit the concept of work to that which

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<sup>14</sup> See, Rossel (Sweden), E/CN.4/SR.216, at 6, (1951).

<sup>15</sup> See, Cassin (France), E/CN.4/SR.275, at 12, (1952).

<sup>16</sup> See *e.g.*, Bowie (UK), E/CN.4/SR.206, at 10, (1951); Sorensen (Denmark), E/CN.4/SR.207, at 10, (1951); Roosevelt (USA), E/CN.4/SR.276, at 6, (1952).

<sup>17</sup> See *e.g.*, Cassin (France), E/CN.4/SR.269, at 4, (1952); Hoare (UK), E/CN.4/SR.278, at 8, (1952).

<sup>18</sup> That article 6 was to be governed by the general implementation clause was the reason for the rejection of additional articles on the implementation of the right to work. See *e.g.* UN Doc.E/2256, at 16-17, 14 ESCOR, Supp.4, (1952).

<sup>19</sup> See *e.g.*, Proposal of France, E/CN.4/576; proposal of ILO, E/CN.4/AC.14/2/Add.1.

<sup>20</sup> See, Cassin (France), E/CN.4/SR.216, at 27, (1951).



generated income,<sup>21</sup> and because the question of remuneration fell more clearly within the scope of article 7.<sup>22</sup>

Although inclusion of the phrase did have considerable support, the main controversy lay over the precise relationship between the right to work and the opportunity to gain one's living by work. The original proposal accepted at the Commission's seventh session linked the right to work with the opportunity to gain one's living by the phrase "that is to say".<sup>23</sup> Although it was argued that the concepts in fact described two separate rights,<sup>24</sup> the majority felt that the opportunity to gain one's living was, in part at least, a definition of the right to work.<sup>25</sup> A Greek amendment to alter the phrase to read "the fundamental right to work, which includes the right of everyone to the opportunity to gain his living by work"<sup>26</sup> was ultimately adopted,<sup>27</sup> it being felt that the right to work "did not mean simply the right to remuneration but the right of every human being to do a job freely chosen by himself, one which gave meaning to his life."<sup>28</sup> Although the other elements within the right to work were unfortunately not spelled out,<sup>29</sup> the discussion implies that it includes, at least, the right not to be arbitrarily deprived of work of any kind, whether remunerative or otherwise.

There was some underlying confusion as to the exact nature of State obligations that were implicit in the right to gain a living through work. Some States seem to have considered that the opportunity to work

<sup>21</sup> See, Yu (China), E/CN.4/SR.216, at 25, (1951).

<sup>22</sup> See, Azmi Bey (Egypt), E/CN.4/SR.216, at 29, (1951).

<sup>23</sup> Article 20 of the draft covenant read:

"Work being the basis of all human endeavour, the States Parties to the Covenant recognize the right to work, that is to say, the fundamental right of everyone to the opportunity, if he so desires, to gain his living by work which he freely accepts."

UN Doc.E/1992, Annex 1, at 23, ECOSOC OR, 13th Sess., Supp.9, (1951).

<sup>24</sup> See, Pazhwak (Afghanistan), A/C.3/SR.709, at 137, para.28 (1956).

<sup>25</sup> See e.g., Diaz Casanueva (Chile), A/C.3/SR.709, at 137, para.34 (1956); Ponce (Ecuador), A/C.3/SR.711, at 148, para.12 (1956).

<sup>26</sup> UN Doc.A/C.3/L.536. A similar amendment was to use the word "as" in place of "that is to say". See Mufti (Syria), A/C.3/SR.709, at 137, para.31 (1956).

<sup>27</sup> 42 votes to ten with 13 abstentions. The word "fundamental" was deleted from the final version. UN Doc.A/3525, at 4, para.28, 11 UN GAOR, Annexes, C.3, Ag.Item 31, (1956).

<sup>28</sup> Thierry (France), A/C.3/SR.709, at 138, para.37 (1956); See also, Mufti (Syria), A/C.3/SR.710, at 144, para.42 (1956).

<sup>29</sup> Cf. Marriott (Australia), A/C.3/SR.711, at 150, para.36, (1956).



obliged the State to provide work for all who wished to do so.<sup>30</sup> Other States, however, considered that the opportunity to work merely implied that the State should restrain itself from preventing persons from working.<sup>31</sup> A general reading of the debate would suggest that a position of compromise was reached that enabled the word "opportunity" to be included by consensus.<sup>32</sup> Whereas market or mixed economy States would not accept an obligation to provide employment, as suggested above, they could accept a position where they were responsible for developing employment opportunities.<sup>33</sup> Presumably the development of employment opportunities could be achieved either directly through State employment or indirectly by developing the economic conditions for increasing private sector employment.

### C) FREE CHOICE IN EMPLOYMENT

A certain tension between a guarantee of the right to work and free choice in employment was identified in the early stages of drafting.<sup>34</sup> It was considered inconceivable that everyone should be provided with work of their own choosing by the State. If the State was obliged to provide employment, it could not be required to cater entirely for individual choice but would obviously limit job opportunities according to the requirements of the country's economic development.<sup>35</sup> Some States accordingly suggested that free choice of employment should be qualified for the purpose of maintaining full employment.<sup>36</sup> The majority, however, looked to the primacy of free choice over the achievement of full employment through the provision of labour by the State.<sup>37</sup>

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<sup>30</sup> See e.g., Azkoul (Lebanon), E/CN.4/SR.268, para.8, (1952); Jevremovic (Yugoslavia), E/CN.4/SR.277, para.11, (1952).

<sup>31</sup> See e.g., Nisot (Belgium), E/CN.4/SR.268, para.8, (1952); Pazhwak (Afghanistan), A/C.3/SR.710, at 141, para.7, (1956).

<sup>32</sup> E/CN.4/SR.218, para.7, (1952).

<sup>33</sup> See, Diaz Casanueva (Chile), A/C.3/SR.710, at 144, paras 37-38, (1956).

<sup>34</sup> See e.g., Jevremovic (Yugoslavia), E/CN.4/SR.205, at 11, (1951); Bowie (UK), E/CN.4/SR.206, at 10, (1951); Rossel (Sweden), E/CN.4/SR.216, at 6, (1951).

<sup>35</sup> See, Santa Cruz (Chile), E/CN.4/AC.14/SR.3, at 15-16, (1951).

<sup>36</sup> See e.g., Valenzuela (Chile), E/CN.4/SR.206, at 23, (1951); Ahmed (Pakistan) A/C.3/SR.709, at 138, para.39, (1956).

<sup>37</sup> The USSR representative objected, for example, that free choice could be used to justify unemployment and the lack of measures to combat it. Morosov (USSR), E/CN.4/SR.218, at 7, (1951).



There was considerable concern that the right to work should contain some indication that forced labour or slavery should be illegal.<sup>38</sup> It was pointed out that the prohibition of forced labour was implicit in the concept of a "right to work" which could be invoked or not, as a matter of choice,<sup>39</sup> and that it was already covered by article 5 of the Covenant.<sup>40</sup> Nevertheless proposals were made to include the phrase "of his own choice"<sup>41</sup> or "who so desires"<sup>42</sup> to indicate this concern. The latter term was the one chosen initially, together with the stipulation that work be freely accepted.<sup>43</sup> The term "choice" was rejected on the basis that it might have implied that governments undertook to find the employment of everyone's choosing.<sup>44</sup> The inclusion of both the terms "desires" and "freely accepts" seemed to stress that people should not only be free from coercion in their choice of occupation but also be at liberty not to work at all.

However at a later stage the position was reversed. The term "desires" was deleted in favour of the phrase "work which he freely chooses or accepts".<sup>45</sup> One justification for the deletion of the term "desires" was that it might be seen as a legitimisation of "social parasitism".<sup>46</sup> For those States that instigated the change, work was not

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<sup>38</sup> See e.g., Simarsian (USA), E/CN.4/SR.216, at 18, (1951); Sender (ICFTU), E/CN.4/SR.216, at 19, (1951).

<sup>39</sup> See, Jevremovic (Yugoslavia), E/CN.4/SR.216, at 20, (1951); Cassin (France), E/CN.4/SR.216, at 27, (1951). Cassin later commented:

"Article 20 [later article 6] contained both the positive and negative aspects, like the word 'droit' itself. Inherent in that word was the notion that it could be exercised voluntarily; otherwise it would be an obligation. Equally inherent was the notion of the ability to exercise the right."

He went on to argue that there was therefore no need to include the words "opportunity" or "desires" within the text. E/CN.4/SR.268, at 9, (1952).

<sup>40</sup> See e.g., Malik (Lebanon), E/CN.4/SR.217, at 11, (1951).

<sup>41</sup> See e.g., Mehta (India), E/CN.4/SR.216, at 24, (1951).

<sup>42</sup> See e.g., Sorensen (Denmark), E/CN.4/SR.216, at 9, (1951).

<sup>43</sup> UN Doc. E/1992, Annex 1, at 23, *supra*, note 23. It would seem that the inclusion of the term "freely accepts" was similarly intended to prohibit forced labour. See, Simarsian, E/CN.4/SR.217, at 10, (1951).

<sup>44</sup> See, Myrddin-Evans (ILO), E/CN.4/SR.216, at 29, (1951).

<sup>45</sup> UN Doc.A/3525, at 3-4, paras 25 and 28, *supra*, note 27.

<sup>46</sup> See, Aznar (Spain), A/C.3/SR.709, at 137, para.30, (1956); Jaramillo Arrubla (Colombia), *ibid*, at 138, para.44; Nestor (Rumania), A/C.3/SR.712, at 153, para.7, (1956). One member of the Third Committee felt he could not support the term "desires" as it was at variance with his States' vagrancy laws. Rivas (Venezuela), A/C.3/SR.710, at 143, para.21, (1956).



merely a right but also a duty.<sup>47</sup> Fortunately, however, the possibility that the individual might be obliged in law to take up some form of employment, as seems to be implied here, was not subject to full agreement. First, a number of States emphasised that the concept of a right to work did not allow for the possibility of a co-existent duty to work. Secondly, if work must be freely accepted as article 6 requires, it is difficult to see how a duty to work could ever be enforced. It was thus the presence of the phrase "freely accepts" which was generally considered to prohibit forced labour, that led to the deletion of the word "desires" as being essentially redundant.<sup>48</sup>

The term "chooses", far from carrying the implications assigned to it in the Commission's debate, was merely intended to strengthen the existing meaning of the article. In the final analysis it seems that the term "chooses" covered the right to choose a trade or profession whilst the term "accepts" covered the right to accept or refuse an offer of employment.<sup>49</sup> As such the alterations did not substantially change the meaning assigned to the original Commission version of the article.<sup>50</sup> Despite opposition,<sup>51</sup> the article seems to have been adopted on the strength of this analysis.

#### D) FULL EMPLOYMENT

Despite the rejection of proposals for a guarantee of the right to work, there remained considerable support for the inclusion of a reference to full employment.<sup>52</sup> This led a contemporary commentary to conclude that the presence of paragraph 2 seemed to include the right to be provided with work, in addition to the right not to be prevented

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<sup>47</sup> See e.g., Aznar (Spain), A/C.3/SR.709, at 137, para.30, (1956). That there might be some conflict between the free choice of work and the duty to work was dispelled by one member:

"...the obligation to work and freedom to work were in no way incompatible. Men ought to work, but they should be free to choose their trade or profession."

Jaramillo Arrubla (Columbia), A/C.3/SR.709, at 138, para.44, (1956). How an obligation to work and a freedom not to accept work can be reconciled is unclear. This somewhat dubious reasoning was not followed in that delegates' later statements. Cf. A/C.3/SR.712, at 154, para.14, (1956).

<sup>48</sup> See e.g., Aznar (Spain), A/C.3/SR.710, at 141, para.4 (1956); De Almeida (Brazil), A/C.3/SR.710, at 142, para.11 (1956)

<sup>49</sup> See, Jaramillo Arrubla (Colombia), A/C.3/SR.712, at 154, para.14, (1956).

<sup>50</sup> Cf. Cheng (China), A/C.3/SR.710, at 144, para.35, (1952).

<sup>51</sup> See e.g., Elliot (UK), A/C.3/SR.712, at 154, para.8, (1956).

<sup>52</sup> See e.g., Fischer (WFTU), E/CN.4/SR.217, at 4, (1951); Whitlam (Australia), E/CN.4/SR.277, at 10, (1952); see generally, UN Doc. E/2256, para.110, ECOSOC OR, 14th Sess., Supp.4, (1952).



from working.<sup>53</sup> However, the debate on paragraph 1 does not seem to bear this out. Any such right to employment was to be viewed in relation to the State obligation to secure full employment in a progressive manner, which in itself was conditional upon the economic development of the country concerned.

In recognising "full employment" as merely being a method of implementation,<sup>54</sup> a proposal to include it in a second paragraph to article 6 extended into a debate on the more general question of whether specific implementation clauses should be included within the substantive portion of the Covenant. Even following the adoption by the Commission of a second paragraph relating to full employment, certain members advocated its deletion.<sup>55</sup> It was argued that it was better to state the principle of the right to work in general terms leaving the specifics of implementation to the ILO. Additionally, not only was it illogical to insert specific implementation clauses in some articles and not others,<sup>56</sup> but also the proposals were limited and indeed self-evident.<sup>57</sup> However it was felt that in order for the Covenant to go beyond the UDHR<sup>58</sup> it was necessary for the specifics of implementation, beyond those found in article 2,<sup>59</sup> to be spelt out where possible.<sup>60</sup> As far as article 6 was concerned, more detailed standards

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<sup>53</sup> UN Doc. A/2929, *ibid*, at 103, para.2.

<sup>54</sup> It was noted that full employment could either be seen as a means for ensuring the right to work or as a separate goal. *See*, Azkoul (Lebanon), E/CN.4/SR.276, at 13, (1952).

<sup>55</sup> UK Amendment, A/C.3/L.534.

<sup>56</sup> *See*, Elliot (UK), A/C.3/SR.710, at 143, para.26, (1956).

<sup>57</sup> *See*, Elliot (UK), A/C.3/SR.709, at 137, para.29, (1956); Shipley (Canada), *ibid*, para.32; Thierry (France), *ibid*, at 138, para.38.

<sup>58</sup> It was felt that without paragraph 2, article 6 would not differ substantially from the UDHR. Abdel-Ghani (Egypt), A/C.3/SR.710, at 143, para.20, (1956). In particular some States seemed to be driven by the rather erroneous idea that without paragraph 2 States would not be bound *inter se* with respect to article 6. *See e.g.*, Ponce (Ecuador), A/C.3/SR.711, at 148, para.13; Pudlak (Czechoslovakia), *ibid*, at 149, para.19.

<sup>59</sup> *See*, Eustathiades (Greece), A/C.3/SR.710, at 143, para.29, (1956).

<sup>60</sup> *See*, Diaz Casanueva (Chile), A/C.3/SR.710, at 144, para.38, (1956); Massoud-Ansari (Iran), A/C.3/SR.711, at 149, para.31.



had been established in ILO instruments,<sup>61</sup> and had already gained general acceptability on the international plane.<sup>62</sup>

So for the majority, the question was not the inclusion of a second paragraph relating to full employment, but what elements should be referred to therein. It was made clear that the obligation to achieve full employment was only one method of securing the right to work,<sup>63</sup> even if considered the most important.<sup>64</sup> This point was made apparent in the final version of article 6 which stipulates that the steps to ensure the right to work "shall include" the obligation to achieve full employment. Paragraph 2 thus is not an all inclusive paragraph.

### 1) Economic Development

There was general agreement that the achievement of full employment was dependent upon the structure and economic development of each country.<sup>65</sup> On the other hand, proposals to make reference to the technical means for ensuring full employment,<sup>66</sup> in particular the need for "economic expansion" or "development",<sup>67</sup> were subject to opposition. It was argued that a reference to development might leave the way open for States to avoid their obligations<sup>68</sup> and that it would duplicate and even limit article 2.<sup>69</sup> In response it was submitted that a reference to economic expansion or development was indeed necessary,<sup>70</sup> being justified by the text of articles 55 and 56 of

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<sup>61</sup> See, Vlahov (Yugoslavia), A/C.3/SR.710, at 142, para.9, (1956).

<sup>62</sup> See, Morosov (USSR), A/C.3/SR.710, at 142, para.15, (1956).

<sup>63</sup> See, Hoare (UK), E/CN.4/SR.278, at 8, (1952).

<sup>64</sup> See, Santa Cruz (Chile), E/CN.4/SR.216, at 11, (1951).

<sup>65</sup> See e.g., it was commented that the aims of article 6 would only be achieved "only in so far as the States provided every opportunity for employment and ensured a stable economy in which only temporary unemployment would be possible". Sender (ICFTU), E/CN.4/SR.276, at 9, (1952). See also, Roosevelt (US), E/CN.4/SR.276, at 6, (1952); Santa Cruz (Chile), *ibid*, at 8.

<sup>66</sup> See, Juvigny (France), E/CN.4/SR.276, at 11, (1952); Cassin (France), E/CN.4/SR.278, at 4, (1952).

<sup>67</sup> In the end the preference was for the word "development". Cf. E/CN.4/SR.278, at 13, (1952).

<sup>68</sup> See, Azkoul (Lebanon), E/CN.4/SR.276, at 12, (1952); Kovalenko (USSR), E/CN.4/SR.278, at 3, (1952).

<sup>69</sup> See e.g., Rossel (Sweden), E/CN.4/SR.277, at 3, (1952).

<sup>70</sup> See, Waheed (Pakistan), E/CN.4/SR.277, at 6, (1952).



the UN Charter.<sup>71</sup> That mention should be made of economic development was finally accepted by the Commission. In the Third Committee however, despite certain reservations,<sup>72</sup> it was decided that development should not be limited to the economic field, and that social and cultural development should also be mentioned to give the article fuller expression.<sup>73</sup>

It would seem that the inclusion of the reference to economic, social and cultural development, not only highlights the perceived interdependence of article 6 and the other articles within the Covenant, but also re-emphasises that article six is intended, in part at least, to be progressively implemented.

## 2) National and International Programmes

In the light of the external considerations that bear upon a particular country's economic development, it was also proposed that article 6 should refer explicitly to "national and international programmes to achieve economic development."<sup>74</sup> Although members were in accordance with the intentions of the proposal,<sup>75</sup> concern was expressed as to the precise obligations that ensued<sup>76</sup> and the limitative effect they might have on article 2.<sup>77</sup> Delegates seem to have been satisfied finally by an assurance that on the basis of article 2, national and international action was implicit in the proposal and therefore did not have to be explicitly mentioned.<sup>78</sup>

## 3) Legislative Measures

Similarly a suggestion that article 6(2) should refer to legislative measures was rejected on the basis that it was not entirely clear how full

<sup>71</sup> See, Santa Cruz (Chile), E/CN.4/SR.277, at 3, (1952).

<sup>72</sup> See e.g., Marriott (Australia), A/C.3/SR.711, at 150, para.34, (1956); Cheng (China), A/C.3/SR.712, at 154, para.10, (1956).

<sup>73</sup> See, Pazhwak (Afghanistan), A/C.3/SR.709, at 137, para.28, (1956); Mufti (Syria), *ibid*, para.31; Ponce (Ecuador), A/C.3/SR.711, at 148, para.12, (1956).

<sup>74</sup> See, Santa Cruz, E/CN.4/SR.276, at 8, (1952).

<sup>75</sup> See e.g., Rossel (Sweden), E/CN.4/SR.277, at 3, (1952).

<sup>76</sup> See, Hoare (UK), E/CN.4/SR.276, at 10, (1952); Azkoul (Lebanon), E/CN.4/SR.276, at 12, (1951).

<sup>77</sup> See, Roosevelt (USA), E/CN.4/SR.277, at 7, (1952).

<sup>78</sup> See, Roosevelt (USA), E/CN.4/SR.277, at 8, (1952). Nevertheless the provision was rejected by only a very small minority of six votes to five with seven abstentions.



employment could be ensured in that manner.<sup>79</sup> This does not discount the possibility that legislation might be necessary on occasions. Moreover, the context of the debate would appear to restrict this conclusion to the achievement of full employment, and not for example, the prohibition of discrimination in employment.

#### 4) Productive Employment

At a number of stages during the drafting of article 6 it was often submitted that work should be productive.<sup>80</sup> Although little discussion took place over the inclusion of this word in the final stages, it seems to have been intended to prohibit the adoption of social projects of little significance merely to draw in the unemployed for the purpose of maintaining full employment.

#### 5) Fundamental Political and Economic Freedoms

The US proposal to achieve full employment "under conditions ensuring fundamental political and economic freedoms to the individual" had a certain amount of support.<sup>81</sup> This proposal reflected the concern of Western States that full employment was not an objective to be imposed through totalitarian means at the expense of democracy and freedom.

It was argued that the term "freedoms" should not be limited to fundamental ones, but should be expanded to include all political and economic freedoms.<sup>82</sup> However it was countered that the purpose was to safeguard only those freedoms which were fundamental in relation to

<sup>79</sup> Chile proposed that States should adopt legislation at a suitable time guaranteeing full employment. Santa Cruz (Chile), E/CN.4/SR.275, at 11, (1952). The Chilean amendment was criticised for emphasising legislative measures as a means for securing full employment. Azkoul (Lebanon), E/CN.4/SR.276, at 12, (1952); Mehta (India), E/CN.4/SR.277, at 7, (1952).

<sup>80</sup> See, Santa Cruz (Chile), E/CN.4/SR.216, at 24, (1951); Fischer (WFTU), E/CN.4/SR.217, at 4, (1951). This must be distinguished from the proposal that the right to work should be limited to "socially useful" work, which was suggested as a recognition that society requires its members to undertake work that contributes to the general well-being. See, Whitlam (Australia), E/CN.4/SR.217, at 12, (1951); Ciasullo (Uruguay), *ibid*, at 10; Yu (China), *ibid*, at 12.. There was a certain amount of opposition to the term "socially useful" as it was thought it might be open to abuse by States. Myrddin-Evans (ILO), E/CN.4/SR.217, at 16, (1951).

<sup>81</sup> See, Azkoul (Lebanon), E/CN.4/SR.276, at 12, (1952); Rossel (Sweden), E/CN.4/SR.277, at 3, (1952). One participant suggested thus that States should seek to prevent further unemployment and achieve full employment under conditions satisfying material needs and with "respect for freedom and the safeguarding of moral and spiritual value." Sender (ICFTU), E/CN.4/SR.276, at 10, (1952).

<sup>82</sup> See, Pazhwak (Afghanistan), A/C.3/SR.709, at 137, para.28.



the right to work and not just any freedom,<sup>83</sup> and that to include all freedoms was too vague and might sanction abuse.<sup>84</sup> It is submitted that this was a meaningless debate. Nowhere was it defined what freedoms were considered to be "fundamental", or which ones were considered to relate to the right to work. Perhaps all that could be concluded from the discussion is that the phrase was intended to prohibit "trade-offs" between the right to work and other civil and political rights.

#### 6) Steps to be Taken

As suggested above there were questions over the extent to which the various proposals modified article 2(1) itself. It was made clear that the purpose of article 6(2) was not to limit article 2 but rather to outline certain conditions which were required for the full attainment of the right to work.<sup>85</sup> The inclusion of the words "steps to be taken" confirmed the intention that article 6(2) should merely be an elaboration of the general implementation provision in article 2(1).<sup>86</sup>

However, it should be made clear that not all the steps were conceived of as existing on the same theoretical level. For example, the reference to development was included only in so far as it related to the achievement of full employment. On the other hand, although full employment must be seen as method of implementing the right to work, it was also be presented as a goal in its own right.<sup>87</sup>

#### E) ABILITY

A number of proposals were made to the effect that the right of access to work should be made subject to the limitations of aptitude, ability and qualifications. Although there were no real objections to such a proposal, it did not gain any significant support. The proposal to include a reference to ability is particularly interesting to the extent that it might be seen to draw upon the notion of equality of opportunity. Whilst non-discrimination in employment could fall within the terms of article 6 read in conjunction with article 2(2), the stipulation of certain limitations within article 6 would have suggested that a positive rather

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<sup>83</sup> See, Eustathiades (Greece), A/C.3/SR.709, at 138, para.35.

<sup>84</sup> See e.g., Rivas (Venezuela), A/C.3/SR.710, at 143, para.22, (1956); Diaz Casanueva (Chile), *ibid*, at 144, para.38.

<sup>85</sup> See, Roosevelt (USA), E/CN.4/SR.277, at 8, (1952).

<sup>86</sup> The US proposal was accordingly amended by the Lebanese proposal to become the new joint amendment E/CN.4/L.95.

<sup>87</sup> For a discussion on the interrelationship between the substance of the rights and their means of implementation see *above*, Chapter 2, text accompanying notes 61-64.



than a negative approach should be taken. In other words instead of outlining the cases in which discrimination is illegitimate, it would reverse the situation and provide only for the cases in which discrimination is legitimate.

### III) THE APPROACH OF THE COMMITTEE

#### A) A GUARANTEE OF THE RIGHT TO WORK

The specific wording of article 6 (which utilises the term "recognise"<sup>88</sup>), supported by the travaux préparatoires<sup>89</sup> and a number of commentators,<sup>90</sup> clearly dismiss the idea that the right to work should necessarily be "guaranteed". Nevertheless, a number of the Committee members have looked towards a legal guarantee of the right to work.<sup>91</sup> One member has even argued that such a guarantee should be formally enshrined in the Constitution.<sup>92</sup> However, it is difficult to envisage how such a guarantee should operate.

A guarantee of the right to work would seem to imply that the State should provide a job for every person who is available for and willing to work. To correspond to the requirements of human dignity, such a guarantee would have to ensure that the type of work suited the skills and aptitudes of the individual worker concerned, and that the individual be given the right to refuse employment. Inevitably, the institution of such a guarantee would involve considerable control of the labour market and expenditure. It is clear that even in those States that do "guarantee" the right to work, it is generally conditional upon the needs of society, off-set by a duty to work and implemented through the

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<sup>88</sup> The term "recognise" is seen as being an indication that the provision is considered to fall within the confines of article 2(1), *see above*, Chapter 2, text accompanying note 189.

<sup>89</sup> *See above*, text accompanying notes 10-18.

<sup>90</sup> *See e.g.*, Van den Berg G. and Guldenmund R., "The Right to Work in East and West" in Bloed A., and Van Dijk P.(eds) Essays on Human Rights in the Helsinki Process, 103 at 111 (1985). *See also* with respect to the UK, Hepple B., "A Right to Work" 10 Ind.L.J. 65 at 73 (1981). It is also interesting to note that the International Labour Conference decided not to provide for a guarantee of the right to work, *see*, Mayer J., "The Concept of the Right to Work In International Standards and the Legislation of ILO Member States" 124 I.L.R., 225 at 239 (1985).

<sup>91</sup> *See e.g.*, Badawi El Sheikh, E/C.12/1987/SR.5, at 3, para.10; Mratchkov, E/C.12/1989/SR.18, at 4, para.11; Neneman, E/C.12/1990/SR.11, at 5, para.27.

<sup>92</sup> *See*, Kouznetsov, E/C.12/1990/SR.15, at 6, para.27. The form which such an expression should take in the Constitution however was not established.



political framework as opposed to law.<sup>93</sup> The situation is even less favourable in market economies where control of labour is insufficient and in developing countries where lack of resources constrain the institution of such a guarantee. Thus in those States where reference to the right to work may be found in their constitutions, it is expressly of a long-term and promotional nature.<sup>94</sup>

In contrast to the occasional reference to a "guarantee" by individual members, the Committee as a whole seems to have taken a more reserved attitude towards the right to work. As one member noted, "it was clear that the right to work could be implemented only if work was available".<sup>95</sup> Accordingly, the Committee has looked towards the implementation of policies and measures aimed at ensuring that there is "work for all who are available for and seeking work".<sup>96</sup> The clearly progressive nature of the obligation indicates that the Committee views article 6, at least as far as the obligation to secure full employment is concerned, as falling squarely within the terms of article 2(1).

## B) ELEMENTS OF THE RIGHT TO WORK

Despite the fact that a guarantee of the right to work is not realistic, it would be superficial to view article 6 merely as requiring the progressive achievement of full employment. That full employment is merely referred to in article 6(2) as one of the steps to achieve the full realisation of the right to work suggests that other elements are implicit in the right which have yet to be spelt out. A right to work in a broader sense seems to encompass two general areas of concern: a right to enter employment and a right not to be unjustly deprived of employment.<sup>97</sup> As far as the former is concerned, it includes all matters that affect access to work such as levels of unemployment, non-discrimination and equal opportunities, vocational guidance and

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<sup>93</sup> See, Hepple B., "Security of Employment", in Blainpain R.(ed), Comparative Labour Law and Industrial Relations at 475 (3rd Ed 1987).

<sup>94</sup> Mayer, *supra*, note 90, at 237-8.

<sup>95</sup> Sparsis, E/C.12/1987/SR.5, at 7, para.31.

<sup>96</sup> Revised guidelines regarding the form and content of reports to be submitted by States parties under article 16 and 17 of the International Covenant on Economic, Social and Cultural Rights. ESCOR, Supp.(No.3), Annex IV, 88 at 90, UN Doc.E/1991/23, (1991).

<sup>97</sup> For example, the Constitution of Luxembourg provides in Article 11 for a right to work. This has been interpreted as providing for free choice of employment, free access to employment and freedom from discrimination. See, UN Doc.E/1990/5/Add.1, at 2, para.3.



training, and education. The latter field on the other hand concerns employment security and in particular security against unfair dismissal.

Further elements of the right to work are specifically stipulated in article 6 which provides that the right to work "includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts". The reference to the opportunity to gain one's living suggests that a minimum remuneration should be provided that satisfies basic needs. This finds more precise recognition in article 7. The reference to freely chosen work seems to provide for a "right not to work" which implies a prohibition of forced labour, and even perhaps legitimises a right to strike.

In the next section, the three main elements of the right to work namely, access to employment, freedom from forced labour, and security in employment will each be discussed in turn.

## 1) Access to Employment

### a) Full Employment

Although article 6(2) was conceived of as being an "implementation clause" in as far as it outlined state obligations as opposed to individual rights,<sup>98</sup> there is no doubt that it forms an indissoluble element in the achievement of the right to work. This is more apparent if it is considered that the "steps" outlined in the Covenant form partial definitions of the "rights".<sup>99</sup> Whereas full employment might be posited as a precondition to the full realisation of the right to work, it must be conceded that an individual's right to work is not necessarily conditional upon the existence of full employment.

It is apparent that the Committee expects there to be some degree of unemployment in every State with which it deals. Thus, as far as the Committee was concerned, there was considerable scepticism as to Czechoslovakia's assertion that unemployment was non-existent,<sup>100</sup> particularly in view of the existence of a system in Czechoslovakia to assist the unemployed.<sup>101</sup> In the context of economics, however, it is generally conceded that the notion of "full employment" does not mean the total absence of unemployment. Forms of unemployment have traditionally been divided into three categories: frictional unemployment, cyclical (or demand-deficiency) unemployment and

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<sup>98</sup> See above, text accompanying notes 54-64.

<sup>99</sup> See above, Chapter 2 text accompanying notes 61-64.

<sup>100</sup> See e.g., Konate, E/C.12/1987/SR.13, at 5, para.21.

<sup>101</sup> See, Simma, E/C.12/1987/SR.13, at 9, para.41; Texier, E/C.12/1987/SR.13, at 10, para.50.



structural unemployment.<sup>102</sup> Whereas cyclical and structural unemployment are matters of serious public concern,<sup>103</sup> frictional unemployment represents the number of people between jobs and as such is not a reflection of the inadequacy of the labour market, but rather of employment mobility. Given that a measure of unemployment (in a general sense) is inevitable, it is surely appropriate for the Committee to define what it understands by the term "full employment" and the extent to which it considers it to be a realistic objective.<sup>104</sup>

Here the text of the article is instructive. In outlining the steps to be taken to achieve the realisation of the right to work, article 6(2) does not speak merely of full employment, but rather of "policies and techniques to achieve... full and productive employment". The achievement of full employment then is not something that the article actually requires. Rather, what is required is a policy that directs itself towards that end.

It is clear from the Committee's comments upon article 2(1) that an essential precondition to the formulation of precise and effective policies is an accurate evaluation of the present situation.<sup>105</sup> Thus according to the Committee's guidelines, States are required to produce information on the "situation, level and trends of employment, unemployment and underemployment".<sup>106</sup> In practice members of the Committee have also expected States to offer some form of explanation for the current level of unemployment<sup>107</sup> and further information on the nature of the unemployment (for example the amount of long-term unemployment)<sup>108</sup>. In addition information is requested as to the level of unemployment with respect to specific categories of workers, and it

<sup>102</sup> See e.g., Scott M. and Laslett R., Can We Get Back to Full Employment?, 10-11 (1978). Other definitions also include seasonal unemployment, see, Worswick G., "Summary", in Worswick G.(ed), The Concept and Measurement of Involuntary Unemployment, 305 (1976).

<sup>103</sup> "Cyclical unemployment" is generally considered to be a result of deficiency of demand for labour; "structural unemployment" is unemployment that results from imperfections in the labour market (such as a mismatch between training and labour demand).

<sup>104</sup> It was traditionally considered that an unemployment level of about 3% was consonant with full employment. For a discussion of "target rates" of unemployment see, Blackaby F., "The Target Rate of Unemployment", in Worswick G.(ed), The Concept and Measurement of Involuntary Unemployment, 279 (1976).

<sup>105</sup> See above, Chapter 2, text accompanying notes 75-77.

<sup>106</sup> Reporting guidelines, *supra*, note 96, at 90.

<sup>107</sup> See, Texier, E/C.12/1987/SR.5, at 6, para.23; Sviridov, E/C.12/1987/SR.6, at 5, para.16.

<sup>108</sup> See, Texier, E/C.12/1989/SR.6, at 5, para.20.



has offered as examples "women, young persons, older workers and disabled workers". This corresponds to the obligation to identify vulnerable or disadvantaged persons, groups, regions or areas with regard to employment.<sup>109</sup> Such areas of concern will clearly vary from country to country and the State will have considerable discretion in identifying them. Nevertheless members of the Committee have generally looked for information on the employment situation of each of the above groups and occasionally on the situation of particular ethnic groups.<sup>110</sup> Any information provided should be placed in the context of the situation both five and ten years previously.<sup>111</sup>

Accurate and useful measurement of unemployment, however, is subject to serious difficulties. Whereas unemployment may be estimated with relative ease in developed States, in developing States, which have a smaller percentage of the working population in wage employment (many being self-employed) and have less well-developed social security systems, unemployment is considerably more difficult to measure. In addition, in developing States, the figures of unemployment are likely to disguise serious underemployment (in the sense of employees having insufficient work).<sup>112</sup> Although the Committee has begun to tackle the question of statistical indicators in general,<sup>113</sup> it has not as yet done so in the context of full-employment.

As noted above, on the basis of their evaluation of the situation, States are expected to pursue a policy with the aim of ensuring that there is work for all who are available for and seeking work.<sup>114</sup> The precise nature of such a policy has not been specifically provided for by the Committee although reference is made to ILO standards in this area,

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<sup>109</sup> Reporting guidelines, *supra*, note 96, at 90.

<sup>110</sup> The following questions are exemplary: What was Jamaica doing to reduce the high unemployment rate, particularly in the case of women? Neneman, E/C.12/1990/SR.11, at 5, para.27. What measures was Canada taking to reduce the high level of unemployment especially among women and children? Mratchkov, E/C.12/1989/SR.8, at 7, para.36. What were the trends of unemployment among young women and ethnic groups? Simma, E/C.12/1989/SR.8, at 8, para.43; Neneman, E/C.12/1989/SR.8, at 9 para.49.

<sup>111</sup> Reporting guidelines, *supra*, note 96, at 90.

<sup>112</sup> *See*, Squire C., Employment Policy in Developing Countries 58-65 (1981).

<sup>113</sup> *See below*, Chapter 9.

<sup>114</sup> Such an obligation is sometimes Constitutionally entrenched, *e.g.* Panama, E/1984/1/Add.19, at 2.



particularly the Employment Policy Convention of 1964 (No.122).<sup>115</sup> One member has commented that the mere identification of four objectives of public policy was not a sufficient indication that an employment policy as envisaged by Convention No.122 had been established. Such a policy "seemed to be required if a State wished to prove that it was making every possible effort to ensure full employment."<sup>116</sup> Beyond the question of the sufficiency of the policy concerned, members of the Committee have looked for both policies to combat unemployment in general<sup>117</sup> and policies that are directed at assisting specific vulnerable and disadvantaged groups.<sup>118</sup>

There is room for the Committee to expand further upon the type of policy it expects. It is submitted that States should be expected to show that they have a coherent strategy of the short, medium and long-term which has as a central aim the achievement of full employment. In this respect it is arguable that a government policy that was directed at the achievement of economic growth at the expense of maintaining a permanent pool of unemployed would be in conflict with that States obligations under the Covenant.<sup>119</sup>

Similarly a stricter level of scrutiny should be directed at policies that relegate employment goals to long-term strategies. In this respect, those States that pursue a pure "monetarist" philosophy where the emphasis is upon the adoption of fiscal measures to reduce inflation and encourage investment, will be required to show that the short and medium-term effects are not unduly detrimental to the employment situation.<sup>120</sup> Although the reduction of inflation may be a precondition

<sup>115</sup> See e.g., Sparsis, E/C.12/1990/SR.10, at 13, para.82; Alston, E/C.12/1987/SR.6, at 3, para.10. The reporting guidelines provide for reference to the relevant parts of ILO Convention No.122 to avoid repetition. Cf. ILO Employment Policy Convention (No.122), 1964, 569 U.N.T.S. 65.

<sup>116</sup> Alston, E/C.12/1987/SR.6, at 3, para.10.

<sup>117</sup> See e.g., Texier, E/C.12/1990/SR.40, at 12, para.57.

<sup>118</sup> See, Texier, E/C.12/1989/SR.6, at 5, para.20.

<sup>119</sup> Compare the position under article 1(1) of the European Social Charter, see, Harris D., The European Social Charter at 23 (1984).

<sup>120</sup> The "monetarist philosophy" that underlay UK and USA economic policy in the 1980's was essentially a rejection of the Keynesian idea that governments could fix the level of unemployment through monetary and fiscal policies. It was asserted that such measures would lead to inflation and eventually a rise in unemployment. It was advocated instead that governments should concentrate on combatting inflation. If left alone, unemployment would settle at a "natural rate" which was determined purely by the nature of the labour market. See, Brittan S., Second Thoughts on Full Employment Policy, 15-22 (1975).

Although the monetarist philosophy does not prevent measures being taken to



for the resumption of steady and stable growth, it should not be undertaken without measures to mitigate its adverse effect on employment.<sup>121</sup>

The Committee has in general paid considerable attention to the enjoyment of rights in the face of structural adjustment.<sup>122</sup> It has been argued in this context that those States that are suffering high levels of unemployment, whether as a result of structural adjustment or otherwise, should demonstrate that certain short-term policies are being taken with the specific aim of reducing unemployment and which are targeted at alleviating the situation of the most vulnerable and disadvantaged and avoiding regional imbalance. A general or long-term policy in such a case would not be sufficient.<sup>123</sup> In addition, where there is a large informal sector, States should adopt, in addition to short-term relief strategies, a policy that has as its aim the full integration of the informal sector into the formal economic and social life of the nation.

Whilst the text of article 6(2) does not require that full employment exist but rather that States pursue policies towards that end, the actual rate of unemployment will be significant in the Committee's evaluation of whether or not the State is committed to a policy to create high and stable levels of employment. There is no evidence yet that the Committee has established a "ceiling" above which unemployment should not rise except in extreme circumstances, although it is open to do so. However, it is clear that the higher the level of unemployment, the stricter the scrutiny of State policy undertaken by the Committee will be. Members of the Committee have quite rightly expressed particular concern over rising levels of unemployment<sup>124</sup> and disproportionately high levels of unemployment among certain groups within a State.<sup>125</sup> Although such situations do not necessarily give rise to violations of the Covenant in themselves, it is clear that they are of

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improve training and flexibility in the labour market, it does present a considerable obstacle to the idea that full employment is a matter that can be achieved through government action alone.

<sup>121</sup> Cf. Report of the ILO Director-General, "Human Rights- A Common Responsibility" Int.Lab.Conf. 75th Sess. at 35 (1978).

<sup>122</sup> See, General Comment No.2 (1990), ESCOR, Supp.(No.3), Annex III, at 88, para.9, UN Doc.E/C.12/1990/3 (1990).

<sup>123</sup> Cf. Mayer, *supra*, note 90, at 240; Van den Berg and Guldenmund, *ibid*, at 112.

<sup>124</sup> See e.g., Texier, E/C.12/1987/SR.5, at 6, para.23; Sviridov, E/C.12/1987/SR.6, at 5, para.16.

<sup>125</sup> See e.g., Neneman, E/C.12/1989/SR.8, at 9 para.49.



serious concern to the Committee when evaluating whether a State was in fact pursuing an adequate policy.

In accordance with article 6(2), the Committee has also expressed concern that employment should be productive and that measures should be adopted to this end.<sup>126</sup> It would appear to consider that policies merely aimed at producing high levels of employment with no apparent benefit to society are incompatible with the Convention.<sup>127</sup> That States should not undertake unproductive activities merely to boost employment is in line with the principle that they should utilise their resources efficiently towards the realisation of the rights in the Covenant.<sup>128</sup> Thus the view has been put forward within the ILO that increased productive employment is a vital factor in the realisation of other basic economic and social rights (or as the ILO puts it the fulfilment of basic needs).<sup>129</sup>

#### b) The Opportunity to Gain his Living by Work

The reference to an opportunity to gain one's living in article 6 seems to relate most closely to the right to favourable conditions of work, and in particular the right to fair wages found in article 7(a)(i). Although the Committee does request information in its reporting guidelines as to the proportion of the working population who hold more than one job in order to secure an adequate standard of living for themselves and their family,<sup>130</sup> a more detailed consideration of the matter has occurred under the aegis of article 7.

#### c) Equal Access to Employment

The right to work in article 6, read together with the prohibition of discrimination in article 2(2), would seem to prohibit discrimination as regards access to vocational guidance and training, access to freely chosen employment, and security of tenure in employment.<sup>131</sup> In fact, whilst adopting the ILO definition of discrimination, the Committee has addressed itself to the question of discrimination in employment as a

<sup>126</sup> See, Reporting guidelines, *supra*, note 96, at 90.

<sup>127</sup> Whereas "false employment" of this kind should be discouraged, the Committee must take heed of the ILO policy to encourage States to time the undertaking of public works in such a way as to reduce industrial fluctuations and unemployment. ILO Unemployment Recommendation (No.1), 1 Off.Bull. 419 (1919-20); ILO Public Works (National Planning) Recommendation (No.51), 22 Off.Bull. 86 (1937).

<sup>128</sup> See *above*, Chapter 2, text accompanying notes .

<sup>129</sup> Valticos N., International Labour Law, 118 (1979).

<sup>130</sup> Reporting guidelines, *supra*, note 96, at 91.

<sup>131</sup> See *generally*, *above* Chapter 4.



whole. According to the reporting guidelines, the Committee is specifically concerned with "distinctions, exclusions, restrictions or preferences, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, colour, sex, religion, political opinion, nationality or social origin, which have the effect of nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity or treatment in employment or occupation."<sup>132</sup>

It may be implied from the Committee's guidelines that equality of opportunity and treatment should be established for all individuals and groups within society. Quite clearly, any restriction that has the effect of unreasonably impairing the employment opportunities of members of a particular group would be contrary to the provisions of the Covenant. Thus a legal provision in Zaire which required women to seek the permission of their husbands in order to work outside the home was considered by certain members of the Committee to be a violation of the Covenant.<sup>133</sup>

It is apparent that a great number of States allow for distinctions to be made with regard to access to employment on the grounds of sex, national origin, political opinion, religion and sometimes race.<sup>134</sup> According to the general principles of non-discrimination, although many of such distinctions may be considered to be "suspect", distinctions being made as to the inherent requirements of a particular job would not amount to discrimination.<sup>135</sup> The Committee accordingly requests information as to distinctions, exclusions or preferences based on one of the stipulated conditions which are not considered to be discrimination in that country "owing to the inherent requirements of a particular job".<sup>136</sup> In addition, it has requested information as to difficulties, disputes and controversies as to the application of such conditions.<sup>137</sup>

Again, the Committee has not been called upon to establish the legitimacy of certain job requirements. Its approach at this stage seems

<sup>132</sup> Reporting guidelines, *supra*, note 96, at 91.

<sup>133</sup> *See*, Alvarez Vita, E/C.12/1988/SR.17, at 2, para.3.

<sup>134</sup> *See*, Blainpain R., "Equality of Treatment in Employment" in Hepple B.(ed), Int. Encyclopedia of Comparative Law, Vol.XV Labour Law, Chap.10, at 17 (1990).

<sup>135</sup> *See* above, Chapter 2. *Cf.also* ILO Convention No.111, article 1(2). ILO Discrimination (Employment and Occupation) Convention (ILO Convention 111), 1958, 362 U.N.T.S. 31. Valticos, *supra*, note 129, at 107.

<sup>136</sup> Reporting guidelines, *supra*, note 96, at 91.

<sup>137</sup> *Ibid.*



to be to engender debate at the national level as to the desirability of any such conditions. It is submitted that certain considerations should be borne in mind. First, such distinctions should be legitimate "only in the case of jobs which by their very nature involve a special responsibility to contribute to the attainment of the institution's objectives".<sup>138</sup>

Secondly, the legitimacy of such distinctions, especially as regards sex, change according to the prevailing social and moral mores of the time. In particular, measures of protection for example that restrict the employment of women in certain types of work (such as coal mines),<sup>139</sup> are increasingly considered to be excessively paternalistic.<sup>140</sup>

Thirdly, whereas distinctions as to race might be legitimate for certain cultural purposes such as the employment of actors of a certain race to enhance realism, it is doubtful whether they should be utilised otherwise. As has been stated, "the term 'race' cannot be given a very precise scientific definition, the essential point being the way in which the persons concerned consider their differences".<sup>141</sup> Given the imprecise nature of such a concept and the possibilities for abuse, it would be better if any necessary distinctions, such as employment for "authenticity",<sup>142</sup> be made on the basis of national origin. Finally, although it is clear that restrictions will be placed upon foreign nationals and those of particular political persuasions on employment in certain higher civil service posts, such restrictions should be limited to posts that bear some relation to the security of the State,<sup>143</sup> and to the extent that those persons can not reasonably be relied upon.<sup>144</sup>

The legitimacy of restrictions on access to employment has arisen

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<sup>138</sup> Rossillion C., "ILO Standards and Actions for the Elimination of Discrimination and the Promotion of Equality of Opportunity in Employment", in Blainpain R.(ed), Equality and Prohibition of Discrimination in Employment at 27 (1985).

<sup>139</sup> See e.g., ILO Night Work (Women) Convention (No.4) 1919, 38 U.N.T.S. 67.

<sup>140</sup> See, for example the UK denunciation of article 8(4) European Social Charter which provides for the regulation of the employment of women at night and the employment of women in underground mining. See also, Polson T., "The Rights of Working Women: An International Perspective", 14 V.J.I.L., 729, at 736-741 (1974).

<sup>141</sup> Valticos N., "International Labour Law", in Blainpain R.(ed), International Encyclopaedia for Labour Law and Industrial Relations, s.246 (1977).

<sup>142</sup> Cf. The exception provided for in the UK Race Relations Act 1976, sect.1(1)(b)(ii). See e.g., Hepple B., "Great Britain", in in Blainpain R.(ed), Equality and the Prohibition of Discrimination in Employment, 117 (1985).

<sup>143</sup> Cf. Alston, E/C.12/1987/SR.22, at 5, para.18.

<sup>144</sup> Cf. ILO Convention No.143. Valticos, *supra*, note 129, at 107-8.



particularly in the context of political affiliation.<sup>145</sup> In one case, a member of the Committee questioned the operation of the "Berufsverbot" laws in the F.R.G. whereby people were excluded from public service whose political views did not reflect enough fidelity to the "free democratic basic order". Relying upon information from an ILO report which indicated that certain people had been excluded from access to non-security-related jobs, such as teaching, merely because they had criticised the existing economic order in Germany, Professor Alston doubted the legitimacy of those restrictions. He concluded that "economic and social rights could be effectively recognised only if individuals were free to speak out openly".<sup>146</sup>

Members of the Committee have concerned themselves primarily with the position of women in the workforce.<sup>147</sup> However it is clear that the Committee is also attentive to discrimination on the grounds of race, colour, sex, religion, political or other opinion, nationality or social origin.<sup>148</sup> A particularly pertinent point here is the degree to which aliens have a right to equal opportunity in employment.<sup>149</sup> It is readily accepted that foreign workers may be required to obtain special authorisations (or permits) in order to work.<sup>150</sup> Indeed the ILO has generally exercised a certain amount of restraint from prohibiting discrimination between nationals and non-nationals.<sup>151</sup> It might be argued that the Covenant, in specifically allowing for the differential treatment of non-nationals in the case of developing countries (under article 2(3)), impliedly excludes the possibility of restrictions being imposed upon equality of access to employment in the case of developed countries.

A reservation on this point was entered by the UK on ratification. Accordingly it reserved "the right to interpret article 6 as not precluding the imposition of restrictions, based on birth or residence qualifications, on the taking of employment in any particular region or

<sup>145</sup> See *e.g.* Konate, E/C.12/1991/SR.4, at 10, para.55.

<sup>146</sup> Alston, E/C.12/1987/SR.19, at 9, para.45. The matter also arose in the context of the European Convention, *see, Kosiek v.F.R.G.*, Eur.Court H.R., Series A, Vol.105, Judgement of 28 Aug.1986, (1987) 9 EHRR 328.

<sup>147</sup> See *e.g.*, Sviridov, E/C.12/1987/SR.6, at 5, para.16; Rattray, E/C.12/1987/SR.6, at 12, para.66; Jimenez Butragueno, E/C.12/1991/SR.3, at 11, para.51.

<sup>148</sup> See *above*, Chapter 4.

<sup>149</sup> *Ibid*, text accompanying notes 121-140.

<sup>150</sup> Blainpain, *supra*, note 134, at 26. An important exception is found in article 48 EEC Treaty.

<sup>151</sup> Dao (ILO), E/C.12/1989/SR.18, at 5, para.28.



territory for the purpose of safeguarding the employment opportunities of workers in that region or territory."<sup>152</sup> Similarly France has made a declaration to the effect that article 6 is "not to be interpreted as derogating from provisions governing the access of aliens to employment".<sup>153</sup>

It is open to question whether the French interpretative declaration is in fact a "mere interpretative declaration" or rather a "qualified interpretative declaration" that might be assimilated to a reservation.<sup>154</sup> Arguably, France was in fact relying upon its declaration as a condition for its acceptance of the obligations under article 6 in which case the declaration would have the force of a reservation. This appears to have been the view of the French delegation when addressing the subject before the Committee. There, a member of the Committee had raised the question of the compatibility of a French law that restricted the payment of disability benefits to French nationals, with article 2(2) of the Covenant.<sup>155</sup> In reply the French delegate referred to the declaration implying that it had modified the French obligations under the Covenant.<sup>156</sup>

As the Covenant makes no reference to reservations it is presumed that they are legitimate in so far as they conform to the rules of customary international law, which can be taken to be those in article 19 of the Vienna Convention.<sup>157</sup> Neither reservation appears to be incompatible with the object or purpose of the Covenant, nor has any State objected to them. The effect of the UK and French reservations, which may be said to be tacitly approved, are to modify the obligations of those States under the Covenant in relation to other States parties.<sup>158</sup>

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<sup>152</sup> See, UN Doc.ST/LEG/SER.E/10, at 127 (1992).

<sup>153</sup> *Ibid*, at 124.

<sup>154</sup> Such a distinction was utilised by the European Court of Human Rights in Belilos v.Switzerland, Eur.Court H.R., Series A, Vol.132, paras 41-49, Judgement of 20 Apr. 1988.

<sup>155</sup> See, Alvarez Vita, E/C.12/1989/SR.12, at 12, para.61.

<sup>156</sup> See, de Gouttes (France), E/C.12/1989/SR.13, at 10, para.42. At a later stage France submitted a piece of "additional information" in which it specifically utilised the language of article 19(c) of the Vienna Convention in stating that the declaration "cannot be seen as contrary to the object and purpose of the Covenant". E/1989/5/Add.1, at 6, para.25.

<sup>157</sup> Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331.

<sup>158</sup> Articles 20-21 Vienna Convention, *ibid*. An interpretative declaration, on the other hand, does not purport to modify the obligations under the Covenant but rather establishes an understanding of the relevant provision's meaning. Such a declaration, with the tacit acceptance of other States parties, might be seen to be an



They do not imply, however, that the provisions of the Covenant in general allow for such an interpretation.

In so far as the UK and France considered it necessary to rely upon reservations to modify their obligations under the Covenant, it might be assumed that the Covenant otherwise prohibits discrimination against aliens with respect to employment. Given general State practice, however, this would be a difficult position to maintain. Members of the Committee have paid little attention to the complexities of the issues involved. Questions have been asked as to the employment possibilities of foreign workers (including refugees<sup>159</sup>) in the same manner as for other groups.<sup>160</sup> However, when it comes to deal with the question in more detail the Committee might well find it difficult to adopt an interpretation that might prejudice the immigration policies of the States concerned.

It is possible that article 4 might be utilised to some effect here. According to that article States are required to show that any restrictions they impose on the employment opportunities of foreign workers are determined by law and are "solely for the purpose of promoting the general welfare in a democratic society." Although this would not prohibit discrimination as regards aliens wishing to work in the country concerned, it would mean that any restrictions imposed should be extraordinary and justified on the basis of the general welfare.<sup>161</sup>

Whereas article 6 is generally progressive in nature, the prohibition of discrimination is an immediate obligation.<sup>162</sup> In theory then, a State will be obliged to ensure that whatever Stage of realisation of article 6 it has achieved, there should be no vestiges of discrimination in that area. It is clear that the State is obliged to take the necessary legislative and administrative action (whether through enacting new measures or repealing old inconsistent ones) to ensure equality of treatment as to employment and the related spheres of education, vocational guidance and training. Although article 2(1) specifically

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instrument indicating the general interpretation of article 6 in accordance with article 31(2)(b) of the Vienna Convention.

<sup>159</sup> See, Taya, E/C.12/1988/SR.3, at 6, para.22; Texier, E/C.12/1990/SR.40, at 12, para.56.

<sup>160</sup> See e.g., Taya, E/C.12/1987/SR.6, at 6, para.23.

<sup>161</sup> The European Court of Human Rights has not deferred entirely to State immigration policies that might affect the enjoyment of the rights of non-nationals. See, Berrehab v. Netherlands, Eur.Court H.R., Series A, Vol.138, Judgement 21 June 1988, (1989) 11 EHRR 322. However, it is doubtful whether it would take such a position in the delicate area of employment.

<sup>162</sup> See above, Chapter 4, text accompanying notes 176-186.



leaves States with a certain amount of discretion as to what measures are appropriate, members of the Committee have placed a high priority on legislation in the field of discrimination.<sup>163</sup>

In addition, it is clear that the Committee expects States to take appropriate action to ensure observance of the principles of non-discrimination with respect to employment and vocational guidance under private control.<sup>164</sup> Various methods could be employed to achieve this end such as making the receipt of funds or licences dependent upon the observance of such principles. Committee members have also placed some emphasis upon the establishment of appropriate agencies to promote the application of the policy and provide for appropriate remedies.<sup>165</sup>

A point of some interest is the extent to which States are required to control trade union security measures (such as the closed shop), that might effectively limit access to employment through a requirement of union membership. It is possible to argue that such arrangements despite being discriminatory, have a legitimate purpose in ensuring the effectiveness of the trade unions concerned. However, although the Committee has not made any statement as to the legitimacy of closed-shop agreements, the Covenant, like other international instruments,<sup>166</sup> does not expressly prohibit them.

In accordance with its approach to non-discrimination generally,<sup>167</sup> the Committee has looked towards the achievement of *de facto* equality of opportunity.<sup>168</sup> Thus members of the Committee have expressed interest both as to the level and type of employment in different social groups.<sup>169</sup> There does appear to be some expectation that States take specific measures to develop the employment prospects

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<sup>163</sup> See e.g., Sviridov, E/C.12/1987/SR.6, at 4, para.14. Alston, E/C.12/1987/SR.6, at 3, para.8.

<sup>164</sup> See e.g., Simma, E/C.12/1989/SR.8, at 8, para.46; Muterahajuru, E/C.12/1987/SR.5, at 10, para.46.

<sup>165</sup> For the ILO position, see, Valticos, *supra*, note 129, at 110.

<sup>166</sup> In the case of the European Social Charter, the text itself is neutral on the question of closed-shop agreements. The Committee of Independent Experts, however, has found union security agreements to be incompatible with article 5. See, Conclusions XI-1, at 78 (1989).

<sup>167</sup> See above, Chapter 4, text accompanying notes 26-41.

<sup>168</sup> See e.g., Simma, E/C.12/1988/SR.3, at 3, para.8.

<sup>169</sup> See, Muterahajuru, E/C.12/1987/SR.5, at 10, para.46; Texier, E/C.12/1989/SR.6, at 5, para.24.



of disadvantaged groups. As with the ILO,<sup>170</sup> it would seem that any such differences aimed at promoting equality of opportunity and treatment, would not be considered discriminatory. The ILO additionally has considered that specific quotas in employment are not necessarily discriminatory if their effect is to "secure an equilibrium between the different communities and ensure protection of minorities, or to compensate for discrimination against the economically less advanced population group".<sup>171</sup> Although it might be possible to infer from the Committee's general approach that affirmative action measures are legitimate, the necessity of taking those measures in the context of employment has not been clearly established.

#### d) Employment Services

In contrast to the European Social Charter (article 1(3)), the Covenant does not specifically provide for the establishment and maintenance of employment agencies, nor has the Committee made mention of such an obligation in its reporting guidelines. Indeed individual members have only mentioned the matter infrequently.<sup>172</sup> However, there is little doubt that the provision of placement services is crucial not only to the full exercise of the individual's right to freely chosen work of an appropriate nature, but is important as far as the effective use of human resources is concerned. That the State stands to gain from the maximisation of its human potential suggests that a right to employment placement services could be inferred from the obligation to achieve steady economic, social and cultural development and full and productive employment.<sup>173</sup>

#### e) Occupational Training

Article 6(2) provides that the steps taken to achieve the full realisation of the right to work shall include "technical and vocational guidance and training programmes". It might be considered that the right to technical and vocational training would fall under article 13 which establishes the right to education. In as far as article 6 provides for an individual right to technical and vocational guidance and

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<sup>170</sup> See, Article 5, ILO Discrimination (Employment and Occupation) Convention (No.111), 1958, 362 U.N.T.S. 31.

<sup>171</sup> Valticos, *supra*, note 129, at 108.

<sup>172</sup> See *e.g.*, Texier, E/C.12/1989/SR.10, at 8, para.40; Jimenez Butragueno, E/C.12/1987/SR.14, at 11, para.32.

<sup>173</sup> The standards on the organisation of a public employment service are found in the ILO Employment Service Convention (No.88) 1948, 70 U.N.T.S. 85.



training, like article 13, it is logically of a progressive character.<sup>174</sup> The ultimate objective is clearly for every individual to be given the opportunity for appropriate guidance and training with regard to their personal capacity and relevant employment opportunities. Such a service should be free or financially assisted in appropriate cases.

At this early stage, the Committee has limited itself to requesting information as to the mode of operation and practical availability of such training programmes. Information is requested specifically as to the situation with respect to persons according to their race, colour, sex, religion, and national origin.<sup>175</sup> Members of the Committee have also been concerned with the financing of such schemes.<sup>176</sup> Although private training establishments were to be accommodated, it was felt that there should also be a central authority for evaluating the needs of industry<sup>177</sup> and coordinating the activities of the public and private training schemes.<sup>178</sup>

## 2) Free Choice in Employment

Article 6 provides that the right to work includes the opportunity to gain one's living by work which is freely chosen or accepted. Members of the Committee have stressed the need for free choice in employment,<sup>179</sup> but little has been said about how it should be ensured in practice. The Committee's guidelines merely suggest that there should be provisions ensuring freedom of choice.<sup>180</sup> In theory, the concept of freely chosen employment seemingly extends to ensuring the fullest opportunity for each worker to use his or her skills in a suitable job.<sup>181</sup> However, there is a possible tension between absolute individual choice and the limited options that might be open to him or her in the

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<sup>174</sup> Although the right to occupational training is to be implemented immediately under Article 10 of the European Social Charter, it would probably be too burdensome for many developing States.

<sup>175</sup> Reporting guidelines, *supra*, note 96, at 91.

<sup>176</sup> *See e.g.*, Badawi El Sheikh, E/C.12/1987/SR.5, at 3, para.11.

<sup>177</sup> *See*, Sparsis, E/C.12/1987/SR.5, at 7, para.31.

<sup>178</sup> *See*, Jimenez Butragueno, E/C.12/1988/SR.3, at 4, para.9. For the ILO position in this area *see*, General Survey of the Committee of Experts, Human Resources Development: Vocational Guidance and Training, Paid Educational Leave, ILC 78th Sess, Report III (Pt.4B), (1991).

<sup>179</sup> *See e.g.*, Badawi El Sheikh, E/C.12/1987/SR.13, at 7, para.30; Alvarez Vita, E/C.12/1987/SR.21, at 12, para.54; Rattray, E/C.12/1987/SR.13, at 6, para.24.

<sup>180</sup> Reporting guidelines, *supra*, note 96, at 90.

<sup>181</sup> *See*, Konate, E/C.12/1987/SR.7, at 2, para.2.



employment market.<sup>182</sup> It is not realistic to suggest, for example, that the State has to create work opportunities that correspond entirely to the wishes of individuals seeking work.<sup>183</sup> As the Austrian representative stressed before the Committee:

"The right to work, understood as a right to a job or a specific job, was not included in the Austrian legal order, and it was impossible for the State to guarantee a certain job to a certain person in a certain place. Employment opportunities clearly depended on the economic situation. What could be guaranteed was the right to help in finding a new job and in overcoming the difficulties associated with unemployment."<sup>184</sup>

An obligation to ensure freedom of choice can only imply that the State should provide appropriate employment training, guidance and placement services. These have already been dealt with above.<sup>185</sup>

However, as was made clear in the drafting of article 6, the reference to freely chosen and accepted employment was also considered to entail a prohibition of forced labour.<sup>186</sup> Such a conclusion may also be drawn from the term "opportunity" and indeed from the idea that a right to work implies simultaneously a right not to work. The ILO has dealt extensively with the question of forced labour particularly in Convention No.29 of 1930<sup>187</sup> and Convention No.105 of 1957.<sup>188</sup> The latter Convention deals with various matters that are of relevance to the application of the right to work within the Covenant. It prohibits *inter alia* the use of forced labour as a method of using labour for purposes of

<sup>182</sup> See, Badawi El Sheikh, E/C.12/1987/SR.22, at 2, para.2.

<sup>183</sup> See, Sieghart P., Ziman J. and Humphrey J., The World of Science and the Rule of Law, 71 (1986).

<sup>184</sup> Berchtold (Austria), E/C.12/1988/SR.4, at 3, para.13. Similarly, as the Director-General of the ILO noted:

"While this [freedom of choice] does not mean that work must be made available in accordance with individual preferences irrespective of a need for the services concerned, it implies the development of programmes to foster skills for the use of which opportunities can reasonably be expected to exist."

Report of the ILO Director-General, *supra*, note 121, at 33.

<sup>185</sup> See above, text accompanying notes 172-178.

<sup>186</sup> See above, text accompanying notes 45-51.

<sup>187</sup> ILO Forced Labour Convention (No.29) 1930, 39 U.N.T.S. 55.

<sup>188</sup> ILO Forced Labour Convention (No.105), 1957, 320 U.N.T.S.



economic development and as a means of labour discipline (specifically for having participated in a strike).

The Committee as a whole has not made any specific references to the question of forced labour and does not make it a matter for general response in its reporting guidelines. Although there might be a general desire not to impinge upon the work of the Human Rights Committee with respect to article 8 ICCPR, individual members of the Committee have not been so restrained in their approach. In one case in particular, great concern was expressed as to the position of Haitian workers in the Dominican Republic who seemed to be recruited by force and compelled to work for the entire sugar-cane harvest season.<sup>189</sup>

Whilst article 6(2) stipulates that among the steps to be taken to realize the right to work, States should create policies and techniques to achieve steady economic, social and cultural development, it is clear that the right to choose employment prohibits the adoption by States of measures such as the compulsory requisitioning of labour to achieve economic growth or full employment.<sup>190</sup> It is arguable, nevertheless, that States may rely upon the provisions of article 4 to justify compulsory labour in cases of emergency where the "general welfare" so demands.<sup>191</sup> Thus some States allow a certain amount of compulsion in employment in cases of *force majeure*.<sup>192</sup> However, any such exception would clearly have to be "determined by law" and proportionate to the emergency faced.

Whereas the ILO has considered that compulsory employment training programmes or "youth schemes" are contrary to the prohibition of forced labour<sup>193</sup> (with certain limited exceptions<sup>194</sup>), article 6 does not seem to cover them to the same extent. In particular, free choice of employment appears to be confined to cases of remunerative work alone, excluding those

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<sup>189</sup> See, Texier, E/C.12/1990/SR.44, at 12, para.54.

<sup>190</sup> See, Valticos, *supra*, note 129, at 98.

<sup>191</sup> This would broadly cover the exception found in article 8(c)(iii) ICCPR.

<sup>192</sup> Vallaro (Panama), E/C.12/1991/SR.5, at 2, para.5.

<sup>193</sup> See, Abolition of Forced Labour- General Survey by the Committee of Experts on the Application of Conventions and Recommendations, 65th Sess. (1979). ILO II.65/3 (4B), at 41.

<sup>194</sup> Special Youth Schemes Recommendation, 1970 (No.136), para.7(2)(a) and (b), in ILO, International Labour Conventions and Recommendations (1919-1981), at 81 (1982).



schemes that provide for little or no remuneration. It might be argued that as article 6(2) provides that the pursuit of economic development should not infringe upon "fundamental political and economic freedoms" of the individual, youth schemes would be similarly prohibited. However, freedom from forced labour would be described more precisely as a civil right.

Given the lack of textual clarity, it is open for the Committee to interpret free choice in employment as applying to all forms of employment whether remunerative or otherwise. In doing so, however, the Committee would have to consider how far it wishes to extend the scope of the Covenant. For example, this would bring in questions such as the legitimacy of forced labour as part of penal service.<sup>195</sup> It is submitted that as other institutions already deal with such questions,<sup>196</sup> it would be better for the Committee to confine itself to issues of work as a remunerative activity.

In considering the report of Zaire, it was noted that the ILO Committee of Experts had commented on the requisitioning of medical practitioners and graduates and had emphasised the need to bring all legislation concerning civic service into conformity with the Forced labour Convention (No.29 1930).<sup>197</sup> Members of the Committee relied upon this information to enquire into the general situation of forced labour in Zaire.<sup>198</sup> Following an assurance by Zaire that such requisitioning had been discontinued, the matter went no further. One might infer that the Committee will concern itself with issues of civic service<sup>199</sup> (and presumably military service), but in absence of its own detailed standards, the Committee will initially draw upon those of the ILO in its

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<sup>195</sup> This question did arise in the case of Panama, but only following the comments of the ILO representative, *see*, Swepston (ILO), E/C.12/1991/SR.3, at 5, para.21; Ucros (Panama), E/C.12/1991/SR.3, at 13, para.61.

<sup>196</sup> *See e.g.*, Article 8(3)(c)(ii) ICCPR.

<sup>197</sup> *See*, Dao (ILO), E/C.12/1988/SR.17, at 9, para.59. One of the exceptions to the prohibition of youth schemes relates to obligations of service that have been accepted as a condition of training. The Committee of Experts has considered that such an exception may operate only where there is full compliance with the forced labour conventions.

<sup>198</sup> *See e.g.*, Alston, E/C.12/1988/SR.17, at 8, para.45.

<sup>199</sup> For the approach of the European Commission on Human Rights in this area, *see*, Nedjati Z., Human Rights Under the European Convention, 73 (1978).



interpretation of the Covenant.<sup>200</sup> This was seemingly accepted by Zaire in the present case.

According to the ILO, freely chosen employment would also seem to prohibit the use of compulsory labour as a means of labour discipline either to ensure the performance of a contract or as a punishment for breaches of labour discipline. Unlike the question of penal labour, this would appear to fall clearly within the realm of the Covenant. The Committee has not adopted any coherent policy on such a question and individual comments have only centered on the question of the right not to work in general.<sup>201</sup> It is submitted that the Committee should ensure that workers have the right to terminate contracts of employment (with reasonable notice in appropriate cases). In particular care should be taken when the law provides for the enforcement of the individual labour contract, especially where it is by use of criminal law.<sup>202</sup>

A similar concern relates to the right to strike. Although not necessarily relating to the right to terminate employment, excessive restrictions on the right to strike may well entail some form of coercion to work against the worker's better judgement.<sup>203</sup> The Committee has dealt with the question of the right to strike in the context of article 8 of the Covenant where it is specifically provided for.<sup>204</sup>

Perhaps the area that has concerned members of the Committee most is where States provide for a "duty to work". As noted above, certain members of the Committee have stressed that the right to work implies a right not to work.<sup>205</sup> Accordingly a legally enforceable duty to work might well be in contravention of article 6 of the Covenant.<sup>206</sup> In many States, a duty to work may

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<sup>200</sup> For the Committee's willingness to utilise ILO standards *see*, Konate, E/C.12/1990/SR.42, at 5, para.18.

<sup>201</sup> *See e.g.*, Rattray, E/C.12/1987/SR.21, at 13, para.63.

<sup>202</sup> The enforcement of contracts of employment through criminal law has been considered to be contrary to the European Social Charter, *see*, Harris, *supra*, note 119, at 27.

<sup>203</sup> *See*, General Survey of the Committee of Experts, *supra*, note 193, paras 122-131; Ben-Israel R., International Labour Standards: The Case of Freedom to Strike, at 24-25 (1988).

<sup>204</sup> *See below*, Chapter 6, text accompanying notes 226-274.

<sup>205</sup> *See*, Rattray, E/C.12/1987/SR.21, at 13, para.63.

<sup>206</sup> *See*, Neneman, E/C.12/1988/SR.17, at 4, para.23.



be Constitutionally defined,<sup>207</sup> yet remain merely a moral obligation without concomitant legal sanctions.<sup>208</sup> Members of the Committee have looked towards the precise legal value of such provisions when they are apparent, and have warned against the possible abuses to which the obligation to work could give rise.<sup>209</sup> There is no evidence as yet, that the mere existence of such provisions will be considered to be contrary to the provisions of the Covenant.

### 3) Guarantee Against Arbitrary Dismissal

In providing for the right to work in article 6 it might reasonably be concluded that one element should be the right not to be arbitrarily deprived of work.<sup>210</sup> Indeed this would be the logical result of an obligation upon the State to respect and protect the right to work. Whilst the Committee as a whole has not made reference to such a right in the context of the right to work, individual members have been strong advocates of freedom from arbitrary dismissal. Indeed one member commented that "[w]ithout a fundamental guarantee against arbitrary dismissal, the right to work would be meaningless."<sup>211</sup>

The most commonly established rules on employment security provide that termination of employment should not take place unless there is a valid reason connected with the capacity or conduct of the worker or based upon the operational requirements of the undertaking concerned.<sup>212</sup> Members of the Committee have not indicated whether they will adopt this general principle, but have merely suggested that dismissals should not be "arbitrary". Members thus appear to expect States concerned to establish their

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<sup>207</sup> See e.g. Yemen, E/1990/5/Add.2, at 2, para.3; Costa Rica (article 7 of the Constitution), E/1990/5/Add.3, at 2, para.6; Panama (article 59 Constitution of 1972), E/1984/6/Add.19, at 2.

<sup>208</sup> Cf. General Survey on Forced Labour, *supra*, note 193, para.45.

<sup>209</sup> See e.g., Mratchkov, E/C.12/1990/SR.40, at 13, para.63; *ibid*, E/C.12/1991/SR.4, at 12, para.66; Neneman, E/C.12/1991/SR.3, at 8, para.41.

<sup>210</sup> For the travaux préparatoires on this point see *above*, text accompanying note 29.

<sup>211</sup> Badawi El Sheikh, E/C.12/1987/SR.5, at 3, para.12. See also, Mratchkov, E/C.12/1990/SR.40, at 13, para.63.

<sup>212</sup> Cf. ILO Termination of Employment at the Initiative of the Employer Recommendation, (No.119) 1963, in ILO, International Labour Conventions and Recommendations (1919-1981), at 138 (1982). See also, Hepple, *supra*, note 93, at 478-480.



own rules governing whether or not a dismissal is "justified",<sup>213</sup> but nevertheless will comment upon the adequacy of such rules. For example in considering the report of Trinidad and Tobago it was noted that the concept of "retirement in the public interest" appeared to involve "a risk of arbitrariness".<sup>214</sup>

In certain circumstances the dismissal of an employee for arbitrary reasons might amount to discrimination. Thus in the case of Czechoslovakia, it was noted that a report of the ILO Committee of Experts drew attention to fact that workers might be dismissed for shortcomings related not only to their professional skills, but also to their civic engagement, moral or political qualities. The Committee pointed out that protection of workers against discrimination on the ground of political opinion should also be extended in respect of activities expressing opposition to established political principles. One member commented:

"Even if the aim of the authors of Charter 77 had been to change the existing social order, in the absence of any indication that they sought to bring about that result by violent or unconstitutional means, such an aim should not constitute grounds for considering them as being beyond the protection afforded under article 2(2) of the Covenant."<sup>215</sup>

It appears that the termination of employment on such grounds would amount to a violation of article 2(2) in conjunction with article 6.

In the practice of a number of States, certain procedural safeguards are apparent. These may include the communication of reasons for dismissal to the employee; consultation with, or notification of the fact of dismissal to the relevant trades unions; and the provision of advance notice to the employees concerned in cases of contracts of indefinite duration. In cases of dismissal for serious misconduct, notice may not be required, but should only take place after a hearing and then only where the employer cannot be expected to take any other course.<sup>216</sup> Certain members of the Committee have made reference to these principles in their

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<sup>213</sup> See e.g., Mratchkov, E/C.12/1987/SR.6, at 12, para.62; Mratchkov, E/C.12/1987/SR.21, at 10, para.43.

<sup>214</sup> Marchan Romero, E/C.12/1989/SR.17, at 17, para.89.

<sup>215</sup> Simma, E/C.12/1987/SR.13, at 9, para.40.

<sup>216</sup> See, Hepple, *supra*, note 93, at 493-4; Kennedy T., European Labour Relations at 386 (1980). See also, Valticos, *supra*, note 129, at 169.



questions.<sup>217</sup> In one notable case, a rule that the employer only had to give notice of dismissal or make redundancy payments to workers with more than ten years service was considered too restrictive.<sup>218</sup> However, nowhere has the Committee made reference to such principles *in toto*.

The Committee's main cause for concern seems to have been that there should exist adequate safeguards to enable any worker who feels he has been unjustifiably dismissed to appeal,<sup>219</sup> or take a case of judicial review,<sup>220</sup> against that decision to a court or some other independent body. Additionally members have stressed that the individual should be provided with some form of remedy for an invalid termination of contract,<sup>221</sup> which might take the form of compensation<sup>222</sup> or reinstatement.<sup>223</sup>

The concept of workforce reductions may be distinguished from disciplinary dismissals in that it generally affects a larger number of employees and has more significant social and economic consequences for society as a whole.<sup>224</sup> As members of the Committee have only occasionally alluded to the specific nature of workforce reductions,<sup>225</sup> it is submitted that certain general principles may be borne in mind. First, whereas job security may be provided for it is not often of a uniform nature. As one commentator noted:

"There is a hierarchy of ranks in the labour market from whole-time secure employment through less secure forms of whole-time employment, part-time

<sup>217</sup> See e.g., Did trade unions play any role in protecting workers from arbitrary dismissal? Sviridov, E/C.12/1987/SR.6, at 4, para.16. Did the concept of "grievous fault" exist in Czechoslovakia whereby workers could be dismissed without notice? Texier, E/C.12/1987/SR.13, at 10, para.49.

<sup>218</sup> See, Sparsis, E/C.12/1989/SR.11, at 15, para.66.

<sup>219</sup> See e.g., Texier, E/C.12/1987/SR.5, at 5, para.22; Konate, E/C.12/1987/SR.22, at 3, para.6; Mratchkov, E/C.12/1988/SR.3, at 4, para.10; Rattray, E/C.12/1987/SR.6, at 12, para.67.

<sup>220</sup> See, Rattray, E/C.12/1987/SR.5, at 9, para.43.

<sup>221</sup> See, Mratchkov, E/C.12/1987/SR.13, at 4, para.12.

<sup>222</sup> See, Mratchkov, E/C.12/1987/SR.6, at 12, para.62.

<sup>223</sup> See, Mratchkov, E/C.12/1990/SR.34, at 7, para.47.

<sup>224</sup> See, Hepple, *supra*, note 93, at 479.

<sup>225</sup> See e.g., Texier, E/C.12/1988/SR.3, at 5, para.15; Mratchkov, E/C.12/1988/SR.17, at 5, para.30; Jimenez Butragueno, E/C.12/1988/SR.17, at 8, para.52; Jimenez Butragueno, E/C.12/1989/SR.18, at 5, para.20.



employment, and casual and temporary work to continuous unemployment".<sup>226</sup>

Secondly, the lack of collective bargaining power in specific sectors of employment often entails that certain groups in society such as ethnic minorities, women and migrant workers are vulnerable to unemployment. Thirdly, in face of economic adjustment it is open for States to encourage the use of alternative methods to alleviate the pressure upon undertakings without recourse to workforce reductions. Such methods might include the reduction of the workforce through "natural wastage" or the reduction of working time.

#### IV) CONCLUSION

Although it is commonly assumed that a right to work means the right to be given the job of one's choice, it is manifestly clear, both from the travaux préparatoires and the approach of the Committee that this is neither realistic nor the principal utility of article 6. Similarly, the Committee has not been in a position to require that States achieve full employment at any particular point in their development. The Committee has not, as yet, come to an understanding as to the means by which unemployment might be monitored or what benchmarks might be utilised for assessing the adequacy of State performance. Rather, the Committee's current concern has been to ensure that States establish and pursue a policy that has as its main objective the achievement of full employment.

The Committee has indicated, however, that article 6 includes a number of other elements that derive from ensuring the individual the opportunity to work. Particular matters that have been identified by Committee members include the right to equal access to employment, the right to freedom from arbitrary dismissal and the right to freedom from forced labour. While this is an important development in itself, it is apparent that the Committee has some way to go before it may assume an effective monitoring role over article 6.

The role of the Committee as an international supervisory body in relation to matters arising within article 6, as with articles 7, 8 and 9, will inevitably be secondary to that of the ILO. It is arguable that the Committee may have a minor role in reinforcing the supervisory processes of the ILO, but its main utility will be in so far as it addresses States that are not party to the relevant ILO Conventions, or where the Covenant standards are stricter. As such there is a pressing need for members of the Committee to

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<sup>226</sup> Hepple, *supra*, note 93, at 480.



have sufficient understanding and awareness of the relevant ILO norms and the degree to which article 6 duplicates or extends the protection offered by those ILO provisions. This is also appropriate, not merely because of the necessity of maintaining institutional co-operation and compatible standards, but also because those ILO standards will reflect, to a large degree, the current State practice of many of the States parties to the Covenant.

At present, such knowledge is lacking in the Committee. Given the inadequate Secretariat servicing and generally poor level of participation by the ILO, there is clearly a need for individual Committee members to develop their own expertise in the area. As an initial measure, the Committee will have to establish the general scope of article 6. For example, it will have to decide the extent to which article 6 provides for the individual right to benefit from the services of employment agencies or the right to vocational guidance and training.

Further, it will have to take a position with respect to those issues that are of particular delicacy, such as the legitimacy of restrictions on the access to employment for non-nationals (whether through work permits or otherwise), or non-union members (where pre-entry closed shop agreements exist). Finally, the Committee should endeavour to identify the extent to which the standards in article 6 extend the protection offered by existing ILO Conventions and for which States.



## **CHAPTER SIX: JUST AND FAVOURABLE CONDITIONS OF WORK**

### *Article 7*

*"The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:*

- (a) Remuneration which provides all workers as a minimum with:*
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;*
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;*
- (b) Safe and healthy working conditions;*
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;*
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."*

### **D) INTRODUCTION**

In a broad sense, the right to just and favourable conditions of work in article 7 is an essential corollary of the right to work (found in article 6). On the one hand, if work is seen to be a necessary evil then humanity requires that the conditions under which it is undertaken are as tolerable as possible. If, on the other hand, work is seen to be a productive activity entered into as a matter of choice, then utility demands that the terms of employment are reasonable and attractive. Notwithstanding such considerations, some elements of article 7 (particularly the rights to rest and leisure) are of the most controversial of all economic, social and cultural rights.<sup>1</sup>

Although the text of article 7 defines the right to just and favourable conditions of work to a greater extent than article 23 UDHR for example, it does so merely by establishing a number of other rights each of which requires greater specification. As with article 6 and article 8 however, the Committee has the benefit of being able to draw upon the great experience of the ILO in defining the precise meaning of terms within article 7.

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<sup>1</sup> See, Sieghart P., The Lawful Rights of Mankind, 129 (1986).



## II) THE TRAVAUX PREPARATOIRES

The Commission on Human Rights discussed the provision on conditions of work at its 218th to 222nd, and 279th to 281st meetings in 1951 and 1952.<sup>2</sup> The draft article 7 was then finalised following a discussion in the Third Committee at its 713th to 719th meetings in 1956.<sup>3</sup> The discussion centred upon the following issues:

### A) ARTICLE 7: STATE OBLIGATIONS

As with other articles, the discussion centered upon the degree to which the State could be said to be responsible for conditions of work.<sup>4</sup> It was argued that the method of securing conditions of work depended upon the organisation of the industrial and economic system in each State. In the case of those States that operated a system of collective bargaining it would be impossible for the State to assume responsibility for matters that were negotiated by the trade unions,<sup>5</sup> especially as regards the right to equal pay.<sup>6</sup> Thus a USSR amendment<sup>7</sup> to add a provision requiring the State to guarantee just and favourable conditions of work to all wage earners, either through law or collective agreements, was rejected, albeit narrowly.<sup>8</sup>

Nevertheless it came to be accepted that the State did have some responsibility to improve conditions of work in a progressive manner.<sup>9</sup> This was particularly the case where the State itself acted as an employer in which it could play an exemplary role.<sup>10</sup> Opposition was maintained, however, to stipulating specific methods of implementation.<sup>11</sup> It was considered that although legislation did play a

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<sup>2</sup> UN Docs.E/CN.4/SR.218-222 (1951); UN Docs.E/CN.4/SR.279-281 (1952).

<sup>3</sup> UN Doc.A/C.3/SR.713-719 (1956).

<sup>4</sup> UN Doc.A/2929, 10 GAOR, Annexes, Ag.Item 28 (Pt.II), at 105, para.10 (1955).

<sup>5</sup> See, Bowie (UK), E/CN.4/SR.206, at 10 (1951); Roosevelt (USA), E/CN.4/SR.279, at 12 (1952).

<sup>6</sup> See, Sorensen (Denmark), E/CN.4/SR.207, at 8 (1951); Boersma (Netherlands), A/C.3/SR.713, at 158, para.12, (1956).

<sup>7</sup> E/CN.4/L.46, para.4.

<sup>8</sup> It was rejected by nine votes to eight with four abstentions.

<sup>9</sup> See, Thierry (France), A/C.3/SR.715, at 173, para.45 (1956).

<sup>10</sup> See, Rossel (Sweden), E/CN.4/SR.207, at 13 (1951); Bengtson (Sweden), A/C.3/SR.713, at 160, para.31 (1956)..

<sup>11</sup> See, Myrrdin-Evans (ILO), E/CN.4/SR.218, at 18 (1951); Pickford (ILO), E/CN.4/SR.279, at 14 (1952).



part in many countries, collective agreements were often more important than legislation in the arena of conditions of work.<sup>12</sup>

## B) ARTICLE 7(A): MINIMUM REMUNERATION

There was considerable concern that the term "minimum remuneration" was too limitative and therefore unnecessary.<sup>13</sup> It was considered that the phrase would be used as a "ceiling" that might act as a check on further improvements,<sup>14</sup> and that it was inappropriate in relation to the concepts of fairness and equality which were also to be found in the article.<sup>15</sup> However agreement was finally reached primarily due to the value that the term "minimum remuneration" was seen to have for less-developed countries.<sup>16</sup> One member, moreover, in recognising the potential usefulness of the term with regard to future implementing bodies commented that "it seemed difficult to disregard an aspect of the matter that might give rise to a court action".<sup>17</sup>

In the Third Committee a number of States were concerned that the term "workers" only included industrial workers and was therefore somewhat restrictive.<sup>18</sup> It was argued in response that article 7 was not intended to cover the position of the self-employed or employers,<sup>19</sup> and that the term had been advocated on the basis that protection was to be restricted to wage-earners.<sup>20</sup> After noting that ILO practice was to use the term "worker" as a generic one including both industrial and commercial employees,<sup>21</sup> the provision was found to be generally acceptable upon the condition it was to be seen as including all

<sup>12</sup> See, Sender (ICFTU), E/CN.4/SR.279, at 15 (1952).

<sup>13</sup> See, Manas (Comm. on Status of Women), E/CN.4/SR.279, at 6 (1952); Santa Cruz (Chile), *ibid.* at 7 (1952); Mehta (India), *ibid.* at 9 (1952); Pickford (ILO), *ibid.* at 14 (1952); Payro (ILO), A/C.3/SR.714, at 164, para.16 (1956); Marriott (Australia), *ibid.* SR.716, at 176, para.11 (1956).

<sup>14</sup> See, Sender (ICFTU), E/CN.4/SR.279, at 15 (1952).

<sup>15</sup> See, Elliott (UK), A/C.3/SR.715, at 170, para.13 (1956).

<sup>16</sup> See e.g., Ahmed (Pakistan), A/C.3/SR.716, at 177, para.24 (1956). Rivas (Venezuela), *ibid.* at 178, para.33 (1956).

<sup>17</sup> Cassin (France), E/CN.4/SR.279, at 11 (1952).

<sup>18</sup> See e.g., Massoud-Ansari (Iran), A/C.3/SR.717, at 182, para.21 (1956). Pazhwak (Afghanistan), *ibid.* at 183, para.26 (1956).

<sup>19</sup> See, Cheng (China), A/C.3/SR.715, at 170, para.23 (1956).

<sup>20</sup> See e.g., Diaz Casanueva (Chile), A/C.3/SR.717, at 183, para.24 (1956).

<sup>21</sup> See, Payro (ILO), A/C.3/SR.717, at 183, para.27 (1956).



categories of workers.<sup>22</sup> Surprisingly enough, the precise meaning of the term remained somewhat obscure. On the basis that delegates wished to use the term in a wide sense,<sup>23</sup> it is assumed that it includes all those who work for a living (excluding those who work merely on a voluntary basis). In addition to wage-earners, this would also appear to cover the self-employed.

### C) ARTICLE 7(A)(I): FAIR WAGES AND EQUAL REMUNERATION

It was proposed that wages should be fixed both in relation to the cost of living and the profits made from the undertakings employing the workers.<sup>24</sup> However, it was pointed out that a reference to the profits made would pose considerable problems especially in State-owned industries.<sup>25</sup> It might also legitimise reductions in wages in enterprises running at a loss and result in vastly different wages for similar work across the public utilities.<sup>26</sup> Both proposals were ultimately rejected, although the reference to the cost of living was rejected by only a narrow margin.<sup>27</sup>

The main discussion centered upon the question of whether a specific reference should be made to women in the equal remuneration clause. It was argued that such a reference would be "dangerous" in that it implied that women were not covered by the original equality clauses,<sup>28</sup> that there was some disadvantage to employing women,<sup>29</sup> and that the phrase was in any case repetitious.<sup>30</sup> Thus a simple reference to "workers" or "everyone" which did not limit the principle to men and women was thought preferable.<sup>31</sup>

<sup>22</sup> See, Pazhwak (Afghanistan), A/C.3/SR.718, at 185, para.4 (1956).

<sup>23</sup> UN Doc.A/3525, 11 GAOR, Annexes, Ag.Item 31, at 6, para.44 (1956).

<sup>24</sup> See, Jevremovic (Yugoslavia), E/CN.4/SR.279, at 8 (1952).

<sup>25</sup> See e.g., Mehta (India), E/CN.4/SR.279, at 9 (1952).

<sup>26</sup> See, Cassin (France), E/CN.4/SR.279, at 11 (1952).

<sup>27</sup> It was rejected by six votes to five, with seven abstentions.

<sup>28</sup> See e.g., Bowie (UK), E/CN.4/SR.222, at 6 (1951); Mehta (India), *ibid*, at 9 (1951); Bengtson (Sweden), A/C.3/SR.713, at 160, para.31 (1956); Pazhwak (Afghanistan), A/C.3/SR.714, at 163, para.3 (1956); Macchia (Italy), A/C.3/SR.715, at 169, para.6 (1956).

<sup>29</sup> See, Bowie (UK), E/CN.4/SR.224, at 5 (1951).

<sup>30</sup> See, Roosevelt (USA), E/CN.4/SR.224, at 12 (1951).

<sup>31</sup> See, Bowie (UK), E/CN.4/SR.218, at 14, (1951). *Ibid*. SR.222, at 6 (1951); Mossel (Sweden), E/CN.4/SR.279, at 9 (1952).



In contrast, it was felt necessary to reiterate the non-discrimination provision with regard to women to ensure that States actually apply it in practice since it was not yet a reality in many countries.<sup>32</sup> It was noted that the principle had been enshrined in the Charter of the UN and the UDHR,<sup>33</sup> and that it had been requested both by the General Assembly in Resolution 421(V)<sup>34</sup> and by the Commission on the Status of Women<sup>35</sup> that reference be made to the equal rights of women.

It was noted by the UK that in practice it was forced to restrict the right to equal pay in order to combat inflation. The UK reasoned that if it was instituted, purchasing power would increase, reducing the amount of goods available for export and increasing the demands for imports.<sup>36</sup> Other States could not agree to such an argument.<sup>37</sup> Indeed, at a later stage one State commented that discrimination against women would eventually hinder the improvement of the general standard of living, through the lowering of the average wage level.<sup>38</sup> What became clear however was that States considered such economic arguments inconsistent with the nature of the provision. Action to combat inflation should not penalise one particular group in society, especially one that was already disadvantaged.

#### D) ARTICLE 7(A)(II): A DECENT LIVING

A reference to "a decent living for themselves and their families" was adopted unanimously by the Commission at its eighth session. However in the Third Committee some States considered that a reference to remuneration that provides "a decent living" was redundant as being already covered by the notion of fair wages and the right to an

<sup>32</sup> See e.g., Kovalenko (Ukrainian SSR), E/CN.4/SR.280, at 11 (1952); Cheng (China), A/C.3/SR.715, at 170, para.23 (1956); Gerlein de Fonnegra (Colombia), *ibid.* at 171, para.27 (1956); Novikova (Byelorussia SSR), *ibid.* at 172, para.41 (1956).

<sup>33</sup> See, Bernadino (Dominican Republic), A/C.3/SR.714, at 164, para.18 (1956); Paulus (India), A/C.3/SR.714, at 165, para.31 (1956).

<sup>34</sup> See, Santa Cruz (Chile), E/CN.4/SR.224, at 7 and 12 (1951).

<sup>35</sup> UN Doc. E/CN.6/197.

<sup>36</sup> See, Hoare (UK), E/CN.4/SR.280, at 6 (1952).

<sup>37</sup> See e.g., Mehta (India), E/CN.4/SR.280, at 8, (1952); Jevremovic (Yugoslavia), *ibid.* at 12 (1952); Figueroa (Chile), *ibid.* at 13 (1952).

<sup>38</sup> See, Rivas (Venezuela), A/C.3/SR.716, at 175, para.8 (1956).



adequate standard of living.<sup>39</sup> On the other hand many States argued for its retention on the basis that remuneration should be such as to provide for the possibility of decent living conditions.<sup>40</sup> Some States considered it necessary to make some reference to living standards so as to emphasise that the term "remuneration" also covered matters that fell outside mere financial remuneration, such as social security benefits and cheap housing.<sup>41</sup> On this analysis the article seems to explicitly foresee the possibility of States supplementing low wages by State benefits to ensure reasonable living standards. However in that case the provision relating to "fair wages" seems to be deprived of full effect.

#### E) ARTICLE 7(B): SAFE AND HEALTHY WORKING CONDITIONS

A reference to working conditions "not injurious to health" was first proposed by Yugoslavia.<sup>42</sup> It was later taken up by the ILO<sup>43</sup> and found its way with little discussion into the final text.

#### F) ARTICLE 7(C): EQUAL OPPORTUNITY FOR PROMOTION

During the Third Committee's discussion of the draft article, Guatemala sponsored an amendment to include a reference to equal opportunity in promotion.<sup>44</sup> Although certain States objected to such a provision on the basis that seniority and competence were not the only criteria on which promotion was based,<sup>45</sup> no other suggestions were made and the amendment was adopted by a majority decision.

#### G) ARTICLE 7(D): REST, LEISURE AND REASONABLE LIMITATION OF WORKING HOURS

Following a USSR amendment<sup>46</sup>, the general reference to rest and leisure was adopted by the Commission despite the contention that the phrase "reasonable limitation of working hours and periodic

<sup>39</sup> See e.g., Boersma (Netherlands), A/C.3/SR.713, at 158, para.12, (1956); Macchia (Italy), A/C.3/SR.715, at 169, para.6 (1956).

<sup>40</sup> See e.g., Eustathiades (Greece), A/C.3/SR.714, at 167, para.41 (1956).

<sup>41</sup> See, Rivas (Venezuela), A/C.3/SR.716, at 173, para.6 (1956); Marriott (Australia), *ibid*, at 176, paras 13 and 18 (1956).

<sup>42</sup> UN Doc. E/CN.4/AC.14/Add.2, at 2.

<sup>43</sup> See, Myrrdin-Evans (ILO), E/CN.4/SR.218, at 18 (1951).

<sup>44</sup> UN Doc. A/C.3/L.546 and Corr.1

<sup>45</sup> See e.g., Mufti (Syria), A/C.3/SR.715, at 174, para.54 (1956).

<sup>46</sup> UN Doc. E/CN.4/L.46, para.3.



holidays with pay" was considered to be more specific,<sup>47</sup> and indeed implied the notions of rest and leisure.<sup>48</sup>

Although a reference to limitation of working hours was generally acceptable,<sup>49</sup> some felt that the term "reasonable" was too ambiguous, vague and subjective.<sup>50</sup> It was proposed alternatively that working hours should be subject to "legal limitation".<sup>51</sup> Certain States responded that legal interference in this area would be opposed by national trade unions<sup>52</sup> and that it would leave too great a discretion to the State concerned.<sup>53</sup> Additionally it was noted that legal limitations would be particularly difficult to enforce with regard to agricultural workers, small farmers working their own land and small ships. In such cases the best method was collective bargaining.<sup>54</sup>

In the Third Committee Spain proposed that a reference be made to remuneration for public holidays.<sup>55</sup> It was argued however that this would give this aspect undue prominence at the expense of other equally important aspects such as vocational rehabilitation, individual or collective labour contracts and labour disputes;<sup>56</sup> that it was already covered by the term periodic holidays with pay;<sup>57</sup> and that it would limit the right of trade unions to negotiate conditions of work.<sup>58</sup> On the other hand a number of States supported the amendment on the basis that public holidays were not covered by the term "periodic holidays".<sup>59</sup> The phrase seems to have been adopted on this basis.

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<sup>47</sup> See, Bowie (UK), E/CN.4/SR.218, at 14, (1951).

<sup>48</sup> See, Roosevelt (USA), E/CN.4/SR.279, at 12 (1952).

<sup>49</sup> It was considered that it was inappropriate for any precise figure to be given as a limit on the working week which was rather a matter for the implementing body to establish. Myrrdin-Evans (ILO), E/CN.4/SR.218, at 18 (1951); *ibid*, at 20 (1951).

<sup>50</sup> See e.g., Diaz Casanueva (Chile), A/C.3/SR.713, at 159, para.19 (1956).

<sup>51</sup> See, Valensuela (Chile), E/CN.4/SR.218, at 16 (1951).

<sup>52</sup> See e.g., Sorensen (Denmark), E/CN.4/SR.218, at 16 (1951).

<sup>53</sup> See, Myrrdin-Evans (ILO), E/CN.4/SR.218, at 18 (1951); Simarsian (USA), *ibid*, at 19 (1951).

<sup>54</sup> See, Sorensen (Denmark), E/CN.4/SR.218, at 21 (1951).

<sup>55</sup> UN Doc. A/C.3/L.538 (1950).

<sup>56</sup> See, Diaz Casanueva (Chile), A/C.3/SR.713, at 159, para.16 (1956).

<sup>57</sup> See, Abdel-Ghani (Egypt), A/C.3/SR.713, at 160, para.27 (1956); Vlahov (Yugoslavia), A/C.3/SR.714, at 166, para.33 (1956).

<sup>58</sup> See, Macchia (Italy), A/C.3/SR.715, at 169, para.9 (1956).

<sup>59</sup> See, Mufti (Syria), A/C.3/SR.715, at 174, para.54 (1956).



Despite a proposal that the article should refer to "annual" as opposed to "periodic" holidays,<sup>60</sup> the latter term was finally adopted on the understanding that it meant that workers should be given consecutive holidays of not less than two weeks' duration at least once a year.<sup>61</sup>

### III) THE APPROACH OF THE COMMITTEE

#### A) ARTICLE 7(A): MINIMUM REMUNERATION<sup>62</sup>

According to article 7(a) every worker has the right to a minimum level of remuneration which provides them with "fair wages"<sup>63</sup> and enough to ensure them (and their families) a decent living.<sup>64</sup> Although the term "fair wages" might appear to be synonymous with the idea that remuneration should as a minimum provide workers and their families with a decent living, the travaux préparatoires show an intention to distinguish between the two.<sup>65</sup> Each concept will be considered in turn.

##### 1) Fair Wages

That wages should be "fair" suggests that they should be "equitable" or "just". This goes considerably further than merely saying that wages should provide for the basic needs of all workers. The fact that the term "fair wages" is included in a section that also specifies the right to "equal remuneration for work of equal value" lends weight to the idea that fairness requires wage rates to be set in accordance with the real social value of the employment. This is particularly relevant to the position of women in the workforce, whose value has often been underrated.<sup>66</sup> However, an assessment of wages merely in terms of the productive output of a particular form of employment would not necessarily be "fair". Certain forms of employment may not be

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<sup>60</sup> Payro (ILO), A/C.3/SR.714, at 164, para.15 (1956).

<sup>61</sup> Brena (Uruguay), A/C.3/SR.716, at 177, para.29 (1956).

<sup>62</sup> Cf. UDHR, article 23(2) and (3); European Social Charter, article 4; ILO Minimum Wage-Fixing Machinery Convention (No.26), 1928, 29 U.N.T.S. 3; ILO Minimum Wage-Fixing Machinery (Agriculture) Convention (No.99), 1951, 172 U.N.T.S. 159; and ILO Minimum Wage-Fixing Convention (No.131), 1970, 825 U.N.T.S. 77.

<sup>63</sup> Article 7(a)(i).

<sup>64</sup> Article 7(a)(ii).

<sup>65</sup> *See above*, text accompanying notes 39-41.

<sup>66</sup> For the question of pay differentials between men and women *see below*, text accompanying notes 87-109.



intrinsically more "valuable" than others yet are undertaken at higher cost to the worker.

Accordingly, it is submitted that the term "fair wages" implies that the basic level of pay for each particular occupation should reflect the nature and circumstances of the work undertaken. Certain objective criteria such as the level of skill, the amount of responsibility, the amount of disruption to family life, the value of the productive output to the economy and the health and safety risks involved should be taken into account in determining whether the wages of a particular occupation could be said to be "fair". Certainly this would mean that wages rates should reflect, to a large extent, the value of the employment undertaken, but it would also mean that workers employed in dangerous occupations or who work unsociable hours, should be afforded sufficient remuneration to act as a recompense for the disruption to their family life or health.

Unfortunately, the Committee has given no indication that it views the term "fair wages" in this light. The reporting guidelines merely make reference to minimum wages and equal remuneration. Indeed it is rare for Committee members to refer specifically to the right to "fair wages" at all. It is submitted that there is little justification, either on the basis of the travaux préparatoires or the text of article 7(a) itself, to view the term merely as a repetition of the concept of "minimum remuneration" for the purpose of providing a "decent living". "Fairness" requires reference to a range of socially relevant considerations over and above the economic value of the work undertaken, in the determination of the level of wages in a particular occupation.

## 2) Minimum Wages

Whereas ILO instruments provide for minimum "wages", the Covenant refers to minimum "remuneration". It is clear from the travaux préparatoires that "remuneration" was considered to be a wider concept than "wages".<sup>67</sup> It is assumed that the drafters had in mind the distinctions operated by the ILO. According to ILO practice, wages are defined as sums to be paid under a contract of employment for work done or services rendered. The term "remuneration" includes, in addition, emoluments such as bonuses or benefits (in cash or kind) paid by the employer to the worker arising out of the worker's employment.<sup>68</sup>

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<sup>67</sup> See above, text accompanying note 41.

<sup>68</sup> See, General Survey of the Committee of Experts, Minimum Wages, I.L.C., 79th Sess., Report III (Pt.4B), 7-13 (1992).



In theory this distinction means that in calculating whether or not a worker has sufficient means to enjoy a decent life, consideration will be given to additional benefits or bonuses that might arise from his or her employment. There is no indication that the Committee is aware of such a distinction. Instead, the Committee has focussed its attention primarily upon the level of wages and particularly upon the establishment and maintenance of a system of minimum wages.<sup>69</sup>

That the Committee considers the establishment of such a system as a priority in the realisation of article 7(a) is suggested by the detailed information that is requested in its reporting guidelines.<sup>70</sup> The guidelines indicate that the Committee expects the establishment of a system which conforms, in large part, to the ILO Minimum Wage-Fixing Convention of 1970 (No.131)<sup>71</sup> to which reference is made. It seems to be expected that a system, as extensive as possible, be established which must be enforceable either in law or by means of some other sanction. Machinery should be set up to fix, monitor and adjust the level of the minimum wage, which should take into account the needs of the workers, their families and any relevant economic circumstances such as the cost of living. Finally, the system as a whole should be subject to supervision and presumably enforcement where necessary.<sup>72</sup>

Individual members of the Committee have frequently looked to the establishment of a minimum wage to ensure the realisation of the right to just and favourable conditions of work.<sup>73</sup> In absence of a system of minimum wages, they have looked to the existence of other measures that would ensure that workers received "equitable remuneration geared to the cost-of-living index in order to enable them to lead a decent life".<sup>74</sup> It is apparent that the vast majority of States have established some form of minimum-wage legislation, and of those that have not, a number have established systems of wage protection

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<sup>69</sup> For a discussion of the economic effects of a minimum wage see, Craig C., Rubery J., Tarling R. and Wilkinson F., Labour Market Structure, Industrial Organisation and Low Pay, 96-141 (1982).

<sup>70</sup> Reporting Guidelines, ESCOR, Supp.(No.3), Annex IV, at 92, UN Doc.E/C.12/1990/8, (1991).

<sup>71</sup> *Supra*, note 62.

<sup>72</sup> *Ibid*, at 92.

<sup>73</sup> See e.g., Texier, E/C.12/1987/SR.5, at 6, para.24; Sparsis, E/C.12/1987/SR.5, at 7, para.32.

<sup>74</sup> Fofana, E/C.12/1988/SR.3, at 6, para.23.



through collective agreements.<sup>75</sup> Recognition is paid to the fact that wages are, and should be, determined through a collective bargaining process to some degree,<sup>76</sup> but it has been noted that "the minimum wage was mainly applicable in sectors where trade unions did not exist or were very weak".<sup>77</sup> There is no doubt thus, in the eyes of a number of members of the Committee, equitable remuneration is to be secured primarily through the institution of a compulsory minimum wage.<sup>78</sup> This would appear to indicate that although article 7 speaks of "workers" in a general sense, it is not deemed to apply to the self-employed or employers. The Committee, however, has made no comment upon this question.

As regards the operation of the system of minimum wages, members of the Committee have been concerned that there should be sufficient worker participation in the determination of standards.<sup>79</sup> Although the natural choice would be to suggest the participation of trade unions in such a scheme, it has been pointed out that as trade unions were not prevalent in vulnerable sectors, an independent body should be set up to advise the government.<sup>80</sup>

The final and perhaps most important issue is that the minimum wage should have sufficient enforcement. Clearly in those cases where the State itself is the employer, it should be easily enforced. However, in a number of developing countries it is apparent that enforcement remains a considerable problem.<sup>81</sup> It is submitted that the Committee should direct a certain amount of its attention to the question of whether there are adequate inspection services and sufficient sanctions for breach of the minimum wage standards. The approach of the Committee with respect to the establishment of a labour inspectorate will be dealt with below.

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<sup>75</sup> Report of the Director-General of the ILO, Human Rights: A Common Responsibility, ILC 75th Sess., at 43 (1988).

<sup>76</sup> See e.g., Sparsis, E/C.12/1988/SR.3, at 6, para.18; Rattray, E/C.12/1991/SR.4, at 12, para.62.

<sup>77</sup> Sparsis, E/C.12/1988/SR.4, at 6, para.32.

<sup>78</sup> See e.g., Sparsis, E/C.12/1990/SR.10, at 12, para.79; Rattray, E/C.12/1991/SR.3, at 9, para.43.

<sup>79</sup> See, Sparsis, E/C.12/1988/SR.3, at 6, para.18.

<sup>80</sup> See, Sparsis, E/C.12/1988/SR.4, at 6, para.32. See also, General Survey, *supra*, note 68, at 65-99.

<sup>81</sup> See, Report of the Director-General, *supra*, note 74, at 43-44. Goldman A., "Settlement of Disputes over Interests", in Blainpain R.(ed), Comparative Labour Law and Industrial Relations, 361 at 368 (3rd Ed. 1987).



According to article 7(a)(ii), the level of remuneration should be such as to provide for a "decent living" for the worker and his or her family. The text indicates that the term "decent living" is to be read in light of the other provisions in the Covenant. Particular reference could be made to article 11 which refers to "an adequate standard of living". More specifically however, the phrase a "decent living" appears to refer to those rights that depend for their enjoyment upon personal income such as the rights to housing, food, clothing, and perhaps health, education and culture.

Members of the Committee have stressed that the minimum legal wage should at least meet the "basic needs" of workers and their families.<sup>82</sup> It appears to be expected that States establish their own standards and goals in this regard. As far as the ILO is concerned, the level of minimum wages should take into account not only the needs of the workers and their families (in which reference would be made to matters such as the general level of wages, the cost of living, social security benefits), but also economic factors such as the requirement of economic development, levels of productivity and the desirability of maintaining high levels of employment.<sup>83</sup> Although the Committee does refer rather generally to "economic factors" that might be taken into consideration,<sup>84</sup> its position in this regard is not clear. In particular, no indication is given as to whether economic considerations could justify setting the level of minimum wages below that which would provide for basic needs.

As the general approach of the Committee has been to look towards a process of "equalisation" as regards the enjoyment of economic, social and cultural rights,<sup>85</sup> there is a possibility that it will look towards the adoption of a test similar to that operated under the European Social Charter. There, the Committee of Independent Experts has established a "decency threshold" in which the lowest permissible wage in any sector of the economy is quantified as being 68% of the national average.<sup>86</sup> Although such a test is relatively easy to utilise it is essentially directed at equality of income distribution rather than the adequacy of income *per se*. The level of income advanced by the test, which is essentially a national standard, may well be insufficient to provide for basic needs in poorer countries and excessive in more

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<sup>82</sup> See e.g., Muterahajuru, E/C.12/1990/SR.34, at 6, para.40.

<sup>83</sup> See, General Survey, *supra*, note 68, at 101-109. Valticos N., International Labour Law, at 130 (1979).

<sup>84</sup> Reporting guidelines, *supra*, note 69, at 92.

<sup>85</sup> See above, Chapter 4, text accompanying notes 25-26.

<sup>86</sup> See, Harris D., The European Social Charter, 49-51 (1984).



wealthy countries. It may nevertheless be useful as a basic indicator when used in conjunction with other criteria.

It has to be noted that the utilisation of minimum wage-fixing machinery is only a partial procedural means by which workers and their families might be ensured reasonable remuneration from employment. Although it might be open for the worker in the public sector to rely upon article 7(a)(ii) in a claim against the State as regards the inadequacy of his or her pay, the State cannot be seen to have the same responsibility for wages in the private sector. Thus for the impoverished worker employed in the private sector, the principle claim against the State will be that the wage-fixing machinery has insufficient coverage. Moreover, in so far as coverage is generally determined on the basis of sectors of the workforce, the claim will have to be conditioned by the individual's membership of a particular "vulnerable group".

### 3) Equal Remuneration

Article 7(a)(i) specifies as a general principle that all workers should be provided with "equal remuneration for work of equal value". More specifically, however, it provides that women should be guaranteed "equal pay for equal work". The concept of "equal pay for equal work" is the more restrictive of the two concepts in that it confines the comparison to workers with the same job description in the same establishment. The concept of equal remuneration for work of equal value, however, like the "comparable worth" doctrine in the United States,<sup>87</sup> requires comparisons to be made between a wider range of jobs across the spectrum of the employment market.<sup>88</sup>

The rationale for extending the equal pay guarantee to work of equal value is that groups in society (particularly women) are vulnerable to low wage levels not merely because of direct discrimination as regards the pay they receive in the same job. The problem is rather that the employment market is often segregated, with women undertaking forms of employment that are less well protected by trade unions and traditionally undervalued by society.<sup>89</sup> To some extent this problem may be ameliorated by action to increase access to

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<sup>87</sup> See, Benson M., "Equal Pay for Work of Equal Value", 15 Isr.Yrbk H.R., 66 at 67-70 (1985).

<sup>88</sup> Cf. Valticos, *supra*, note 82, at 176.

<sup>89</sup> See, Rubenstein M., Equal Pay, (1984); Horrel S., Rubey J. and Burchell B., "Unequal Jobs or Unequal Pay?", 20 Ind.R.L.J., No.3, 176 (1989).



employment for women<sup>90</sup> and by the protection of wages in vulnerable sectors of the labour market. However, even with the existence of a truly integrated and open employment market, there would still remain a need to ensure pay reflected the proper value of the work undertaken.

It would appear that the concept of "equal pay for equal work" in the Covenant is narrower than that provided for in the ILO Equal Remuneration Convention of 1951<sup>91</sup> or in the European Social Charter,<sup>92</sup> both of which refer to "equal pay for work of equal value".<sup>93</sup> However, the text of article 7(a)(i) makes clear that the term "equal pay for equal work" is merely one element of the more general concept of "equal remuneration for work of equal value". It has been concluded that "the wording of the provision mandates the application of the theory of comparable worth".<sup>94</sup>

The requirement of equal remuneration in the Covenant is broader than that found in other instruments in two respects. First, whereas ILO Convention No.100<sup>95</sup> and article 119 of the Treaty of Rome<sup>96</sup> provide for equal pay specifically for men and women, article 7(a)(i) applies to "all workers... without distinction of any kind". Secondly, the Covenant uses the term "remuneration" which is arguably broader than the term "pay".<sup>97</sup> Wide though its coverage may be, the Covenant gives no further instruction as to how the concept be realised.

Although it is evident that the "work of equal value" concept is wider than, and includes, the concept of equal pay for equal work, the

<sup>90</sup> Cf. Para.6, ILO Equal Remuneration Recommendation (No.90), 1951, ILO, International Labour Conventions and Recommendations (1919-1981), at 44 (1982).

<sup>91</sup> ILO Equal Remuneration Convention (No.100), 1951, 165 U.N.T.S. 303.

<sup>92</sup> See, Harris, *supra*, note 85, at 53.

<sup>93</sup> In the practice of the European Communities, however, the concept of equal pay for equal work has been interpreted to include work "to which equal value is attributed". Council Directive 75/117, 18 O.J.Eur.Comm. (L.45), 19 (1975). See generally, Szyczak E., "Pay Inequalities and Equal Value Claims", 48 M.L.R., 139, at 140 (1985); Argiros G., "Sex Equality in the Labour Market and the Community Legal Order: An Attempt at an Appraisal", 11 Liv.L.R., No.2, 161, at 171-174 (1989).

<sup>94</sup> Benson, *supra*, note 86, at 71 (1985).

<sup>95</sup> Provisions on equal remuneration and on the decrease of differentials between rates of remuneration resulting from discrimination are also contained in the ILO Social Policy (Basic Aims and Standards) Convention (No.117), 1962, 494 U.N.T.S. 249.

<sup>96</sup> EEC Treaty (1957), 298 U.N.T.S. 11.

<sup>97</sup> For the difference between "remuneration" and "wages", see *above*, text accompanying notes 67-68. It is notable, however, that the European Court of Justice has interpreted "pay" in a broad manner. See, Argiros, *supra*, note 93, at 169-171.



Committee has tended to deal with the matters separately.<sup>98</sup> The reason for this is indicated by the text of article 7(a)(i) itself. Whereas States are required to "recongise" the right to equal remuneration for work of equal value (thus implying progressive achievement),<sup>99</sup> they must "guarantee" the right of women to equal pay for equal work. Use of the term "guarantee" implies that full enjoyment of the right should be ensured immediately. Thus the Committee's reporting guidelines request information as to "infringements" of the principle of equal pay for equal work.<sup>100</sup>

Whereas it might be assumed that the reference in article 7(a)(i) to "equal pay for equal work" applies only to women, the Committee has requested more general information as to infringements of the principle with respect to any person or group of persons.<sup>101</sup> A wider operation of the principle of equal pay for equal work may be justified by the fact that it is merely a specific element of the equal value concept which is to operate "without distinction of any kind". It has to be noted, however, that although a general legislative provision requiring equal pay might be sufficient in overt cases, if the Committee considers that "indirect" or "implicit" discrimination is to be prohibited, then the State will have to establish which groups are to be protected.

The Committee gives no indication as to how the right to equal pay for equal work is to be guaranteed. Although it is clear that the State may guarantee equal pay where remuneration is subject to statutory control (such as in public undertakings), to effectively guarantee the right to equal pay in other areas States will have to provide for individual remedies.<sup>102</sup> The form such remedies may take would depend upon the structure and form of the existing wage-fixing mechanisms within the State concerned. It is submitted that it is indispensable for the Committee to enquire as to the existence of

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<sup>98</sup> See e.g., Reporting guidelines, *supra*, note 69, at 92-93.

<sup>99</sup> See *above*, Chapter 2, text accompanying notes 189.

<sup>100</sup> Reporting guidelines, *supra*, note 69, at 92. There is some evidence that States themselves recognise that the principle of equal pay for equal work should be implemented immediately. Both Barbados and the UK have made reservations to the effect that they postpone the application of the principle of article 7(a)(i) in so far as it concerns the provision of equal pay to men and women for equal work, thus implying that article 7(a)(i) does indeed require States to immediately guarantee the principle of equal pay for equal work. UN Doc.E/C.12/1988/1, at 7 and 18 (1987).

<sup>101</sup> *Ibid.*

<sup>102</sup> An example might be the UK Equal Pay Act 1970. See e.g., Palmer C. and Poulton K., Sex and Race Discrimination in Employment, 91-125 (1987); Honeyball S., Sex, Employment and the Law, 17-52 (1991).



mechanisms through which the right to equal pay for equal work may be effectively enforced.

As regards the principle of equal remuneration for work of equal value, the Committee expects States to "promote an objective appraisal of jobs on the basis of the work to be performed".<sup>103</sup> Such an appraisal should take into account differences in income distribution not only within enterprises or sectors of the employment market, but also between "comparable jobs in the public and private sector".<sup>104</sup> It is interesting to note that the Committee has rather cautiously used the term "promote". Clearly the establishment of such a scheme across all forms of employment in all areas, would represent a monumental task, and would in any case present problems where the government does not traditionally interfere directly in the determination of wages in the private sector.<sup>105</sup> Although the Committee has occasionally implied that article 7(a)(i) as a whole is capable of immediate implementation,<sup>106</sup> the guidelines clearly suggest that any obligation to create a job evaluation scheme is merely progressive.<sup>107</sup>

Although the appraisal of job value should be "objective", the Committee has not itself established any criteria which should be taken into account. It is clear from the text of article 7(a) that the social utility of a particular job is not a sufficient criterion alone. As a minimum, the level of pay should be such as to provide all workers and their families with a decent living.<sup>108</sup> Moreover, that wages should be "fair" suggests that other considerations of justice should be taken into account.<sup>109</sup> It is submitted that to the extent to which it expects States to establish job evaluation schemes, the Committee should attempt to outline the general considerations that should be taken into account.

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<sup>103</sup> Reporting guidelines, *supra*, note 69, at 93.

<sup>104</sup> *Ibid.* For the position of the ILO *see*, ILO General Survey, Equal Remuneration, ILC, 72nd Sess., Report III (Part 4B), para.22 (1986).

<sup>105</sup> Valticos, *supra*, note 82, at 177. The Committee of Independent Experts of the European Social Charter has experienced certain problems in this regard, *see*, Harris, *supra*, note 85, at 54-56.

<sup>106</sup> *See above*, Chapter 4, text accompanying notes 176-186.

<sup>107</sup> *Cf also*, Sparsis, E/C.12/1990/SR.10, at 12, para.78.

<sup>108</sup> *See above*, text accompanying notes 67-86. For a discussion of the possible conflict between needs and equal pay *see*, Källström K., "Article 23", in Eide A. *et al* (eds), The Universal Declaration of Human Rights: A Commentary, 357, at 364 (1992).

<sup>109</sup> *See above*, text accompanying note 66.



## B) EQUALITY IN CONDITIONS OF EMPLOYMENT

Article 7(a)(i), in addition to providing for equal remuneration, establishes that women should be guaranteed "conditions of work not inferior to those enjoyed by men". It would seem nevertheless, from the existence of article 2(2) which prohibits discrimination in the enjoyment of the rights, that such a reference is unnecessary. Indeed the Committee has not viewed the provision as either adding to or subtracting from the general non-discrimination clause in any way. Whereas the concept of non-discrimination has been dealt with in more detail elsewhere,<sup>110</sup> it is pertinent to note that members of the Committee have been concerned primarily with the employment conditions of women<sup>111</sup> and migrant workers<sup>112</sup> (whether legally or illegally employed).<sup>113</sup>

## C) SAFE AND HEALTHY WORKING CONDITIONS

Article 7(b) provides that everyone has a right to safe and healthy working conditions. This provision has significant overlap with article 12 which provides for the right to health. Article 12(2) in particular provides in sub-section (b) for the improvement of all aspects of environmental and industrial hygiene, and in sub-paragraph (c) for the prevention, treatment and control *inter alia* of occupational diseases.

The Committee in its reporting guidelines requests information as to the legal or administrative provisions that prescribe minimum conditions of occupational health and safety.<sup>114</sup> There is no indication that the Committee expects States to have formulated a "coherent national policy" in line with article 4 of the ILO Occupational Safety and Health Convention 1981,<sup>115</sup> although that Convention is mentioned.<sup>116</sup>

The Committee conceives of the right to safe and healthy working conditions as being open to progressive achievement to some extent. It asks specifically for information as to the categories of workers which are excluded either in whole or in part from the existing schemes, and

<sup>110</sup> See above, Chapter 4.

<sup>111</sup> See e.g., Jimenez Butragueno, E/C.12/1987/SR.7, at 6, para.25.

<sup>112</sup> See, Simma, E/C.12/1988/SR.3, at 3, para.8; Jimenez Butragueno, E/C.12/1988/SR.3, at 4, para.9; Texier, E/C.12/1989/SR.6, at 5, para.22; Simma, E/C.12/1990/SR.34, at 4, para.22.

<sup>113</sup> See, Wimer Zambrano, E/C.12/1987/SR.7, at 7, para.28; Simma, E/C.12/1990/SR.40, at 10, para.44.

<sup>114</sup> Reporting guidelines, *supra*, note 69, at 93.

<sup>115</sup> ILO Occupational Safety and Health Convention (No.155), 1981 Cmnd 8773.

<sup>116</sup> Reporting guidelines, *supra*, note 69, at 92.



looks for the progressive reduction in occupational accidents over time.<sup>117</sup> In so far as article 7(b) relates to article 2(1), it can be assumed that the Committee will look towards the establishment of policies directed towards the prevention of accidents and injury to health.

However, whilst the elimination of all accidents is clearly not possible, an obligation for States to establish national policies embodied in legislation that prescribe standards which apply to all employed workers<sup>118</sup> could be implemented immediately. The standards themselves certainly may be improved over time, as indeed they should be, but the establishment of a coherent national policy should be a minimum requirement for all States. The financial burden upon the State, and indeed on the undertaking concerned, in enforcing such standards is far outweighed by the human and economic costs of not doing so.<sup>119</sup> As has been noted by the ILO, "there is wide agreement that flexibility should have no place in standards aimed at ensuring safety and health at work".<sup>120</sup>

Members of the Committee have recognised the central role of legislation and regulations in this area.<sup>121</sup> Like the requirement in article 4 ILO Convention No.155, members have asked about the extent of participation of workers in the establishment of such regulations,<sup>122</sup> and as to whether the areas of risk have been evaluated and preventive measures designed.<sup>123</sup> The Committee should also take note of the fact that the constant introduction of new technologies, substances and working methods means that the situation has to be constantly under supervision.<sup>124</sup>

Once States have established appropriate legislation and regulations as to safety and health at work, the most crucial aspect is the degree to which they are enforced. More often than not a labour inspectorate is mandated with the supervision of legislation regarding

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<sup>117</sup> *Ibid*, at 93.

<sup>118</sup> The term "employed workers" could be considered to include those self employed who operate as independent contractors. See, Szubert W., "Some Considerations on Safety and Health at Work in Comparative Law", in Gamillscheg F. *et al*, In Memoriam: Sir Otto Khan-Freund, 701, at 713 (1980).

<sup>119</sup> Report of the Director-General of the ILO, Making Work More Human: Working Conditions and the Environment, ILC 60th Sess., at 23 (1974).

<sup>120</sup> Report of the Director-General, *supra*, note 74, at 47.

<sup>121</sup> See *e.g.*, Texier, E/C.12/1987/SR.5, at 6, para.25.

<sup>122</sup> See *e.g.*, Mratchkov, E/C.12/1987/SR.7, at 5, para.19.

<sup>123</sup> See *e.g.*, Konate, E/C.12/1987/SR.7, at 2, para.4.

<sup>124</sup> Report of the Director-General, *supra*, note 74, at 47.



conditions of work and particularly safety standards. Although the Committee makes reference to the ILO Labour Inspection Convention of 1947 (No.81) and the Labour Inspection (Agriculture) Convention of 1969 (No.129) in its reporting guidelines,<sup>125</sup> no further mention is made as to an obligation to establish labour inspectorates, or of their appropriate number, size or power once created. Given that inspectorates are often poorly organised, overworked and limited in their powers,<sup>126</sup> this is an area which perhaps deserves more consideration.

Individual members of the Committee have, however, taken a certain amount of interest in the establishment and functioning of labour inspectorates, not only in the field of safety and health at work, but also with respect to general conditions of work.<sup>127</sup> Thus questions have been asked as to the organisation, size and range of functions of the labour inspectorate concerned,<sup>128</sup> the number of cases taken up by the inspectorate<sup>129</sup> and the sanctions imposed for breach of the regulations.<sup>130</sup>

Given that there is a need for enforcement over a whole range of issues within article 7, it might be appropriate if the Committee were to suggest that labour inspectorates be established to enforce the various regulations and assist or advise employers. Consideration could be given to the requirements laid down in ILO Convention No.81 where inspectorates must be independent and subject to central control. The inspectors themselves should have adequate training, facilities and powers, and be sufficient in number to undertake their work.<sup>131</sup>

Although it is beyond the powers of the Committee to lay down specific health and safety requirements that should be established in particular forms of employment, it clearly has a role to play in ensuring that adequate mechanisms exist to ensure the continued adjustment, improvement, and enforcement of standards relating to the working environment.

<sup>125</sup> Reporting guidelines, *supra*, note 69, at 93.

<sup>126</sup> Szubert, *supra*, note 118, at 708.

<sup>127</sup> See e.g., Sparsis, E/C.12/1991/SR.3, at 10, para.48.

<sup>128</sup> See e.g., Mratchkov, E/C.12/1988/SR.17, at 5, para.30; Mratchkov, E/C.12/1990/SR.40, at 13, para.63; Mratchkov, E/C.12/1991/SR.7, at 11, para.46.

<sup>129</sup> See e.g., Texier, E/C.12/1989/SR.6, at 5, para.19.

<sup>130</sup> *Ibid*, para.21; Texier, E/C.12/1987/SR.5, at 6, para.25.

<sup>131</sup> See, Valticos, *supra*, note 82, at 214-219.



## D) EQUAL OPPORTUNITY FOR PROMOTION

Article 7(c) provides that everyone has the right to equal opportunity to be promoted "subject to no considerations other than those of seniority or competence". Whilst being linked with the right to work in article 6 and the right of women to equal conditions of work in article 7(a)(i), the right to equal opportunity in promotion is perhaps most closely related to article 2(2) which guarantees the exercise of the rights within the Covenant without discrimination.

As has been noted elsewhere, the Committee has interpreted the general non-discrimination clause as requiring some form of de facto equality.<sup>132</sup> Accordingly the Committee's reporting guidelines require the provision of information as to groups which do not currently enjoy equal opportunity in promotion. Specific steps are required to combat that situation and promote the opportunities for advancement of the disadvantaged sectors in society.<sup>133</sup> It is evident that the degree to which States succeed in this task will be assessed by how many persons within the disadvantaged groups enter into more responsible positions within society.<sup>134</sup>

The approach of individual members of the Committee suggests that the State has an obligation to establish objective norms to govern promotion possibilities in the public sector.<sup>135</sup> In relation to private sector employment, members have looked towards the adoption of legislation to guarantee equality of promotion opportunities.<sup>136</sup> It might be pointed out that such legislative measures would most probably take the form of a general non-discrimination provision which should be guaranteed by some form of individual remedy.

## E) REST AND LEISURE

Article 7(d) provides for a general right to rest and leisure, and specific work-related aspects of that right, namely the reasonable limitation of working hours, periodic holidays with pay and

<sup>132</sup> See above, Chapter 4.

<sup>133</sup> Reporting guidelines, *supra*, note 69, at 93. Cf also, ILO Recommendation No.111, para.2 which provides for equality of opportunity as to advancement in accordance with the individual's characters, experience, ability or diligence. ILO Discrimination (Employment and Occupation) Recommendation (No.111), 1958, in ILO, International Labour Conventions and Recommendations 1919-1981, at 49 (1982).

<sup>134</sup> Questions are regularly asked as to the number of women occupying positions of responsibility at work, *see e.g.*, Jimenez Butragueno, E/C.12/1991/SR.3, at 11, para.52.

<sup>135</sup> See *e.g.*, Mratchkov, E/C.12/1987/SR.5, at 8, para.40.

<sup>136</sup> See *e.g.*, Daoudi, E/C.12/1987/SR.5, at 4, para.15.



remuneration for public holidays. Whilst it might be argued that a right to leisure implies an obligation on the State to promote or provide adequate leisure facilities,<sup>137</sup> the Committee has concentrated almost exclusively upon the reduction in working hours and the provision of paid holidays.

That the Committee intends initially to rely upon the ILO standards in this field is apparent from the reference to the Weekly Rest (Industry) Convention of 1921 (No.14), the Weekly Rest (Commerce and Offices) Convention of 1957 (No.106) and the Holidays with Pay Convention (Revised) of 1970 (No.132).<sup>138</sup> It is particularly noticeable that in the area of remuneration for public holidays, where there is no relevant ILO Convention to apply, the Committee has made little comment. In addition to making reference to ILO Conventions, the reporting guidelines request, rather generally, information as to laws and practices relating to the various rights within article 7(d), factors and difficulties that affect the degree of realisation particularly as to the categories of workers which are excluded in law or practice from the enjoyment of the rights, and measures taken to improve the situation.<sup>139</sup>

It is notable that the Committee has made no mention of the Hours of Work (Industry) Convention of 1919 (No.1),<sup>140</sup> the Hours of Work (Commerce and Offices) Convention of 1930 (No.30),<sup>141</sup> or the Forty-Hour Week Convention of 1935 (No.47).<sup>142</sup> One reason might be the limited number of States that have ratified those treaties.<sup>143</sup> Whether or not the Committee considers that these ILO standards are realistic, it would be appropriate for the Committee to make some form of statement as to what length of working week it considers suitable as a

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<sup>137</sup> See, Melander G., "Article 24", in Eide A. *et al* (eds), The Universal Declaration of Human Rights: A Commentary, 379, at 380 (1992).

<sup>138</sup> Reporting guidelines, *supra*, note 69, at 92. ILO Weekly Rest (Industry) Convention (No.14), 1921, 38 U.N.T.S. 187; ILO Weekly Rest (Commerce and Offices) Convention (No.106), 1957; ILO Holidays with Pay Convention (Revised) (No.132) 1970, Cmdnd 4706.

<sup>139</sup> Reporting guidelines, *supra*, note 69, at 93.

<sup>140</sup> ILO Hours of Work (Industry) Convention (No.1), 1919, 38 U.N.T.S. 17.

<sup>141</sup> ILO Hours of Work (Commerce and Offices) Convention (No.30), 1930, 39 UNTS 85.

<sup>142</sup> ILO Forty-Hour Week Convention (No.47), 1935, 271 U.N.T.S. 199.

<sup>143</sup> For example the Forty-Hour Week Convention (No.47) of 1935 has only been ratified by 8 States.



general standard,<sup>144</sup> and what would be considered excessive. The only statements made to this effect by individual members indicate that States should make efforts to reduce the length of the working week<sup>145</sup> and that a 54 hour working-week would in normal circumstances be considered excessive.<sup>146</sup>

It is submitted that the Committee should establish as a principle, in line with the approach of the ILO,<sup>147</sup> that States should attempt to reduce the working week in a progressive manner. Clearly the extent to which States are capable of shortening the working week is dependent upon their social and economic situation and the degree to which it would affect productivity, competitiveness and the balance of trade. However, given the existing general differentials between States, a useful guideline for the Committee might well be the provisions of the ILO Reduction of Hours of Work Recommendation of 1962 (No.116).<sup>148</sup> It recommends that States pursue a national policy designed to promote the principle of progressive reduction of normal hours of work with a view to attaining the standard of the forty-hour week. In the case of those States which operate an existing working week of more than 48 hours, immediate steps should be taken to reduce it to that level.

By referring to the Weekly Rest Conventions, the Committee seems to imply that those obligations are operative as far as article 7(d) is concerned. Accordingly States have an obligation to ensure that employees, whether in public or private undertakings, shall enjoy a period of rest of at least twenty four consecutive hours in every seven days. Exceptions are provided for in certain defined situations, but in such cases compensatory rest periods should be provided. Like the provision relating to the working week, it would be appropriate for the Committee to view this provision as a progressive one such that States should attempt to increase the period of weekly rest over time. Nevertheless, as the ILO has discovered, the question of weekly rest has not generally been a serious problem.<sup>149</sup>

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<sup>144</sup> For the ILO position *see*, General Survey of the Committee of Experts, Working Time: Reduction of hours of work, weekly rest and holidays with pay ILC 70th Sess, Report III (Pt.4B), (1984).

<sup>145</sup> *See*, Texier, E/C.12/1989/SR.8, at 5, para.26.

<sup>146</sup> *See*, Mratchkov, E/C.12/1989/SR.8, at 7, para.36.

<sup>147</sup> General Survey, *supra*, note 141, at 10.

<sup>148</sup> ILO Reduction of Hours of Work Recommendation (No.116), 1962, in ILO, International Labour Conventions and Recommendations 1919-1981, at (1982).

<sup>149</sup> *Ibid*, at 185.



As regards the right to holidays with pay, it was made clear in the drafting of article 7 that the term "annual holiday" was intended to mean that workers should be given, at minimum, consecutive holidays of two weeks duration once a year.<sup>150</sup> Although this is less than that provided for in the ILO Holidays With Pay Convention (Revised) of 1970 (which provides for a three week holiday)<sup>151</sup>, it should clearly be made the basic standard. The Committee has yet to give this right some meaning. In addition to stipulating what it considers to be the minimum duration of annual holiday, the Committee will also have to consider the legitimacy of qualifying periods for, or the division of, holiday entitlements, and the means by which such standards are to be enforced.

#### IV) CONCLUSION

The broad and general terms of article 7, whilst lacking the specificity found in other instruments (such as the European Social Charter), do not suffer from the inherent limitations that such definitions might offer. For example, the general right to equal remuneration for work of equal value allows for a far wider application than other guarantees which restrict comparisons to the relative position of men and women. However, that the provisions have to be given more precise and meaningful detail places a considerable burden upon the Committee.

The fundamental characteristic of the right to just and favourable conditions of work is that it concerns the relationship between individuals (or bodies). Certainly the State might have direct responsibility for such matters in so far as it is an employer itself, but in most States now conditions of work are the subject of the private employment contract and stipulations of collective agreements. The effectiveness of the rights within article 7 are thus heavily dependent upon the operation of *drittwirkung der grundrechte*, or the horizontal application of rights.<sup>152</sup>

As it is rarely conceded that the State should interfere in the terms and conditions of every employment contract, State obligations will primarily involve establishing a minimum "floor" of rights (which should form the basis of every employment contract) and instituting mechanisms of enforcement. Although the Committee does face problems with establishing the exact level at which each right should be set, it does have a serious role to play in ensuring that basic procedural

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<sup>150</sup> See above, text accompanying note 61. Cf. article 2(3) European Social Charter.

<sup>151</sup> See, General survey, *supra*, note 141, paras 151-259.

<sup>152</sup> For a discussion of the notion of *drittwirkung*, see above Chapter 2, text accompanying notes 28-42.



obligations are undertaken. For example, it should at least examine the existence, coverage and operation of minimum wage machinery, labour inspectorates and wage evaluation schemes. Thus far, this element of its work has been seriously undervalued.

Thus far, the Committee has made only a little headway in developing the substance of the rights. As with article 6, although the Committee is in the fortunate position of being able to draw upon the vast experience of the ILO in the area, there is little evidence of it having done so in a serious manner. There is clearly a need for the Committee to generate greater sophistication and more focused attention upon the various elements of article 7. Having said that, a brief glance at the number of ILO Conventions and Recommendations in the area (particularly in respect to health and safety at work) does give an indication of the extremely difficult task that faces the Committee in developing the normative content of the rights and assessing State reports in a meaningful manner. It is perhaps fortunate that the Committee only has to play a supportive role to the ILO in the area.



## **CHAPTER SEVEN: TRADE UNION RIGHTS<sup>1</sup>**

### *Article 8*

- 1. The States Parties to the present Covenant undertake to ensure:*
  - (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*
  - (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations;*
  - (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;*
  - (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.*
- 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.*
- 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.*

### **I) INTRODUCTION**

As is recognised in a number of human rights instruments, the right to join and form trade unions is a fundamental element

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<sup>1</sup> The term "trade union rights" is used here as a generic term to describe the rights in article 8. Although the term is inaccurate in so far as many of the rights pertain to the individual and not the trade union, it is commonly used and understood in the wider sense.



of the right to freedom of association.<sup>2</sup> That it has been given specific legal recognition over and above other forms of association, is a reflection of the fact that "freedom of association for trade union purposes is a major postulate of democratic government in an industrial society."<sup>3</sup> However, the importance of protecting the right to form and join trade unions is more than merely a recognition that trade unions are a common form of association. Trade unions have historically played a crucial role in the protection of the rights and interests of workers. Identification of the instrumental value of trade unions in the realisation of other economic and social rights (particularly the right to just and favourable conditions of work<sup>4</sup>) is reflected in the value placed upon the rights of trade unions themselves in the Covenant (articles 8(1)(b) and (c)), as opposed to the rights of the individual trade union members.

It is possible to argue that the right of trade unions to function freely may be readily inferred from the effective enjoyment of the individual right to freedom of association, and indeed might have been framed in those terms. As it is, article 8 is very much a hybrid of individual and collective rights. That tensions may arise between the rights of the individual and those of the collective is apparent in the experience of the European Court of Human Rights.<sup>5</sup> The fact that collective rights are specifically enumerated as opposed to inferred might make the resolution of such conflicts more difficult to attain.

Article 8 is of particular importance in the Covenant as far as the Committee is concerned, as it represents a good benchmark against which the progress of the Committee in developing the norms within the Covenant may be measured. It has many of the hallmarks of the rights enumerated in the ICCPR, being defined in comparable detail and being subject to immediate implementation.

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<sup>2</sup> Cf. Article 22(1), ICCPR (1966); Article 11(1), ECHR (1950). The UDHR, however, provides for the right to freedom of association (article 20) and the right to form and join trade unions (article 23(4)) in two separate articles.

<sup>3</sup> Jenks W., Human Rights and International labour Standards, 50 (1960).

<sup>4</sup> For the role of collective bargaining in the realisation of the rights in article 7, *see above*, Chapter 6.

<sup>5</sup> *See e.g., Young, James and Webster Cases*, Eur.Court H.R., vol.44., Judgement of 13th Aug.1981, (1982) 4 EHRR 38.



## II) THE TRAVAUX PREPARATOIRES

During the drafting of the Covenant,<sup>6</sup> there was considerable opposition to the inclusion of an article relating to trade-union rights. It was contended that the right of association was already provided for in the draft Covenant (and article 20 UDHR) and that the inclusion of an article on trade-union rights was unduly repetitious.<sup>7</sup> Certain States also considered it unjust to single out trade unions above other forms of association such as co-operative societies.<sup>8</sup>

In response it was argued that to reduce trade union rights merely to the right of association would run counter to historical developments where trade-union rights had been embodied in a number of legislative texts in their own right.<sup>9</sup> Even if the right to association was extended it would still be inadequate,<sup>10</sup> particularly as it had too many restrictions and gave inadequate protection to trade unions.<sup>11</sup> Emphasis was placed upon the idea that "trade unions were a necessary instrument for implementing economic, social and cultural rights"<sup>12</sup> and therefore an "essential condition" for the guarantee of economic rights in general,<sup>13</sup> and especially as regards the right to satisfactory working conditions.<sup>14</sup> It was noted, moreover, that the right to join and

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<sup>6</sup> Proposals for an article on trade union rights were discussed in the Commission at its seventh and eighth sessions, and later in the General Assembly's Third Committee. *See*, UN Doc.E/CN.4/SR.203-4, 206-8, 218, 224-6 (1951); UN Doc.E/CN.4/SR.298-300 (1952); UN Doc.A/C.3/SR.719-726 (1956). *See generally*, UN Doc.A/2929, 10 GAOR, Annexes, Ag.Item 28 (Pt.II), 106-107 (1955); UN Doc.A/3525, 11 GAOR, Annexes, Ag.Item 31, 8-12, paras 54-75 (1956).

<sup>7</sup> *See e.g.*, Whitlam (Australia), E/CN.4/SR.225, at 9-10 (1951); Mehta (India), E/CN.4/SR.224, at 23 (1951).

<sup>8</sup> *See e.g.*, Sorensen (Denmark), E/CN.4/SR.224, at 24 (1951).

<sup>9</sup> *See*, Fischer (WFTU), E/CN.4/SR.225, at 4 (1951).

<sup>10</sup> *See*, Cassin (France), E/CN.4/SR.225, at 9 (1951); Morosov (USSR), *ibid*, at 15 (1951).

<sup>11</sup> *See*, Jevremovic (Yugoslavia), E/CN.4/SR.298, at 10 (1952). Ironically, the restrictions in the article on freedom of association were included in the final version of article 8.

<sup>12</sup> Malik (Lebanon), E/CN.4/SR.298, at 8 (1952).

<sup>13</sup> Jevremovic (Yugoslavia), E/CN.4/SR.298, at 9 (1952).

<sup>14</sup> *See*, Chaudhuri (Pakistan), A/C.3/SR.719, at 199, para.19 (1956).



form trade unions had already been given recognition in the UDHR.<sup>15</sup>

Further arguments against the inclusion of a provision relating to trade-union rights were made on the basis that they were essentially "prejudicial to the general conception of human rights",<sup>16</sup> in that they related to only one category of persons<sup>17</sup> and were collective in nature. It was responded that the right to form and join trade unions was "open to interpretation" as an individual right.<sup>18</sup> In any case, there was no problem with introducing rights that belonged to communities because they were nevertheless fundamental.<sup>19</sup> Indeed, as was noted in the report of the Third Committee in 1956, it was not "fitting", "on the one hand to grant the right to form and join trade unions and, on the other, to deprive unions of their rights to function and join in national and international federations."<sup>20</sup>

The early drafts of the article were of a single paragraph, containing only an expression of the right to join and form trade unions. It was assumed that further detailed elaboration would be undertaken at a later stage by the ILO. However, following pressure from the Latin American and Socialist States, the article was expanded in the Third Committee, where the discussion moved from what rights should be included in article 8 to what limitations should be imposed on the rights.

The final text, although subject to agreement, was not entirely satisfactory for all concerned. On the one hand a number of States clearly preferred the initial general provision drafted by the Commission.<sup>21</sup> On the other hand, those who looked for a more detailed article were disappointed that it be subject to so many restrictions.<sup>22</sup> The fact that all the proposals that remained at the voting stage were adopted, reflects the concern that the article be acceptable to as many States as possible. It is considered

<sup>15</sup> Article 23(4). Santa Cruz (Chile), E/CN.4/SR.225, at 13 (1951).

<sup>16</sup> Sorensen (Denmark), E/CN.4/SR.224, at 24 (1951).

<sup>17</sup> *See e.g.*, Mehta (India), E/CN.4/SR.224, at 23 (1951).

<sup>18</sup> *See*, Malik (Lebanon), E/CN.4/SR.224, at 23 (1951).

<sup>19</sup> *See*, Santa Cruz (Chile), E/CN.4/SR.224, at 23 (1951).

<sup>20</sup> UN Doc.A/3525, *supra*, note 6, at 9, para.66.

<sup>21</sup> *See e.g.*, Vlahov (Yugoslavia), A/C.3/SR.726, at 227, para.27 (1956); Basavilbaso (Argentina), *ibid*, para.28 (1956).

<sup>22</sup> *See e.g.*, Castaneda (Mexico), A/C.3/SR.726, at 227, para.30 (1956); Morosov (USSR), *ibid*, para.33 (1956).



that this was achieved, however, by sacrificing the coherence of the article as a whole.

#### A) ARTICLE 8(1): THE OBLIGATION TO ENSURE

It was generally agreed that "progressive implementation could not be invoked in the case of trade union rights because no expenditure was necessary on the part of the State."<sup>23</sup> The State action required was one of self-restraint or non-interference.<sup>24</sup> As was commented in the debate within the Third Committee:

"...the Commission had decided that some of the rights in that Covenant should be the subject of an obligation which would be definite and immediate, and not progressive in character. Article 8 was such an article since it required States to "undertake to ensure" the right. That obligation was the same as the one in article 21 of the draft Covenant on Civil and Political Rights."<sup>25</sup>

It was clear that in utilising the word "ensure" in preference to the standard term "recognise", the drafters intended that the article should not fall within the terms of article 2(1).

However, there was some indication among members of the Third Committee that although immediate, the obligation extended further than merely State restraint. Mention was made of the need for positive action by the State to promote trade unionism among workers,<sup>26</sup> particularly with respect to countries in which trade-union organisation was obstructed by low levels of development.<sup>27</sup>

#### B) ARTICLE 8(1)(a): THE RIGHT TO FORM AND JOIN TRADE UNIONS

##### 1) "The right of everyone to form trade unions..."

As far as the Commission was concerned, article 8 was not

<sup>23</sup> Jevremovic (Yugoslavia), E/CN.4/SR.298, at 10 (1952).

<sup>24</sup> Malik (Lebanon), E/CN.4/SR.298, at 11 (1952).

<sup>25</sup> Hoare (UK), A/C.3/SR.720, at 197, para.20 (1956). Draft article 21 is now article 22 ICCPR.

<sup>26</sup> See, Diaz Casanueva, A/C.3/SR.720, at 195, para.3 (1956).

<sup>27</sup> See, Diaz Casanueva (Chile), A/C.3/SR.720, at 196, para.6 (1956).



intended to cover the rights of employers.<sup>28</sup> However in the Third Committee this question gave rise to considerable debate. It was pointed out that whereas the English, Chinese and Russian terms for "trade unions" were understood to refer to workers' organisations only, the French term "syndicats", and the Spanish term "sindicatos", both included employers' associations.<sup>29</sup>

Notwithstanding these semantic difficulties, there was little real discussion as to whether it was proper for employer's associations to be included in the definition. A number of States did indicate that the term should be read its broadest sense<sup>30</sup> as used in the ILO Convention of 1948,<sup>31</sup> under which both workers and employers would be covered.<sup>32</sup> Indeed it was even argued that organisations of employers were essential to economic development.<sup>33</sup> However, despite the unsatisfactory situation resulting from the adoption of a text which meant different things to different States,<sup>34</sup> a proposal that a declaration be made as to the scope of the provision was not adopted.<sup>35</sup>

In the absence of any clear statement as to the scope of the article it would seem that the matter was intended to be left to the ratifying States.<sup>36</sup> Although, as noted above, some States considered that the protection extended to employers' associations, there is evidence that a number of States voted for the provision

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<sup>28</sup> The Secretary-General comments:

"Article 8 was not intended to govern the rights of employers. It was stated that independent professional workers should be entitled to form professional organisations and that the rights of co-operative associations would not be prejudiced by their not being mentioned in the Covenant."

UN Doc.A/2929, *supra*, note 6, at 106, para.17 (1953).

<sup>29</sup> UN Doc.A/3525, *supra*, note 6, at 10-11, para.73.

<sup>30</sup> *See e.g.*, Azkoul (Lebanon), A/C.3/SR.724, at 218, para.14 (1956).

<sup>31</sup> *See*, Diaz Casanueva (Chile), A/C.3/SR.722, at 208, para.26 (1956).

<sup>32</sup> *See*, Delhay (Belgium), A/C.3/SR.722, at 208, para.24 (1956).

<sup>33</sup> *See*, Diaz Casanueva (Chile), A/C.3/SR.725, at 222, para.8 (1956).

<sup>34</sup> *See*, Diaz Casanueva (Chile), A/C.3/SR.725, at 221, para.7 (1956).

<sup>35</sup> For the proposal *see*, Chairman, A/C.3/SR.723, at 215, para.49 (1956).

<sup>36</sup> *See e.g.*, Hoare (UK), A/C.3/SR.723, at 215, para.50 (1956); Delhay (Belgium), A/C.3/SR.724, at 217, para.2 (1956).



on the understanding that it was limited to workers' organisations.<sup>37</sup>

2) "...the trade union of his choice..."

The phrase "of his choice" was included primarily to ensure the free exercise of the right to form and join trade unions.<sup>38</sup> However, it was noted that the phrase might be interpreted as implying that individuals have the right to join any trade union irrespective of whether or not they have fulfilled the conditions of membership. If enforced, this would result in a considerable limitation on the freedom of trade unions to lay down their own organisational rules.<sup>39</sup>

Accordingly it was suggested that the phrase "subject only to the rules of the organisation concerned" be included.<sup>40</sup> This proposal was criticised as being unnecessary,<sup>41</sup> and even potentially harmful, in that States might be prevented from controlling inequitable trade union rules.<sup>42</sup> In particular it might enable trade unions to circumvent article 8 by establishing rules which would nullify rights specified in that article.<sup>43</sup>

The adoption of the proposed wording seems to indicate that whilst trade unions are free to establish their own conditions of membership, such conditions are subject to an element of State control in so far as is necessary to ensure that the rights within article 8 of the Covenant are respected. An obvious case in point would be to ensure that such rules of entry are not discriminatory.

3) "...for the promotion and protection of his economic and social interests."

In the Commission, the political activity of trade unions was a matter of some concern to a number of States.<sup>44</sup> It was

<sup>37</sup> See e.g., Knox (Denmark), A/C.3/SR.726, at 225, para.7 (1956); Kowalikowa (Poland), *ibid*, at 226, para.13 (1956).

<sup>38</sup> UN Doc.A/2929, *supra*, note 6, at 106, para.14.

<sup>39</sup> See, Bowie (UK), E/CN.4/SR.226, at 9 (1951); Chaudhuri (Pakistan), A/C.3/SR.719, at 191, para.21 (1956).

<sup>40</sup> See, Currie (Canada), A/C.3/SR.721, at 201, para.16 (1956).

<sup>41</sup> See e.g., Bratanov (Bulgaria), A/C.3/SR.722, at 206, para.8 (1956).

<sup>42</sup> See e.g., Serrano (Philippines), A/C.3/SR.722, at 207, para.16 (1956).

<sup>43</sup> See, Mufti (Syria), A/C.3/SR.726, at 225, para.9 (1956).

<sup>44</sup> See e.g., Santa Cruz (Chile), E/CN.4/SR.225, at 13-14 (1951).



considered necessary to include a provision in the Covenant restricting trade union activity to the protection of workers' "economic and social interests" so as to avoid them concerning themselves with purely political matters.<sup>45</sup>

Those who opposed the provision noted that it was "only natural" that trade unions have a role in the formulation of social and economic policy given their influence over the economy of the country,<sup>46</sup> and that they should participate in the implementation of social legislation.<sup>47</sup> Such a provision was "extremely dangerous" in that it might be used as a pretext for taking measures against representative unions<sup>48</sup> and could mandate the formation of employer monopolies.<sup>49</sup> Belgium argued in particular, that the right to form and join trade unions was absolute and should not be made dependent on the purpose sought by the individual.<sup>50</sup>

States supporting the proposal explained that although discussion of economic and social matters was clearly within the powers of trade unions, they should not interfere with policy-making at a regional and national level which ought to be undertaken through the normal democratic channels.<sup>51</sup> The addition, in the Third Committee, of the word "promotion" widened the range of activities envisaged for trade unions to the extent that all States seem to have been satisfied.<sup>52</sup>

It would appear, from the discussion above, that trade unions may undertake a broad range of activities in the protection and promotion of workers' interests. The main restriction envisaged, was that trade unions should not involve themselves in purely political activities. Apparently this would not exclude them from creating links with, or giving allegiance to, certain political parties, but would prohibit action that was aimed at the subversion

<sup>45</sup> See, Eggermann (IFCTU), E/CN.4/SR.225, at 18 (1951).

<sup>46</sup> Pattet (ICFTU), E/CN.4/SR.225, at 21 (1951).

<sup>47</sup> See, Fischer (WFTU), E/CN.4/SR.225, at 25 (1951).

<sup>48</sup> Fischer (WFTU), E/CN.4/SR.225, at 26 (1951).

<sup>49</sup> See, Jevremovic (Yugoslavia), E/CN.4/SR.298, at 9 (1952). This of course is on the assumption that the provision extends to employers.

<sup>50</sup> See, Delhay (Belgium), A/C.3/SR.722, at 208, para.24 (1956).

<sup>51</sup> See, Santa Cruz (Chile), E/CN.4/SR.225, at 22 (1951); Santa Cruz (Chile), E/CN.4/SR.300, at 7 (1952).

<sup>52</sup> The provision was finally adopted by 47 votes to one with 19 abstentions. UN Doc.A/3525, *supra*, note 6, at 11, para.74.



of the democratic processes. This does not fully resolve, however, the question of whether strikes aimed at bringing down a government would be entirely legitimate.

#### 4) Restrictions

A reference to article 16 (now article 22 ICCPR) appeared in the early version of article 8 adopted at the Commission's seventh session.<sup>53</sup> It was later argued that, even if a specific cross-reference was not acceptable, as article 8 was to be implemented immediately like article 22 ICCPR, it should be subject to the same restrictions<sup>54</sup> (found in article 22(2) and (3)) with the exception of the reference to public health.<sup>55</sup> On the other hand certain States argued that such limitations would run counter to the provisions of ILO Convention No.87,<sup>56</sup> and that in any case the limitations had already been dealt with in article 4.<sup>57</sup> However, it was pointed out that Article 4 had not yet been discussed and therefore could not be relied upon,<sup>58</sup> especially as it was not clear whether article 4 would in fact operate with respect to article 8.<sup>59</sup> In any case a general limitations clause did not prohibit specific ones where appropriate.<sup>60</sup>

This discussion of permissible restrictions upon the right to form and join trade unions, although rather summary in nature, does give some indication of the intentions of the drafters. First, for a definition of the various terms used such as "national security" or "democratic society" reference may be made to the travaux préparatoires of article 22 ICCPR. Secondly, to the extent that article 8(1)(a) is already subject to specific limitations, it appears that it is excluded from the scope of article 4. This point is

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<sup>53</sup> See, UN Doc.A/2929, *supra*, note 6, at 106, para.16.

<sup>54</sup> See, Hoare (UK), A/C.3/SR.720, at 197, para.21 (1956); Currie (Canada), A/C.3/SR.721, at 201, para.15 (1956).

<sup>55</sup> See, Hoare (UK), A/C.3/SR.719, at 191, para.23 (1956).

<sup>56</sup> See *e.g.*, Brena (Uruguay), A/C.3/SR.719, at 191, para.28 (1956); Morosov (USSR), *ibid*, at 192, para.31 (1956).

<sup>57</sup> See, Morozov (USSR), A/C.3/SR.719, at 192, para.31 (1956); Diaz Casanueva (Chile), A/C.3/SR.720, at 196, para.5 (1956); Vlahov (Yugoslavia), *ibid*, at 198, para.31 (1956).

<sup>58</sup> See, Hoare (UK), A/C.3/SR.720, at 197, para.22 (1956); Massoud-Ansari (Iran), A/C.3/SR.722, at 206, para.9 (1956).

<sup>59</sup> See, Azkoul (Lebanon), A/C.3/SR.721, at 201, para.21 (1956).

<sup>60</sup> See, Brena (Uruguay), A/C.3/SR.723, at 214, para.46 (1956).



fully supported by the travaux préparatoires of article 4 which reiterate that interpretation.<sup>61</sup>

### C) ARTICLE 8(1)(b): THE RIGHT TO FEDERATE

It was proposed in the Commission that trade unions should be permitted to federate in "local, regional and international spheres".<sup>62</sup> However, concern was expressed over the possibility of international federations of trade unions interfering in the internal politics of individual States.<sup>63</sup> As a result, no right to federate was included in the Commission's final draft. Instead the right to join trade unions was extended to "local, national and international trade unions".<sup>64</sup>

In the Third Committee, there was a certain amount of opposition to the inclusion of a provision relating to the establishment of federations and confederations. In particular, it was felt that such a provision was out of place in the Covenant because it did not relate to the rights of individuals but rather to the rights of trade unions themselves.<sup>65</sup> In response it was argued that the mere fact that the provision related to a group right was not crucial. If the right to trade union organisation was to be considered realistic, trade unions must be guaranteed the right to act which included the right to federate.<sup>66</sup>

It is submitted that, as a matter of textual consistency, the Commission draft was preferable to that of the Third Committee. It is submitted that although collective rights are not necessarily incompatible with individual rights and indeed might be necessary to ensure the full protection of the individual in certain circumstances,<sup>67</sup> in this case they are unnecessary. The right to federate internationally could easily have been posited as a principle deriving from the effective enjoyment of the right to form and join trade unions.

<sup>61</sup> See, UN Doc.A/2929, *supra*, note 6, at 25, para.50.

<sup>62</sup> Azmi Bey (Egypt), E/CN.4/SR.224, at 24 (1951).

<sup>63</sup> See, Ciasullo (Uruguay), E/CN.4/SR.225, at 7 (1951).

<sup>64</sup> UN Doc.E/2256, 14 ESCOR, Supp.(No.4), at 21-22 (1952).

<sup>65</sup> See *e.g.*, Hamilton (Australia), A/C.3/SR.723, at 213, para.30 (1956).

<sup>66</sup> See *e.g.*, Kowalikowa (Poland), A/C.3/SR.720, at 196, para.13 (1956); Bratanov (Bulgaria), A/C.3/SR.722, at 205, para.6 (1956).

<sup>67</sup> See *e.g.*, Brownlie I., "The Rights of Peoples in Modern International Law", in Crawford J.(ed), The Rights of Peoples, 1, at 3 (1988).



#### D) ARTICLE 8(1)(c): THE RIGHT OF TRADE UNIONS TO FUNCTION FREELY

As stated above, the right of trade unions to function freely was considered to be a necessary corollary of the right to form and join trade unions. Although apparently encompassing both the right to call a strike and the right to federate, this provision was adopted in its own right in the Third Committee.<sup>68</sup> Additional elements that the right to function freely might include, are the right of trade unions to operate freely and call conferences and meetings without interference by employers or the State, and the right to collective bargaining.<sup>69</sup> Nevertheless, the precise scope and meaning of this provision was left undefined.

In the Third Committee the original proposal provided that the right of trade unions to function freely should be restricted only "for the protection of the rights and freedoms of others".<sup>70</sup> This phrase was considered too vague, unnecessary<sup>71</sup> and laid the way open for States to avoid their obligations.<sup>72</sup> Nevertheless it was later proposed that the provision should be supplemented by a reference to public order and the security of the State.<sup>73</sup> Although it was argued that such concepts would deprive the article of full effect,<sup>74</sup> they were felt necessary particularly in light of the fact that the trade-union functions to which the provision referred were nowhere defined.<sup>75</sup>

Given the fact that a limitation clause was considered necessary, the right to function freely should be properly interpreted in a wide sense. That the exact functions were left undefined may be because mention had already been made of the right of trade unions to establish and enforce rules as to their own

<sup>68</sup> UN Doc.A/3525, *supra*, note 6, at 11, para.74(j) (1956).

<sup>69</sup> *See*, Sender (ICFTU), E/CN.4/SR.225, at 10 (1951); Pickford (ILO), E/CN.4/SR.299, at 5 (1952).

<sup>70</sup> Revised Amendment of Bolivia, Peru and Uruguay: UN Doc.A/C.3/L.552/Rev.1.

<sup>71</sup> *See*, Serrano (Philippines), A/C.3/SR.722, at 207, para.15 (1956).

<sup>72</sup> *See*, Bratanov (Bulgaria), A/C.3/SR.722, at 206, para.6 (1956).

<sup>73</sup> *See*, Azkoul (Lebanon), A/C.3/SR.721, at 201, para.22 (1956). *Cf.* Amendment of Netherlands and the United Kingdom: UN Doc. A/C.3/L.555.

<sup>74</sup> *See e.g.*, Townsend Ezcurra (Peru), A/C.3/SR.721, at 202, para.28 (1956).

<sup>75</sup> UN Doc.A/3525, *supra*, note 6, at 10, para.70.



organisation,<sup>76</sup> and that their external functions were those necessary for the protection and promotion of their members' interests.<sup>77</sup> In addition, provisions were on the table relating to the right to strike and the right to federate. It became apparent nevertheless, during the debate on the right to strike, that the right to function freely includes at least a right to collective bargaining.

#### E) ARTICLE 8(1)(d): THE RIGHT TO STRIKE

There was considerable debate both in the Commission and in the Third Committee over whether it was appropriate to include a provision on the right to strike.<sup>78</sup> A number of arguments were put forward against the inclusion of a right to strike: i) the right to strike was often not subject to State regulation and thus should be left to the State concerned;<sup>79</sup> ii) the right to strike was subject to a number of restrictions and therefore could not be considered to be a truly universal right;<sup>80</sup> iii) the right to strike was merely a means to implement trade union rights and not a proper right in itself;<sup>81</sup> iv) the right to strike was a collective right and thus was out of place in a Covenant dealing with individual rights;<sup>82</sup> v) the right to strike was not a primary right but only a right of "last resort"<sup>83</sup> to be exercised following other attempts at conciliation and only when other rights were endangered;<sup>84</sup> vi) as there was no corresponding provision in the UDHR, there was no justification for including the right to strike in the Covenant.<sup>85</sup>

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<sup>76</sup> See above, text accompanying notes 40-43.

<sup>77</sup> See above, text accompanying notes 44-52.

<sup>78</sup> See generally, Ben-Israel R., International Labour Standards: The Case of Freedom to Strike, 72-83 (1988).

<sup>79</sup> See e.g., Azmi Bey (Egypt), E/CN.4/SR.224, at 24 (1951); Juvigny (France), E/CN.4/SR.300, at 4 (1952).

<sup>80</sup> See, Mehta (India), E/CN.4/SR.225, at 25 (1951).

<sup>81</sup> See, Rossel (Sweden), E/CN.4/SR.300, at 9 (1952); Azmi Bey (Egypt), E/CN.4/SR.225, at 21 (1951).

<sup>82</sup> See, Hamilton (Australia), A/C.3/SR.723, at 213, para.32 (1956).

<sup>83</sup> Beaufort (Netherlands), A/C.3/SR.721, at 202, para.25 (1956).

<sup>84</sup> See, Rajan (India), E/CN.4/SR.299, at 11 (1952).

<sup>85</sup> See, Juvigny (France), E/CN.4/SR.300, at 4, (1952). Ben-Israel notes that the absence of a right to strike in ILO Conventions was also an important factor in its exclusion in the early drafts of article 8. Ben-Israel, *supra*, note 78, at 73.



Such arguments effectively prevented the inclusion of a right to strike in the early Commission drafts. However in the Third Committee the position was reversed, whereby the majority endorsed the inclusion of a reference to the right to strike. In particular, it was considered that the right to strike was essential for the protection of the economic and social interests of workers<sup>86</sup> to the extent that it was meaningless to try to guarantee trade union rights without a right to strike.<sup>87</sup> Further, the right to strike was mentioned in the legislation of many countries,<sup>88</sup> and had become a social reality that had to be recognised.<sup>89</sup> Interestingly enough, for one State at least, the right to strike was associated with the right not to be forced to work.<sup>90</sup> This has to be tempered by the knowledge that the crucial question in relation to strikes is not the ability to stop work but rather the contractual liabilities or other penalties incurred upon striking.

Although a number of States agreed to the inclusion of a right to strike, they argued that, given the effect of strikes on the economy,<sup>91</sup> reference should be made to the fact that it was a "last resort" following conciliation.<sup>92</sup> It was commented however that it might be necessary in certain cases for a strike to be called without

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<sup>86</sup> See e.g., Morosov (USSR), E/CN.4/SR.298, at 8 (1952).

<sup>87</sup> See e.g., Bracco (Uruguay), E/CN.4/SR.299, at 3 (1952); Brena (Uruguay), A/C.3/SR.719, at 191, para.25 (1956); Townsend Ezcurra (Peru), *ibid*, at 193, para.40 (1956).

<sup>88</sup> See, Townsend Ezcurra (Peru), A/C.3/SR.721, at 202, para.29 (1956).

<sup>89</sup> See, Chaudhuri (Pakistan), A/C.3/SR.723, at 212, para.15 (1956).

<sup>90</sup> See, Jevremovic (Yugoslavia), E/CN.4/SR.225, at 6 (1951).

<sup>91</sup> Concern was expressed particularly for the position of developing countries in which it was considered necessary that new industries be protected from irresponsible trade-union action, Massoud-Ansari (Iran), A/C.3/SR.722, at 206, para.11 (1956). Nevertheless it was responded that one reason for introducing the right to strike was "to protect the workers in under-developed countries against the reactionary tendencies of the dictatorships to which they so frequently succumbed precisely because of the backwardness and instability of the economies of such countries. Another reason was that the under-developed countries were the first to suffer in an economic crisis, and the workers in those countries were usually the hardest hit..." Ayala Mercado (Bolivia), A/C.3/SR.722, at 207, para.19 (1956).

<sup>92</sup> See e.g., Roosevelt (USA), E/CN.4/SR.225, at 12 (1951); Eggermann (IFCTU), *ibid*, at 18 (1956); Azmi Bey (Egypt), *ibid*, at 22 (1951); Cheng Paonan (China), E/CN.4/SR.299, at 15 (1952); Diaz Casanueva (Chile), A/C.3/SR.721, at 203, para.36 (1956); Ayala Mercado (Bolivia), A/C.3/SR.722, at 207, para.19 (1956).



resorting to conciliation procedures.<sup>93</sup> Additionally it was noted that conciliation was a complex process in which it was not always clear when negotiations had broken down- often they continue as long as the strike lasted.<sup>94</sup>

In the same light some States argued that it was wrong to mention the right to strike without the other methods of dispute settlement,<sup>95</sup> or other activities of trade unions,<sup>96</sup> such as the right to picket.<sup>97</sup> However such remarks had little effect upon the final wording adopted.

At most stages of the debate, there was dispute over the extent to which the right to strike should be subject to limitations. In the Commission it was argued that strikes should be limited where the vital interests of the State were at stake.<sup>98</sup> It was responded that this would leave the door open to abuse as the State alone could judge its own security considerations<sup>99</sup> and that any such limitation would encourage governments to attack trade union rights.<sup>100</sup> Indeed Yugoslavia argued that, given the financial constraints on strikes, the possibility of unjustified strike action was extremely unlikely.<sup>101</sup> However, although not explicitly stated, it would seem that the restrictions found in article 8(1)(c) would similarly apply to the right to strike- it being clear that striking is one of the functions of trade unions.

The limitation finally adopted in article 8(1)(d) was proposed as a compromise, and gave much away to those who opposed the inclusion of the provision.<sup>102</sup> Although the limitation made the provision generally acceptable concern was expressed that to make the right subject to the laws of the particular country

<sup>93</sup> See, Sender (ICFTU), E/CN.4/SR.299, at 8 (1952).

<sup>94</sup> See, Whitlam (Australia), E/CN.4/SR.300, at 8 (1952); Hoare (UK), *ibid*, at 11 (1952).

<sup>95</sup> See *e.g.*, Hoare (UK), A/C.3/SR.720, at 198, para.26 (1956); Vlahov (Yugoslavia), *ibid*, para.30 (1956).

<sup>96</sup> See, Aman (Sweden), A/C.3/SR.722, at 205, para.3 (1956).

<sup>97</sup> See, Serrano (Philippines), A/C.3/SR.722, at 207, para.15 (1956).

<sup>98</sup> See, Azmi Bey (Egypt), E/CN.4/SR.225, at 22 (1951). An amendment was proposed to that effect, UN Doc.E/CN.4/595.

<sup>99</sup> See, Fischer (WFTU), E/CN.4/SR.225, at 26 (1951); Jevremovic (Yugoslavia), E/CN.4/SR.226, at 5 (1951).

<sup>100</sup> See, Morosov (USSR), E/CN.4/SR.299, at 13-14 (1952).

<sup>101</sup> See, Jevremovic (Yugoslavia), E/CN.4/SR.298, at 10 (1952).

<sup>102</sup> UN Doc.A/3525, *supra*, note 6, at 10, para.68.



could make it virtually inoperable.<sup>103</sup> This was not enough to dissuade the vast majority of States from voting in favour of the proposal.<sup>104</sup>

#### F) ARTICLE 8(2): MEMBERS OF THE ARMED FORCES, POLICE AND THE ADMINISTRATION OF THE STATE

A provision allowing the imposition of restrictions on the trade-union rights of workers in the public services was proposed in the Commission.<sup>105</sup> These were later encapsulated in the joint amendment proposed by the Netherlands and the United Kingdom which legitimised the imposition of restrictions on members of the police, armed forces and the administration of the State.<sup>106</sup>

A number of States argued that, although restrictions on the armed forces and the police were legitimate, that was not the case with respect to the administration of the State.<sup>107</sup> ILO practice did not allow restrictions upon the trade union rights of all public officials- only those in the army and police and then only to an extent determined by law.<sup>108</sup>

Moreover, to allow limitations upon the right to strike in the public service was open to abuse as the concept of a public service was a flexible one.<sup>109</sup> In this sense it would be unduly prejudicial in the cases of States with large nationalised sectors.<sup>110</sup> It might

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<sup>103</sup> See e.g., Hoare (UK), A/C.3/SR.722, at 209, para.33 (1956); Hamilton (Australia), A/C.3/SR.723, at 214, para.32 (1956); Stabel (Norway), A/C.3/SR.725, at 221, para.4 (1956).

<sup>104</sup> UN Doc.A/3525, *supra*, note 6, at 11, para.74(m).

<sup>105</sup> See, Ciasullo (Uruguay), E/CN.4/SR.225, at 7 (1951); Rajan (India), E/CN.4/SR.299, at 11 (1952).

<sup>106</sup> UN Docs.A/C.3/L.550 and A/C.3/L.555.

<sup>107</sup> See e.g., Dupont Willemin (Guatemala), E/CN.4/SR.225, at 8 (1951); Sender (ICFTU), E/CN.4/SR.299, at 8 (1952); Shoham-Sharon (Israel), A/C.3/SR.722, at 208, para.31 (1956).

<sup>108</sup> See e.g., Santa Cruz (Chile), E/CN.4/SR.299, at 11 (1952); Brena (Uruguay), A/C.3/SR.719, at 191, para.28 (1956); Morozov (USSR), *ibid*, at 192, para.31 (1956).

<sup>109</sup> See, Juvigny (France), E/CN.4/SR.300, at 4 (1952); Bratanov (Bulgaria), A/C.3/SR.722, at 206, para.7 (1956).

<sup>110</sup> See, Eustathiades (Greece), A/C.3/SR.721, at 200, para.6 (1956); Thierry (France), A/C.3/SR.721, at 200, para.11 (1956).



also be a retrograde step for those States where the right to strike was denied only to workers in essential services.<sup>111</sup>

The United Kingdom responded that the provisions of the ILO Convention referring to the armed forces and police were merely declaratory,<sup>112</sup> and in any case the provision did not stipulate that there should be such restrictions but only foresaw their possibility.<sup>113</sup> It would seem that States' acceptance of this provision was conditioned to an extent by their assumption that the ILO would play a significant part in the supervision of the Covenant. It could be inferred from the discussion that restrictions imposed would be considered legitimate only in so far as they comply with the ILO standards in the area. That this seems to have been the intention of the drafters is made clear by the inclusion of sub-paragraph 3 which makes reference to the ILO Freedom of Association Convention.

#### G) ARTICLE 8(3): THE ILO CONVENTION OF 1948.<sup>114</sup>

Considerable misgivings were expressed as to the inclusion of a reference to ILO Convention No.87 as proposed by the Netherlands and the United Kingdom.<sup>115</sup> States argued that such a reference was unclear in its meaning and unnecessary.<sup>116</sup> Not only was it of legally negligible value in that the obligations in the ILO Convention could not be derogated from on the basis of the Covenant,<sup>117</sup> but also it implied that the obligations in other conventions were not similarly protected.<sup>118</sup> Moreover, no such cross-reference had been made in articles 6 and 7.<sup>119</sup> There were few coherent arguments put forward in favour of the paragraph outside a statement that the paragraph would avoid any future

<sup>111</sup> See, Juvigny (France), E/CN.4/SR.300, at 4 (1952).

<sup>112</sup> See, Hoare (UK), A/C.3/SR.720, at 197, para.24 (1956).

<sup>113</sup> See, Hoare (UK), A/C.3/SR.722, at 209, para.33 (1956).

<sup>114</sup> ILO Freedom of Association and Protection of the Right to Organise Convention (No.87), 9 Jul.1948, 68 U.N.T.S. 17.

<sup>115</sup> A/C.3/L.550 and L.555. See, Hoare (UK), A/C.3/SR.719, at 191, para.23 (1956).

<sup>116</sup> See e.g., Brena (Uruguay), A/C.3/SR.719, at 192, para.29 (1956).

<sup>117</sup> See, Eustathiades (Greece), A/C.3/SR.721, at 200, para.6 (1956); Mufti (Syria), A/C.3/SR.726, at 225-6, para.10 (1956).

<sup>118</sup> See, Serrano (Philippines), A/C.3/SR.722, at 207, para.18 (1956); Shoham-Sharon (Israel), A/C.3/SR.722, at 208, para.29 (1956).

<sup>119</sup> See, Kowalikowa (Poland), A/C.3/SR.720, at 196, para.14 (1956).



conflicts between the Convention and the Covenant. However, the paragraph was adopted by a small majority in the Third Committee, perhaps as a matter of maintaining support for the article as a whole.<sup>120</sup>

### III) THE APPROACH OF THE COMMITTEE

The Committee has not as yet produced a general comment, or undertaken a general discussion on article 8. The only indication as to its approach to article 8 is to be found from its reporting guidelines and the comments and questions of individual members. It is a provision, however, in respect of which Committee members have been critical of the performance of a number of States, reflecting a greater confidence in the precise level of protection offered by the Covenant.

#### A) ARTICLE 8: THE OBLIGATION TO ENSURE

As was noted during the drafting of the Covenant, the right to join and form trade unions forms an integral part of the general right to freedom of association found in article 22 ICCPR.<sup>121</sup> According to article 2(1) ICCPR States are required to "ensure" the rights in the Covenant, which contrasts with article 2(1) ICESCR which provides for the progressive realisation of the rights. It would seem somewhat contradictory, given the oft stated "interdependence" of human rights, if a right were to be implemented immediately under one Covenant and progressively under the other. Thus article 8, as was specifically intended during the drafting,<sup>122</sup> uses the term "ensure" to make clear that it is to be implemented in an immediate manner.

Some commentators have argued that article 2(1) ICESCR applies only to those rights that are specifically "recognised" in the terms of the article.<sup>123</sup> Although there is no indication in the

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<sup>120</sup> The paragraph was adopted by 19 votes to 14 with 35 abstentions. UN Doc.A/3525, *supra*, note 6, at 11, para.74(p).

<sup>121</sup> *See above*, text accompanying note 7. The HRC, however, has been reluctant to read into article 22 other rights that are associated with the right to form and join trade unions such as the right to strike. *See, J.B.et al. v.Canada*, 2 Selected Decisions H.R.C. 34 (1986).

<sup>122</sup> *See above*, text accompanying notes 23-25.

<sup>123</sup> Alston P. and Quinn G., "The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights", 9 *Hum.Rts.Q.*, 156, at 185 (1987).



drafting that this was intended to be the case,<sup>124</sup> such an interpretation has some textual coherence. Nevertheless, even if this interpretation is not acceptable, it is clear that as the realisation of the rights in article 8 is not wholly contingent upon the availability of financial resources, the enjoyment of the rights should be ensured within a reasonable time.

The Committee has made clear that it considers that article 8 "would seem to be capable of immediate application by judicial and other organs in many national legal systems".<sup>125</sup> That the enjoyment of the rights within article 8 is primarily a matter for legal regulation is reflected in the questions in the Committee's reporting guidelines which are directed primarily at legal and administrative conditions and restrictions that govern the exercise of trade union rights.<sup>126</sup> This approach seems justified to the extent that a number of States that have come before the Committee have noted that the right to join trade unions is to be found in their respective constitutions.<sup>127</sup> However, as was noted in the Committee's General Comment, constitutional enactment does not necessarily mean that such a right will be enforced.<sup>128</sup>

Although the travaux préparatoires indicate that States should undertake to promote trade unionism in a progressive manner,<sup>129</sup> the Committee has not specifically recognised this obligation. Questions have been asked as to the number and structure of trade unions<sup>130</sup> and to the proportion of the workforce that is unionised,<sup>131</sup> but they would seem to be concerned more with evaluating the effective enjoyment of trade union rights than with establishing an obligation to promote trade

<sup>124</sup> See above, Chapter 2, text accompanying notes 189-196.

<sup>125</sup> General Comment No.3 (1990), ESCOR, Supp.(No.3), Annex III, at 84, para.5, UN Doc.E/1991/23 (1991).

<sup>126</sup> Reporting Guidelines, ESCOR, Supp.(No.3), Annex IV, at 94, UN Doc.E/1991/23 (1991).

<sup>127</sup> See e.g., Rhenan Segura (Costa Rica), E/C.12/1990/SR.40, at 6, para.22; Weitzel (Luxembourg), E/C.12/1990/SR.33, at 5, para.15. See also, Panama, E/1984/6/Add.19, at 17; Afghanistan, E/1990/5/Add.8, at 7, para.22; Syria, E/1990/6/Add.1, at 8, para.28; Rwanda, E/1984/7/Add.29, at 15.

<sup>128</sup> General Comment No.3, *supra*, note 125, at 84, para.6.

<sup>129</sup> See above, text accompanying note 26.

<sup>130</sup> Reporting guidelines, *supra*, note 126, at 95.

<sup>131</sup> See, Mratchkov, E/C.12/1987/SR.6, at 12, para.63; Mratchkov, E/C.12/1987/SR.21, at 10, para.43; Mratchkov, E/C.12/1988/SR.3, at 4, para.10; Mratchkov, E/C.12/1988/SR.17, at 5, para.30.



unionism itself. Nevertheless, given the important role of trade unions in securing just and adequate conditions of work, it might be considered desirable for States to assist workers in unorganised sectors, particularly through educational measures, to form effective trade unions.

## B) ARTICLE 8(1)(a): THE RIGHT TO FORM AND JOIN THE TRADE UNION OF HIS CHOICE.

### 1) The Right of "Everyone"

Article 8 provides that "everyone" has the right to form and join trade unions. Unlike article 7(a), its scope *ratio personae* is not limited to "workers". Despite the unresolved nature of the controversy apparent in the travaux préparatoires,<sup>132</sup> the fact that the French text refers to "syndicats" and the Spanish to "sindicatos", both of which have a broader meaning than the English term "trade unions", suggests that employers' organisations should also fall within the terms of article 8.<sup>133</sup> Although the Committee has not made clear its view on this question, it is not of utmost importance as most problems in the area relate to employee's trade unions.<sup>134</sup>

Notwithstanding the general application of article 8, certain restrictions appear to be legitimised by the Covenant. Article 8(2), in particular, provides that the article "shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State". Whereas article 9 of ILO Convention No.87 allows for restrictions to be placed upon the trade union rights of members of the armed forces and the police,

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<sup>132</sup> See above, text accompanying notes 28-37.

<sup>133</sup> This interpretation would bring the Covenant in line with ILO Convention No.87 which provides that both workers and employers shall have the right to establish and join trade unions "without distinction whatsoever". Valticos N., International Labour Law, at 82 (1979); The Committee of Experts on the Application of Conventions and Recommendations' General Survey on Freedom of Association and Collective Bargaining, 69th Sess., (1983), ILO II:69/3 (4B), paras 100-102 (1983).

<sup>134</sup> Jenks W., The International Protection of Trade Union Freedom, at 173 (1957). He notes earlier that the decision to include employers' organisations was due to a recognition that the collective regulation of conditions of employment required strong and free workers' and employers' organisations. *Ibid*, at 24-5.



unlike article 8 ICESCR, no such restrictions are allowed as regards members of the administration of the State.<sup>135</sup>

As article 8(3) confirms, those States parties that are also party to the ILO Convention No.87 would still be bound by the provisions of that Convention. Indeed, article 8(3) requires that for States parties of the ILO Convention, the terms of article 8(1) and (2) should be read subject to the provisions of that Convention. Accordingly, a State that imposed wholesale restrictions on the ability of public servants to join or form trade unions, would be in violation not only of the ILO Convention but also of the Covenant.<sup>136</sup> Similarly as article 5(2) makes clear, limitations cannot be invoked merely on the pretext that the Covenant offers less protection than that already provided in domestic law.<sup>137</sup>

However, those States not party to the ILO Convention might be entitled to rely upon article 8(2) as justification for restrictions upon the trade union activity of public servants in general, which would represent a significant loophole as far as international standards are concerned. As commentators have noted, the major problems with respect to the concept of freedom of association have occurred in the realm of public servants.<sup>138</sup>

The only occasion on which members of the Committee actually confronted this issue was in a discussion as to the extent to

<sup>135</sup> *Supra*, note 114. Cf. General Survey, *supra*, note 133, para.87. The ILO Freedom of Association Committee has been particularly critical of the UK as regards restrictions imposed upon the right of civil servants employed at GCHQ to join organisations of their own choosing. *See generally*, Ewing K., Britain and the ILO, 11-14, 31-37 (1989). The European Commission of Human Rights, however, did not consider the restrictions to be in breach of article 11 E.C.H.R.. *See*, C.C.S.U. v. United Kingdom, (1987), 20 DREComHR 228, (1988) 10 EHRR 269. Cf. Fredman S. and Morris G., "Union Membership at G.C.H.Q.", 17 Ind.L.J., 105 (1988).

<sup>136</sup> Whereas the terms of article 8(3) will modify the existing obligations under the terms of article 8, it is open to question whether this means that the wider terms of the ILO Convention should be given effect under the Covenant. This interpretation was expressly negated by the HRC as regards the identical provisions of article 22(3) in J.B. et al. v. Canada, *supra*, note 121.

<sup>137</sup> Article 5(2) reads:  
"No restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent."

<sup>138</sup> Pankert A., "Freedom of Association", in Blainpain R.(ed), Comparative Labour Law and Industrial Relations, 173 at 178 (3rd Ed, 1987); Jenks, *supra*, note 117, at 178.



which civil servants in the Dominican Republic enjoyed freedom of association.<sup>139</sup> It was pointed out by the ILO representative that certain legislation within the Dominican Republic that allowed the authorities to dissolve public-employee associations seemed to be in conflict with the right of association.<sup>140</sup> The Committee did not address this point directly, but concentrated instead upon the right to strike of public employees. In that context, it appears that the Committee is not willing to accept general restrictions upon the right to strike of public employees, but will investigate the necessity of such restrictions. It is assumed that as article 8(2) applies to all sections of article 8(1), the Committee will also scrutinise limitations imposed upon the right of public servants to form and join trade unions.<sup>141</sup> If the Committee does take the view that broad restrictions on the rights of public employees to exercise their rights to form and join trade unions are of doubtful legitimacy, it will have to explain its position at a textual level. This will involve making some important decisions as to the meaning and relative scope of the various limitation clauses that might be seen to operate in relation to article 8(1)(a). It will also mean defining what categories of employees are considered to fall within the scope of the term "members of the administration of the State". For example, it might be open to define that term in a narrow manner to include only those working in emergency services or otherwise involved in the security of the State. This would not allow general restrictions being placed upon the rights of civil servants or public employees.

It is considered that there is good reason to deny the possibility of limiting the right of members of the administration of the State to form and join trade unions. As is evident from the travaux préparatoires, the intention of article 8(2) was not to provide for such restrictions but to merely make them possible in certain circumstances.<sup>142</sup> In particular, the purpose appears to have been to bring article 8(1) into line with article 22 ICCPR.<sup>143</sup> Article 22 ICCPR, in outlining the right to form and join trade unions, makes no allowance for the imposition of restrictions upon

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<sup>139</sup> ESCOR, Supp.(No.3), at 58, para.226, UN Doc.E/1991/23 (1991).

<sup>140</sup> Dao (ILO), E/C.12/1990/SR.44, at 8, para.38.

<sup>141</sup> It might also be noted that as far as ILO standards are concerned, more restrictions will be tolerated as regards the right to strike than the right to form and join trade unions.

<sup>142</sup> *See above*, text accompanying note 113.

<sup>143</sup> *See above*, text accompanying note 54.



the rights of members of the administration of the State. It is considered that, in light of article 22 ICCPR and ILO standards,<sup>144</sup> the real intention of the drafters was to allow restrictions *vis a vis* the armed forces and the police in relation to the whole of article 8(1), but allow for restrictions as regards members of the administration of the State only in the case of the right to strike.<sup>145</sup>

Although the terms of article 8 are generally obscure, it is arguable that use of the term "lawful" restrictions in article 8(2) was intended to refer to the criteria laid down in article 8(1)(a) to govern the imposition of restrictions on the right to form and join trade unions. Accordingly, any restrictions imposed upon the right to form and join trade unions should be "prescribed by law" and "necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others".<sup>146</sup> If this were the case, it would be difficult to justify a general restriction upon the right of public servants to join or form trade unions irrespective of the type of work that they undertake.

Another area that has attracted the attention of the Committee is the extent to which non-nationals are allowed full participation in trade unions. Members of the Committee have taken the position that restrictions placed upon the right of foreigners to take part in trade union activities might be incompatible with the Covenant.<sup>147</sup> In both the cases of Costa Rica and Panama, certain members expressed the view that the restrictions imposed constituted a violation of the Covenant. The fact that in neither case did the Committee as a whole adopt this position, is perhaps a reflection of the fact that trade union participation itself was not prohibited, but merely the holding of

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<sup>144</sup> Those contained in ILO Convention No.87, *supra*, note 114.

<sup>145</sup> For the situation with respect to the right to strike, *see below*, text accompanying notes 226-274.

<sup>146</sup> For a discussion of limitations generally, *see below*, text accompanying notes 179-189.

<sup>147</sup> *See*, Alvarez Vita, E/C.12/1990/SR.40, at 11, para.52; Texier, E/C.12/1990/SR.40, at 12, para.56. As far as the ILO is concerned, Article 6(1)(a)(ii) of the ILO Migration for Employment Convention (Revised) of 1949 (No.97), 120 U.N.T.S. 71, provides for equal treatment regarding membership of trade unions for foreign workers. This has been supplemented by article 10 of the ILO Migrant Workers (Supplementary Provisions) Convention of 1975 (No.143), 1120 U.N.T.S. 323. *Cf.* Article 19, European Social Charter (1961); UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).



executive positions within trade unions.<sup>148</sup> It is likely that, were a State to entirely restrict the rights of non-nationals to join or form trade unions, the Committee would take a stronger line.

## 2) Subject to the Rules of the Organisation Concerned

Article 8(1)(a) provides for the right to join the trade union of one's choice "subject only to the rules of the organisation concerned". As the travaux préparatoires make clear, this provision was included to protect the right of trade unions to establish internal rules and maintain control over their own membership.<sup>149</sup> The ILO has noted that the free determination of the structure and membership of trade unions is an essential element of the right to form and join trade unions.<sup>150</sup> The need to protect unions from State interference already has some recognition in article 8(1)(c) in which their right to function freely is recognised. Article 8(1)(a), however, appears to centre upon the dynamic between the interests of the individual and those of the organisation.

The only occasion on which this issue has come to be discussed was in the case of the Democratic People's Republic of Korea. Members of the Committee raised questions over a statement to the effect that the right to join trade unions was subject to a provision which stipulated that the right was acknowledged "once they recognize the programme and rules of the Korean trade unions and strive to implement them".<sup>151</sup> One member went so far as to say that this seemed to be an "extremely restrictive provision".<sup>152</sup> Unfortunately the Committee members did not take the opportunity to establish what principles they considered were involved.

Although it is not appropriate for the State to lay down conditions for membership of a trade union, it is reasonable to expect the right to join trade unions to be conditional upon the internal membership rules of the organisation concerned. If otherwise, it might provide the State with an excuse for undue interference in trade union organisation. However, it might well be appropriate for the State to intervene on behalf of the

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<sup>148</sup> See below, text accompanying note 201.

<sup>149</sup> See above, text accompanying notes 40-43.

<sup>150</sup> General Survey, *supra*, note 133, para.121.

<sup>151</sup> E/1984/6/Add.7. para.66.

<sup>152</sup> Konate, E/C.12/1987/SR.22, at 3, para.6.



individual to ensure that trade unions do not discriminate unlawfully in their membership rules.<sup>153</sup>

### 3) The Trade Union "Of his Choice"

The right to form and join the trade union "of his choice" would seem to provide for a right not to be compelled to join a particular trade union. Whilst simple in principle, the matter is clouded in cases where there is only one trade union, or where a union security agreement is in operation. Each of these matters will be dealt with in turn.

#### a) Trade Union Diversity.

Whilst the Committee rather neutrally requests information as to the "number and structure of trade unions established",<sup>154</sup> members of the Committee have taken a stronger line in arguing that "plurality of trade unions formed part of the notion of freedom of trade union rights".<sup>155</sup> Accordingly in cases where only a single trade union<sup>156</sup> or a single federation<sup>157</sup> exist in the whole country, Committee members have considered the States concerned to be in violation of the Covenant.

The position adopted by the individual members of the Committee above is controversial. Although there is clearly a need to protect union-activity from State interference,<sup>158</sup> it might well be to the advantage of workers, particularly in small developing countries, to avoid trade union multiplicity. This would certainly be the case as far as collective bargaining was concerned. Thus the formation of a single trade union or federation, might in itself be a matter of choice as far as the workers are concerned. It could not possibly be the case that the State is required to establish new trade unions itself to cater for individual choice.

It is submitted that in cases where a single trade union exists, the Committee should direct its attention to whether it emerged as

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<sup>153</sup> For the degree to which States are under an obligation to eliminate discrimination between private individuals and groups *see above*, Chapter 4, text accompanying notes 232-245.

<sup>154</sup> Reporting Guidelines, *supra*, note 126, at 95.

<sup>155</sup> Konate, E/C.12/1987/SR.13, at 5, para.22.

<sup>156</sup> *See*, Texier, E/C.12/1989/SR.12, at 4, para.18.

<sup>157</sup> *See*, Sparsis, E/C.12/1988/SR.4, at 6, para.32.

<sup>158</sup> It has been noted that provisions providing for single trade unions generally aim at the control of the trade union movement by the public authorities. Pankert, *supra*, note 138, at 179-180.



a result of the freely chosen will of the workers concerned,<sup>159</sup> and the extent to which the right to form new trade unions exists. The State here has an obligation to refrain from action that would institutionalise the single trade union in law.<sup>160</sup> The essential question then, is not whether or not trade union diversity exists, but whether that diversity remains a possibility.<sup>161</sup>

#### b) Union Security Agreements

It is clear that when an worker takes up employment in an undertaking where a union security clause (whether pre- or post-entry<sup>162</sup>) is in operation, he or she is effectively obliged to join the union concerned.<sup>163</sup> In such a situation, the restriction upon freedom of choice is often justified as a necessary means for securing union bargaining power.<sup>164</sup> Although article 20(2) of the UDHR provides that "[n]o one may be compelled to belong to an association", other international instruments display more caution in this respect. Article 2 of ILO Convention No.87 leaves it open to the States concerned as to whether union security agreements are considered to be legitimate. Similarly, proposals to insert provisions guaranteeing the negative freedom of association in

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<sup>159</sup> This point has occasionally been made by members of the Committee, *see e.g.*, Mrachkov, E/C.12/1991/SR.7, at 11, para.47.

<sup>160</sup> An interesting point, taken up by only one member, was the general federation of agricultural workers in Syria that "had been established under Decree No.127/1964" and that two other organisations had been merged by decree (No.21/1974), Khoury (Syria), E/C.12/1991/SR.7, at 5, para.16. *Cf.* General Survey, *supra*, note 133, para.137. This does raise serious questions about the legitimacy of the closed shop however, *see below*, text accompanying notes 174-179.

<sup>161</sup> Jenks, *supra*, note 134, at 180; Valticos, *supra*, note 133, at 82.

<sup>162</sup> A post-entry closed shop agreement is sometimes referred to as an "open shop agreement", *see*, Pankert, *supra*, note 138, at 182. There are, in addition to the two forms of closed shop agreements, agency shop agreements under which workers, while not being required to become union members, are obliged to pay dues to the union concerned.

<sup>163</sup> In post-entry closed shop agreements there is of course the theoretical possibility of the worker terminating his or her employment before entry into the Union.

<sup>164</sup> Pankert identifies four main objectives of trade union security agreements: i) to enable unions to control access to jobs; ii) to strengthen the position of the unions in a hostile environment; iii) to force outsiders to share the financial burden of the operation of the trade union; and iv) to strengthen trade unions as an indispensable partner for the effective operation of the industrial relations system. Pankert, *supra*, note 138, at 182.



the ICCPR<sup>165</sup> and the ECHR<sup>166</sup> were rejected. Certainly there was no real discussion of the matter during the drafting of the ICESCR.

As far as the Covenant is concerned, there are two issues. First is whether the right to join trade unions of one's choice includes a right not to join a particular trade union. Secondly, whether dismissal resulting from failure to join the union concerned could amount to a violation of the right to work in article 6.<sup>167</sup> In both cases there is clearly a tension between the rights of the individual and the right of trade unions to function freely and effectively.

To some extent, the terms of the Covenant point to the legitimacy of closed shop agreements. Unlike the ECHR and the ICCPR the right to join trade unions is not placed in the context of "freedom of association" and thus arguably does not bear the same connotations of negativity.<sup>168</sup> Moreover, in specifically outlining the rights of trade unions the Covenant appears to demand that the relative interests of trade unions should not be dismissed out of hand. Indeed, just as much as the right of trade unions to function freely may be subject to limitations "for the protection of the rights and freedoms of others",<sup>169</sup> that is also the case as regards the individual right to join trade unions.<sup>170</sup> It is quite possible to interpret the "rights of others" in article 8(1)(a) as including the rights of trade unions. Far from outlawing closed shop agreements, the text of the Covenant suggests that the position is to be determined on a case by case basis and justified by reference to the appropriate limitation clauses found in article 8.

In a recent case, however, the Committee has indicated that it will consider closed shop agreements to be a violation of the individual's right to join and form trade unions of his or her

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<sup>165</sup> *Ibid*, at 181-2.

<sup>166</sup> *See*, Shea C., "The Case of Young, James and Webster: British Labour Law and the European Convention on Human Rights", 15 Cornell I.L.J., 489, at 506 (1982).

<sup>167</sup> For the extent to which article 6 protects the individual worker from arbitrary dismissal, *see above*, Chapter 5, text accompanying notes 210-226.

<sup>168</sup> For a discussion of the implications of "rights" and "freedoms" in the context of the closed shop *see*, von Prondzynski F., "Freedom of Association and the Closed Shop: The European Perspective", 41 C.L.J., 256, at 263-4 (1982).

<sup>169</sup> Article 8(1)(c).

<sup>170</sup> Article 8(1)(a).



choice. In its comments upon the additional information supplied by Zaire, the Committee included the following statement:

"The Committee would like to draw the attention of the Government of the Republic of Zaire to the fact that the provisions of Zairian law concerning automatic membership of permanent staff of the State public services in the National Union of Zairian Workers (Ordinance No.73-223 of 25 July 1973) seems to be inconsistent with the obligations under article 8 of the Covenant, which guarantees the freedom of the individual to join the trade union of his choice".<sup>171</sup>

It would appear that the Committee is prepared to take a stance similar to that of the Committee of Independent Experts to the European Social Charter in prohibiting both the pre-and post-entry closed shop on the basis that the right to join a trade union implicitly includes a right not to join a trade union.<sup>172</sup> As suggested above, this was not necessarily the only conclusion that the Committee could have drawn from the text of article 8, and was perhaps unduly strict on the point. It is considered that it would have been better to leave such matters to be determined by the State in conjunction with the unions concerned.

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<sup>171</sup> UN ESCOR, Supp.(No.3), at 78, para.328, UN Doc.E/1992/23, (1992).

<sup>172</sup> The Committee of Independent Experts has taken the following position:

"Considering that freedom to join trade unions, guaranteed by Article 5 of the Charter, necessarily implies the absence of any sort of obligation to become or remain a member of a trade union, the Committee held that the absence of adequate protection of such freedom in national law (either through lack of appropriate statutes or through case-law validating practices conflicting with freedom to organise) cannot be considered as consistent with Article 5 of the Charter."

Conclusions XI-I, at 78 (1989).

The European Court of Human Rights has similarly found, on the particular facts of the case, that the dismissal of employees for failing to join a trade union under a closed shop agreement that was imposed during their employment, to be a violation of the ECHR, *see, Young, James and Webster Case, supra*, note 5. *Cf. Shea, supra*, note 173; von Prondzynski, *supra*, note 175; Forde M., "The European Convention on Human Rights and Labour Law", 31 *A.J.C.L.*, 301 (1983); Van Hoof G., *Theory and Practice on the European Convention on Human Rights*, 428-440 (2nd Ed.1990).



#### 4) Conditions

The Committee, in its reporting guidelines, requests States to supply information upon the substantive and formal conditions which must be fulfilled in order to form and join trade unions.<sup>173</sup> It seems to have in mind provisions that require a minimum level of membership for an organisation to gain the status of a trade union, or restrictions on membership to those working in specific trades.<sup>174</sup> The Committee has not as yet expressed any opinion over what conditions it feels are acceptable, but it is implicit in its approach that the need to impose certain conditions on the establishment of trade unions should not be such as to impair the effective exercise of that right. Certainly members of the Committee have been particularly wary of State involvement in the creation of trade unions.<sup>175</sup> It is considered nevertheless that the Committee faces an uneasy task in determining the borderline between legitimate regulation and unlawful restriction.<sup>176</sup>

It is submitted that reference be made to ILO standards here. As far as the ILO is concerned, although formalities over the formation of trade unions may be prescribed by law, they must not be equivalent to previous authorization nor constitute an obstacle amounting to a prohibition.<sup>177</sup> More specifically, where registration is necessary to gain legal personality, the conditions should not be such as to restrict the right to freely establish such organisations.<sup>178</sup>

#### 5) Restrictions

The Committee, quite appropriately, directs most of its attention to the imposition of restrictions upon the right to form and join trade unions. Thus in its reporting guidelines it asks for information as to any legal restrictions that are placed upon this

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<sup>173</sup> Reporting guidelines, *supra*, note 126, at 94.

<sup>174</sup> For the ILO position on these matters *see*, Pankert, *supra*, note 138, at 179.

<sup>175</sup> *See above*, text accompanying note 154-157.

<sup>176</sup> *See*, von Prondzynski F., Freedom of Association and Industrial Relations: A Comparative Study, 25 (1987).

<sup>177</sup> General Survey, *supra*, note 133, para.105. Valticos, *supra*, note 133, at 82.

<sup>178</sup> Article 7, Freedom of Association Convention. *See generally*, General Survey, *supra*, note 133, paras 106-117.



right and their application over time.<sup>179</sup> Individual members have often pursued such questions themselves.<sup>180</sup>

However, the text of the Covenant is by no means clear as to the relevant provisions that govern the imposition of restrictions upon the right to form and join trade unions. Article 8(1)(a) contains its own outline of the general criteria that govern the imposition of lawful restrictions upon the right to form and join trade unions. Article 8(1), however, is subject to the terms of article 8(2) which provides that the article as a whole should not prevent the imposition of lawful restrictions upon members of the police, armed forces, or members of the administration of the State. Further, the legality of restrictions imposed upon rights within article 8 would also appear to be governed by the general terms of article 4 which outlines the characteristics of permissible limitations upon all the rights in the Covenant. As mentioned above, the position is particularly confusing as regards the legitimacy of restrictions upon the right to form and join trade unions of members of the administration of the State.

The Committee has not, as yet, undertaken to clarify either the meaning or the relative scope of the limitation clauses. It is considered that in order to give article 8 some meaningful content the Committee will have to begin by untangling the knot of limitation clauses that serve to obscure the level of protection offered by the rights. As an initial point it is clear that article 4 was only intended to apply with respect to those articles that were not already subject to limitations.<sup>181</sup> Indeed, the limitations in article 8(2) were created on the basis that article 4 would not apply to article 8.<sup>182</sup> It is considered that the legality of a restriction should initially be determined by the specific provisions article 8(1)(a).

According to article 8(1)(a), restrictions should be "prescribed by law"<sup>183</sup> and be "necessary in a democratic society in the interests of national security or public order or for the

<sup>179</sup> Reporting Guidelines, *supra*, note 126, at 94.

<sup>180</sup> See e.g., Badawi El Sheikh, E/C.12/1987/SR.22, at 2, para.3; Texier, E/C.12/1987/SR.5, at 6, para.26; Simma, E/C.12/1987/SR.13, at 9, para.44.

<sup>181</sup> See, UN Doc.A/2929, *supra*, note 6, at 25, para.50.

<sup>182</sup> See *above*, text accompanying notes 57-61.

<sup>183</sup> The French text in contrast uses the term "provided by law" (*prévues par la loi*).



protection of the rights and freedoms of others".<sup>184</sup> Such terms are identical to those found in article 22 ICCPR and have been the subject of considerable jurisprudence in the European Court of Human Rights.<sup>185</sup> The European Court has stipulated *inter alia* that the law concerned must be both accessible and enable the individual to foresee the legal consequences of his or her actions.<sup>186</sup> That the action taken must be "necessary" has been interpreted as meaning that it should be more than merely "reasonable" or "desirable", but should conform to a "pressing social need".<sup>187</sup> In addition, the Court has invoked a principle of proportionality in determining whether or not the action taken was justified by the aimed pursued.<sup>188</sup> If the Committee were to follow the European Court's interpretation of these terms, it would immediately have a good framework for evaluating the legitimacy of limitations.

It is considered that the Committee should be slightly circumspect about the application of article 8(2) to the right to form and join trade unions in article 8(1)(a). As suggested above, the scope of limitations that it seems to legitimise is far greater

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<sup>184</sup> The French text makes clear that the term "necessary" is to apply separately to each of the four justifications:  
 "L'exercice de ce droit ne peut faire l'objet que des seules restrictions prévues par la loi et qui constituent des mesures nécessaires, dans une société démocratique, dans l'intérêt de la sécurité nationale ou de l'ordre public, ou pour protéger les droits et les libertés d'autrui."

<sup>185</sup> See generally, Jacobs F., "The 'Limitation Clauses' of the European Convention on Human Rights", in de Mestral *et al* (eds), The Limitation of Human Rights in Comparative Constitutional Law, 21, at 30-34 (1986). See also, Kiss A., "Permissible Limitations on Rights", in Henkin L.(ed), The International Bill of Rights, 290 (1981); Lockwood B., Finn J. and Jubinsky G., "Working Paper for the Committee of Experts on Limitation Provisions", 7 Hum.Rts.Q., 35 (1985).

<sup>186</sup> Sunday Times v. United Kingdom, Eur.Court H.R., Series A, Vol.30, para.49, Judgement of 26 Apr.1979, (1979-80) 2 EHRR 245.

<sup>187</sup> Handyside Case, Eur.Court H.R., Series A, Vol.24, para.48, Judgement of 7 Dec.1976, (1979-80) 1 EHRR 737. It is clear, however, that the European Court will allow States a "margin of appreciation" in determining whether or not a limitation is "necessary". For the operation of the margin of appreciation doctrine see, MacDonald R., "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights", in International Law and the Time of its Codification: Essays in Honour of Robert Ago, 187 (1987); O'Donnell T., "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", 4 Hum.Rts.Q., 474 (1982).

<sup>188</sup> Sunday Times Case, *supra*, note 186, paras.62, 67.



than that provided by either the ILO or the ICCPR.<sup>189</sup> As a general provision it would appear to require that all the terms of article 8(1) are read in such a way to allow for restrictions to be placed upon the rights of members of the armed forces, police and the administration of the State. Nevertheless, it does state that any such restrictions should be "lawful". It would not deprive article 8(2) of all meaning if the term "lawful" were read to mean "in accordance with the specific requirements laid down for the imposition of restrictions within the terms of article 8(1)". Such an interpretation would allow the Committee a certain degree of control over the imposition of restrictions under the terms of article 8(2).

### C) ARTICLE 8(1)(b): THE RIGHT TO FEDERATE

The right of trade unions to establish national federations or confederations and for the latter to join international trade-union organisations is clearly related to the right of trade unions to function freely as established in article 8(1)(c). At the same time, many of the provisions that relate to the establishment of trade unions within a given country (governed by article 8(1)(a)), will also apply to national federations.

According to the reporting guidelines, the Committee expects States to provide information on how the right to federate and affiliate internationally is secured and any restrictions that are placed upon such a right. This reflects the established practice of the individual members.<sup>190</sup> Although no specific comment has been made, it would seem appropriate for the Committee to provide that the same rights and guarantees apply to federations as to trade unions themselves.<sup>191</sup>

Thus far it could only be said that the right to federate should not be subject to undue State control. In one case members of the Committee were critical of the need for approval from the Minister for Social Affairs and Labour for trade unions in Jordan to join an international organisation.<sup>192</sup> Such requirements have

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<sup>189</sup> See *above*, text accompanying note 138.

<sup>190</sup> Questions have included: Did trade unions have the right to form confederations in Jordan? Konate, E/C.12/1987/SR.7, at 3, para.5. Were trade unions freely allowed to affiliate internationally in Korea? Sparsis, E/C.12/1987/SR.21, at 9, para.40.

<sup>191</sup> Cf. Article 6 and 7 ILO Convention No.87, *supra*, note 114.

<sup>192</sup> See, Sparsis, E/C.12/1987/SR.6, at 10, para.45; Alvarez Vita, E/C.12/1987/SR.6, at 11, para.50.



also been criticised by the ILO Committee on Freedom of Association.<sup>193</sup>

It is interesting to note that the United Kingdom, upon signature, reserved the right "not to apply subparagraph (b) of paragraph 1 in Hong Kong, in so far as it may involve the right of trade unions not engaged in the same trade or industry to establish federations or confederations".<sup>194</sup> On ratification the government went further in reserving the right not to apply article 8(1)(b) at all in Hong Kong.<sup>195</sup>

#### D) ARTICLE 8(1)(c): THE RIGHT OF TRADE UNIONS TO FUNCTION FREELY

The free functioning of trade unions could be said to include *inter alia* the right to federate and affiliate internationally and to a lesser degree, the right to strike (or perhaps to organise strikes), both of which stand as separate rights within the Covenant. The additional protection provided by the right to function freely would then seem to be the protection of the internal organisation of trade unions, the right to organise and take action short of strikes, the right to bargain collectively, and the protection of trade unions from dissolution or suspension.

##### 1) The Internal Organisation of Trade Unions.

If trade unions are to be given the right to function freely they must have the ability to draw up their constitutions and rules, to elect their own representatives and organise their administration and policies. Neither the Committee as a whole, nor its individual members have made significant indications as to the extent to which the State may control the internal affairs of trade unions.<sup>196</sup>

The freedom of trade unions to establish their own rules of membership and election would seem to be confirmed by article 8(1)(a) which refers to "the rules of the organisation concerned".<sup>197</sup> What is of concern here is the extent to which the

<sup>193</sup> Pankert, *supra*, note 138, at 185.

<sup>194</sup> UN Doc.E/C.12/1988/1, at 17 (1987).

<sup>195</sup> *Ibid*, at 18.

<sup>196</sup> The only indication that members of the Committee will concern themselves with this area was the remark that the existence of a Trade Union Office to "monitor trade union organisations" seemed to constitute an interference in the activities of trade unions incompatible with article 8(i)(c) of the Covenant. Mratchkov, E/C.12/1990/SR.40, at 13, para.63.

<sup>197</sup> *Cf.* Article 3(1) ILO Convention No.87, *supra*, note 114.



State may control the content and operation of those rules. It is axiomatic, as the ILO notes, that State control should not be such as to impede the normal running of the organisation.<sup>198</sup> A number of States have rules disqualifying certain kinds of person from election as union officers such as those engaged in occupations other than that which they wish to represent, foreign nationals and those convicted of crimes which suggest that they are untrustworthy.<sup>199</sup> The ILO Committee of Experts has noted that in such cases there is a real risk of arbitrary and improper interference in trade union affairs by the State.<sup>200</sup>

In both cases of Costa Rica and Panama, it emerged that non-nationals were barred from holding executive positions in trade unions.<sup>201</sup> On neither occasion was there a great deal of discussion in the Committee of the matter, but each time a passage was included in the Committee's concluding comments that stated:

"The view was expressed that the restrictions placed on the participation of foreigners in trade unions were not in conformity with article 8 of the Covenant".<sup>202</sup>

In utilising the phrase "the view was expressed" the Committee makes it clear that this was the view of only one or two members. However, the fact that the matter found its way into the concluding observations shows the strength of feeling of the members concerned. It is considered that the Committee should tread with caution in this field. As is evident, a number of States have rules concerning the eligibility of non-nationals to executive posts in trade unions. Consideration needs to be given to whether the limitations imposed have a legitimate purpose within the terms of the Covenant. If not they may be considered an excessive interference in the activities of the trade unions concerned.

The Committee has not yet attempted to outline those activities of trade unions that are protected by their right to function freely or the degree to which those activities may be subject to legal regulation. Certainly in so far as the free functioning of trade unions implies the right of trade unions

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<sup>198</sup> Pankert, *supra*, note 138, at 186.

<sup>199</sup> *Ibid*, at 186-7.

<sup>200</sup> General Survey, *supra*, note 133, at 178-9.

<sup>201</sup> Costa Rica: Dao, E/C.12/1990/SR.40, at 8, para.36. Panama: Rattray, E/C.12/1991/SR.3, at 9, para.43.

<sup>202</sup> Costa Rica: ESCOR, Supp.(No.3), at 50, para.194, UN Doc. E/1991/23, (1991); Panama: ESCOR, Supp.(No.3), at 33, para.138, UN Doc.E/1992/23 (1992).



organise their own administration, it would seem to involve freedom from excessive control of their finances and the protection of trade union premises and correspondence. Additionally, as the ILO has noted,<sup>203</sup> trade unions should also have the right to organize their activities and formulate programmes. Clearly, however, not every activity undertaken by trade unions will be so protected.

During the drafting of the Covenant considerable concern was expressed as to the possible political activities of trade unions. On the basis that trade unions should not undermine the existing democratic process, the phrase "for the promotion and protection of his economic and social interests" was included in article 8(1)(a).<sup>204</sup> It would seem unduly restrictive if trade unions were prohibited from all activities of a political nature. As has been noted, general economic and social policy questions that form a large part of the political diet of most countries do have an effect on the workers' interests.<sup>205</sup> Indeed in Western Europe, it is commonplace for a close association to exist between unions and political parties.<sup>206</sup> Accordingly, a general prohibition of political activities by trade unions would not be justifiable either in theory or practice. It might be argued that restrictions on the political activities of unions should only extend as far as ensuring that the means employed had sufficient relation to the objective of promoting the workers' interests, and should not be such as to compromise the continuance of the trade union movement.

Although it might be possible to find some justification for a whole range of trade union activities, it is clear that actions that only have a remote relation to the immediate objectives of a trade union would not be protected. It would be difficult to justify, for example, trade union action being taken to protest against a government's commitment to nuclear weapons or its maintenance of diplomatic relations with certain other States.

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<sup>203</sup> General Survey, *supra*, note 133, at 180-226.

<sup>204</sup> *See above*, text accompanying notes 44-52.

<sup>205</sup> General survey, *supra*, note 133, at 195.

<sup>206</sup> Bean R., Comparative Industrial Relations, at 22 (1985). It has been noted by the ILO Committee of Experts that States should not attempt to interfere with the normal functions of trade unions merely because of their freely established relationship with a political party. *See*, Report of the Director-General, Human Rights: A Common Responsibility, ILC, 75th Sess., at 17 (1988).



## 2) Collective Bargaining

Whereas an analysis of the variety of forms and functions of the collective agreement is outside the scope of this present study,<sup>207</sup> it is sufficient to note that they may serve the functions *inter alia* of preventing industrial conflict, increasing worker participation in decision-making and forming the basis for standard conditions of employment.

That article 8(1)(c) was intended to protect the right of trade unions to bargain collectively was apparent in the drafting of the Covenant.<sup>208</sup> Members of the Committee have also identified collective bargaining as being implicit in the concept of freedom of association.<sup>209</sup> The Committee specifically mentions the question of collective bargaining in its reporting guidelines and requests States to indicate the measures being taken to "promote free collective bargaining".<sup>210</sup> In implying that States have an obligation to promote collective bargaining, the Committee probably had in mind ILO Right to Organize and Collective Bargaining Convention, 1949 (No.98)<sup>211</sup> which is referred to in the guidelines. Article 4 of that convention provides that measures should be taken to promote the full development and utilization of collective bargaining "with a view to the regulation of terms and conditions of employment by means of collective agreements".<sup>212</sup> This has been supplemented by Recommendation (No.91) of 1951 which leaves it to the States Parties themselves to establish "machinery appropriate to the conditions existing in each country".<sup>213</sup>

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<sup>207</sup> See generally, Schmidt F. and Neal A., "Collective Agreements and Collective Bargaining" in Hepple B.A.(ed), Labour Law, Chap.12, Vol.XV, (1984); Cordova E., "Collective Bargaining" in Blainpain R.(ed), Comparative Law and Industrial Relations, 307 (3rd Ed, 1987); Kahn-Freund O.(ed), Labour Relations and the Law: A Comparative Study, 21-124 (1965); Bean, *supra*, note 205, at 70-99; Prondzynski, *supra*, note 183, at 39-58.

<sup>208</sup> See above, text accompanying note 69.

<sup>209</sup> See, Sparsis, E/C.12/1988/SR.3, at 6, para.18.

<sup>210</sup> Reporting guidelines, *supra*, note 126, at 94.

<sup>211</sup> ILO Right to Organise and Collective Bargaining Convention (No.98), 1 Jul.1949, 96 U.N.T.S. 257.

<sup>212</sup> See also, article 6(2), European Social Charter (1961).

<sup>213</sup> ILO Collective Agreements Recommendation (No.91), 1951, in ILO, International Labour Conventions and Recommendations 1919-1981, at 205 (1982).



In utilising the term "promote" the Committee makes clear that it does not expect States to guarantee to every trade union the right to bargain collectively. It is common practice in a number of States to allow employers to limit the number of trade unions with whom they conclude collective agreements. Often only the "most representative" union within a particular bargaining unit, has the right to consultation and negotiation in the collective bargaining process.<sup>214</sup> Certainly it would appear that the Committee requires, at least, that trade unions generally have the "freedom" to bargain collectively.<sup>215</sup> The principal question is, however, the degree to which the Committee will consider as justifiable, restrictions upon the right of particular trade unions to participate in the bargaining process.

Obligations incidental to the promotion of collective bargaining appear to be the encouragement of trade unionism; the establishment of mechanisms for dispute settlement; State restraint from interference in the process and result of collective bargaining (except in so far as it might be a party to the agreement); and encouragement of the extension of such agreements to other workers. Members of the Committee have emphasised in particular the importance of worker participation in the establishment of standards relating to conditions of work.<sup>216</sup> In particular questions have been asked as to the extent of worker participation in management,<sup>217</sup> in the creation of legislation<sup>218</sup> and the conclusion of collective agreements.<sup>219</sup> In addition, members have looked to the State to restrain itself from interference in the conclusion of collective agreements,<sup>220</sup> but to

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<sup>214</sup> See, Pankert, *supra*, note 138, at 180. In the context of the ECHR see, National Union of Belgium Police Case, Eur.Court H.R., Series A, Vol.19, Judgement of 27 Oct.1975, (1980) 1 EHRR 578; Swedish Engine Drivers Case, Eur.Court H.R., Series A, Vol.20, Judgement of 6 Feb.1976, (1980) 1 EHRR 617. See generally, Forde, *supra*, note 179.

<sup>215</sup> This is currently the position under the ECHR, see, Van Hoof, *supra*, note 172, at 436.

<sup>216</sup> See above, Chapter 6, text accompanying note 122.

<sup>217</sup> See e.g., Mratchkov, E/C.12/1987/SR.13, at 4, para.14.

<sup>218</sup> See e.g., Sparsis, E/C.12/1987/SR.5, at 7, para.32.

<sup>219</sup> See e.g., Sparsis, E/C.12/1987/SR.5, at 7, para.32.

<sup>220</sup> See e.g., Sparsis, E/C.12/1987/SR.6, at 10, para.42; Sparsis, E/C.12/1988/SR.3, at 6, para.18.



establish minimum standards through legislation in the absence of strong workers' organisations.<sup>221</sup>

It is notable however that ILO Convention No.98 does not apply to the armed forces, police, or public servants engaged in the administration of the State. This is specifically the wording adopted in article 8(2) of the Covenant. The ILO Committee of Experts has drawn a distinction between officials engaged in administration of the State who might be excluded from the protection of that convention and persons employed in public enterprises who should enjoy the right to free collective bargaining.<sup>222</sup> At the present stage it would seem that the Committee, by referring to Convention No.98, has taken up a position analogous to that of the ILO in this respect. This is equally apparent from its reference in the reporting guidelines to the ILO Labour Relations (Public Service) Convention (no.151)<sup>223</sup> which provides for the establishment and operation of public employees' organisations with procedures for the determination of conditions of work and settlement of disputes.<sup>224</sup> That special conditions are considered to exist in relation to civil servants has been recognised by individual members of the Committee.<sup>225</sup>

### 3) Protection from Dissolution or Suspension.

The third and final element of the right to function freely is the protection of trade unions from dissolution and suspension. Although the Committee has not expressed any opinion on this matter, it is clearly implicit in the terms of article 8 that trade unions should not be arbitrarily prevented from functioning freely. In cases where unions have been suspended or dissolved, the State concerned will have to justify it on the basis of national security, public order or the protection of the rights of others. In addition, it will have to be shown that the action taken was strictly necessary. As dissolution is the most extreme form of measure to be taken in this context, it is submitted that attention should be paid to whether it was strictly proportionate to the intended aim.

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<sup>221</sup> See e.g., Sparsis, E/C.12/1987/SR.6, at 10, para.42.

<sup>222</sup> Dao (ILO), E/C.12/1988/SR.17, at 9-10, para.60.

<sup>223</sup> ILO Labour Relations (Public Service) Convention (No.151), 27 Jun.1978, UKTS 33 (1981). Reporting guidelines, *supra*, note 126, at 94.

<sup>224</sup> Cf. Valticos, *supra*, note 133, at 90-1.

<sup>225</sup> See e.g., Sparsis, E/C.12/1990/SR.10, at 13, para.81; Sparsis, E/C.12/1990/SR.34, at 7, para.51.



### E) ARTICLE 8(1)(d): THE RIGHT TO STRIKE

In expressly including a provision of the right to strike the Covenant stands out in relation to other international instruments (with the exception of the European Social Charter<sup>226</sup>). The ILO in particular, has been forced to infer a right to strike from article 3 of ILO Convention No.87 under which trade unions have the right to formulate their programmes and organise their activities.<sup>227</sup> However, the fact that a right to strike may be inferrable from the prohibition of forced labour in article 6(1), the right to form and join trade unions "for the promotion and protection of his economic and social interests" in 8(1)(a),<sup>228</sup> and from the right of trade unions to function freely in article 8(1)(c) would suggest that even for those States that have made reservations with respect to article 8(1)(d),<sup>229</sup> a general prohibition of the right to strike would infringe the provisions of the Covenant. This would seem to be the position of certain members of the Committee who have stressed that the right to strike was central to the ability of unions to conduct collective bargaining.<sup>230</sup> Indeed one member asserted that the possibility of conducting meaningful collective bargaining without the right to strike was "an exercise in futility".<sup>231</sup>

Despite the fact that the right to strike is generally exercised as a form of collective action taken by trade unions, it is framed as an individual right in the Covenant. This is significant in so far as it indicates that protection in the case of strikes should not merely be afforded to the Union concerned but also to the individual who

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<sup>226</sup> Article 6(4) European Social Charter provides for both a right to strike and a right to lock-out:

"the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."

<sup>227</sup> Cf. Ben-Israel, *supra*, note 78, at 93.

<sup>228</sup> The HRC faced this question in the case of J.B.et al. v.Canada, *supra*, note 121. The majority decided (erroneously in the author's opinion), that as the ICESCR specifically included the right to strike in article 8(1)(d), it could not be considered to be an implicit element in the right to form and join trade unions.

<sup>229</sup> In addition to the reservations dealt with below, the following States have made reservations or declarations with respect to article 8(1)(d): France, Mexico, the Netherlands, New Zealand and Norway. UN Doc.ST/LEG/SER.E/10, at 124 and 126 (1992).

<sup>230</sup> See e.g., Konate, E/C.12/1990/SR.11, at 6, para.37.

<sup>231</sup> Sparsis, E/C.12/1988/SR.4, at 6, para.32.



should, in particular, be protected from dismissal on this ground.<sup>232</sup> The terms of Article 8(1)(d) are also significant in so far as no mention is made of the purposes for which strike action might be taken.<sup>233</sup> Whereas under article 8(1)(a) the right to form and join trade unions is specifically restricted to the "promotion and protection of his economic and social interests", no such condition is to be found in article 8(1)(d). Although this might imply that all strikes are to be protected, irrespective of their purpose, such a position would be difficult to sustain in light of current State practice.<sup>234</sup> For example, even in States where the constitution explicitly or indirectly guarantees the right to strike, political strikes are generally considered unlawful.<sup>235</sup>

The Committee has yet to establish an understanding of what form of action is protected by article 8(1)(d). In addition to the traditional form of strike (characterised by the complete stoppage of work) and its variants (such as the wildcat and sympathy strikes), there are several other forms of industrial action that might also be included in the definition such as the partial stoppage of work, the go-slow, the work to rule, the sit-down strike and the repeated walk-out.<sup>236</sup> It is submitted that a wide definition be adopted but a certain flexibility given to States as to the restrictions imposed on the various forms. The fundamental consideration should be whether or not the action taken is in pursuit of the economic and social interests of the workers concerned.

The Committee has looked to the establishment of the right to strike as a legal or constitutional right in the States concerned.<sup>237</sup> However, recognition is paid to the fact that some

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<sup>232</sup> For the importance of the individual aspect of the right to strike in the UK *see*, Ewing K., "The Right to Strike", 5 *Ind.R.L.*, 143, at 158 (1986).

<sup>233</sup> *Cf.* Article 6(4) of the European Social Charter (1961) which restricts the right to take collective action to cases of "conflicts of interests".

<sup>234</sup> Schermers uses this particularly as a reason for concluding that the right to strike is not properly a human right at all. Schermers H., "Is there a Fundamental Human Right to Strike?", 9 *Yrbk.Eur.L.*, 225 (1989).

<sup>235</sup> Birk R., "Industrial Conflict: The Law of Strikes and Lock-outs", in Blainpain R.(ed), *Comparative Labour Law and Industrial Relations*, 401, at 415 (3rd Ed.1987). For the ILO position *see*, Ben-Israel, *supra*, note 78, at 93-98.

<sup>236</sup> *See*, Ben-Israel, *supra*, note 78, at 93.

<sup>237</sup> Reporting guidelines, *supra*, note 126, at 95.



countries may secure the right through different legal approaches.<sup>238</sup> This reflects the approach of the ILO Committee of Experts who consider that the right to strike may be recognised either implicitly or explicitly in legislation.<sup>239</sup> Nevertheless, certain members of the Committee have been unhappy about situations where there is stated to be no right to strike but merely a freedom to strike.<sup>240</sup>

The matter arose in the context of the Jamaican report where the situation was explained:

"The Supreme Court had come to the decision, based on some English common law decisions, that there was in fact no right to strike as such.... Since it was an infringement of common law for a person to be compelled to work, slavery having been abolished, there must therefore be a freedom not to work. But if the consequences of exercising that freedom was that one withdrew services for which provision had been made in the contract, a case could arise where there was a breach of the contract of employment. From that it was inferred that there was a freedom to strike, but not the right to strike."<sup>241</sup>

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<sup>238</sup> The reporting guidelines make reference to other legal or factual approaches used to guarantee the right to strike, *ibid.*

<sup>239</sup> Dao (ILO), E/C.12/1988/SR.4, at 8, para.43.

<sup>240</sup> Birk explains these concepts:

"Freedom of strike means that the strike is legally permitted but no special privileges are granted. In this case the strike does not need special rules. The legal *limits* of the freedom to strike are hence a consequence of the *general legal order*. The strike is tolerated but not privileged.... The right to strike differs from the freedom to strike when the legal order evaluates the pursuit of collective interests more highly than the opposed individual obligations of the employment contract. The strike is therefore privileged. If the right to strike is guaranteed the legal order of a state must hence take precautions to ensure the exercise of this right and not to impede it".

Birk, *supra*, note 235, at 406-7.

<sup>241</sup> Rattray, E/C.12/1990/SR.15, at 5, para.22. It is interesting to note here that the legal situation in Jamaica had to be explained by one of the members of the Committee given the insufficient nature of the oral and written reports. *Cf.* Nembhard (Jamaica), E/C.12/1990/SR.12, at 4, para.29.

As regards the position of strikes under the UK common law, *see*, Morris G. and Archer T., Trade Unions, Employers and the Law, 174-277; Ewing K., The Right to Strike, 4-22 (1991). He concludes:

"The legal position of the British worker engaged in a labour dispute is quite remarkable. A strike, for whatever reason, is a breach of contract; any form of industrial action short of a strike can lead to the total loss of



Members of the Committee were critical of this situation. It was suggested that "mere freedom to strike was not sufficient"<sup>242</sup> and that the right to strike should be integral to the contract of employment.<sup>243</sup> Accordingly, it was felt that Jamaica should consider amending its legislation to bring it into line with the article 8(1)(d) of the Covenant.<sup>244</sup>

It is considered that the Committee members were taking an excessively strict line on this question. Whereas certain States have a constitutionally protected right to strike,<sup>245</sup> others ensure the right through statutory immunity from civil liability. What should be of concern to the Committee is not whether the law expressly provides for a freedom or a right to strike, but whether employees are able in practice, without legal penalty, to participate in strike action.<sup>246</sup> This means that in countries such as the UK, statutory immunity from liability should be sufficiently extensive to ensure the operation of the right to strike, and should be bolstered by the protection of the individual worker from dismissal.<sup>247</sup>

Nevertheless, members of the Committee have persisted in treating cases where strikes may in principle involve a breach of contract, with a

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pay; those engaged in industrial action may be dismissed with impunity (regardless of the reasons for the industrial action); there is no right to unemployment benefit; and strikers and their families are penalised by social welfare legislation, even when the dispute is the singular fault of the employer."

*Ibid*, at 141.

<sup>242</sup> Jimenez Butragueno, E/C.12/1990/SR.11, at 2, para.6.

<sup>243</sup> *See*, Konate, E/C.12/1990/SR.15, at 6, para.25.

<sup>244</sup> *See*, Konate, E/C.12/1990/SR.11, at 5, para.36.

<sup>245</sup> States that have declared the possession of a constitutional right to strike include: Costa Rica, E/1990/5/Add.3, at 18, para.29; Panama, E/1984/6/Add.19, at 17; Afghanistan, E/1990/5/Add.8, at 7, para.24.

<sup>246</sup> *Cf.* Rattray, E/C.12/1989/SR.18, at 8, para.42.

<sup>247</sup> The current legal position of the right to strike in the UK has come under much criticism from the ILO and the Committee of Independent Experts of the European Social Charter.

Two main points have concerned the ILO Committee of Experts. First the lack of adequate protection of the individual from dismissal during a strike. Secondly, the limited scope of immunity from civil liability. *See*, ILO Observation of the Committee of Experts on Conventions Nos.87 and 98 (1989), *cited in*, Ewing, *supra*, note 136, at 31-37. The Committee of Independent Experts have been concerned about the fact that an employer may dismiss all employees who take part in a strike. *See*, Conclusions XI-I, at 90 (1989).



certain degree of caution.<sup>248</sup> They seem to consider that the enactment of legislation to ensure the right to strike is a priority.<sup>249</sup> Whether or not it is always appropriate to seek legislation in this area, it is clearly important that existing legislation does not impede the ability of employees to strike.<sup>250</sup> Hence a general prohibition of strikes of a direct or indirect nature (for example through compulsory conciliation and arbitration procedures), would be inconsistent with the right to strike as found in the Covenant.<sup>251</sup>

Beyond the question of how the right to strike is formulated in domestic law, the Committee has concerned itself with any restrictions that are placed upon the exercise of the right and special provisions that relate to certain categories of workers.<sup>252</sup> Article 8(1)(d) provides that the right to strike should be ensured "provided it is exercised in conformity with the laws of the particular country", suggesting that States have considerable discretion in placing legal restrictions upon the enjoyment of the right to strike. This can be contrasted with the right to strike in ILO practice, which cannot be limited by legal provisions if they are not in conformity with the criteria laid down by the Freedom of Association Committee of the Governing Body.<sup>253</sup> However, as has been noted above, for those States that are party to ILO Convention (No.87), the terms of article 8(1)(d) have to be read in conformity with the provisions of the ILO Convention. Additionally, if higher standards were already in place, States could not lower them on the grounds of the Covenant as stipulated in article 5(2). This has been dubbed the "most-favourable-to-individual" clause.<sup>254</sup>

Nevertheless, it would probably be more appropriate to interpret the phrase "in conformity with the laws of the particular country" as legitimising the imposition of certain procedural requirements, rather than substantive limitations which are governed by article 8(2). Procedural requirements on the right to strike identified by the Committee on Freedom of Association have included the obligation to

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<sup>248</sup> See e.g. Rattray, E/C.12/1987/SR.5, at 9, para.44; Texier, E/C.12/1988/SR.3, at 5, para.15; Simma, E/C.12/1988/SR.4, at 7, para.36.

<sup>249</sup> See e.g., Rattray, E/C.12/1989/SR.17, at 17, para.90; Konate, E/C.12/1990/SR.11, at 3, para.12.

<sup>250</sup> Cf. Dao (ILO), E/C.12/1989/SR.8, at 11, para.59.

<sup>251</sup> For the ILO position see, Ben-Israel, *supra*, note 78, at 99-101.

<sup>252</sup> Reporting guidelines, *supra*, note 126, at 95.

<sup>253</sup> Ben-Israel, *supra*, note 78, at 87.

<sup>254</sup> Buergenthal T., "To Respect and Ensure: State Obligations and Permissible Derogations", in Henkin L.(ed), The International Bill of Rights, 72 at 89 (1981).



observe a certain quorum, to take the decision by secret ballot and to provide the employer with prior notice. Additionally certain temporary restrictions have been noted such as strike restrictions during conciliation and arbitration procedures, during the duration of a collective agreement and during a cooling-off period.<sup>255</sup>

As noted above, the Committee has concerned itself with the operation of such restrictions.<sup>256</sup> Although it has not as yet established any stated policy, it would seem that the Committee will respect the imposition of procedural requirements as far as they are reasonable and do not stand as an excessive restriction upon the enjoyment of the right to strike. Members of the Committee have also examined such restrictions as they operate in practice to ensure that they are not abused at the expense of the workers.<sup>257</sup> In the case of the Dominican Republic, a law which provided that in order to strike 60% of the workers concerned needed to have voted in favour, was thought to be contrary to the practice of the ILO's Committee on Freedom of Association and article 8(1)(d) itself.<sup>258</sup> Similarly, a Jordanian provision requiring workers to notify their employer of any planned strike between 14 and 28 days in advance was considered "unduly harsh"<sup>259</sup> and posed a "serious obstacle"<sup>260</sup> to the exercise of that right in that it could have "a dissuasive effect on workers wishing to strike".<sup>261</sup> Strangely enough, a provision in Rwanda that required all strikes in the private sector to be authorised by an Executive Bureau of Trade Unions was subject to little comment by the Committee.<sup>262</sup> It was perhaps a reflection of the initial tentativeness of the Committee that it did not question the power of such a body to prohibit strikes.

In addition to procedural restrictions the Committee has made note of restrictions on the right to strike of certain public servants and those

<sup>255</sup> Ben-Israel, *supra*, note 78, at 118-121.

<sup>256</sup> *See above*, text accompanying notes 179-189.

<sup>257</sup> *See e.g.*, Daoudi, E/C.12/1987/SR.5, at 4, para.15.

<sup>258</sup> *See*, Mratchkov, E/C.12/1990/SR.44, at 14, para.73.

<sup>259</sup> Article 103 Labour Act. Alvarez Vita, E/C.12/1987/SR.6, at 11, para.51; Simma, E/C.12/1987/SR.6, at 12, para.59.

<sup>260</sup> Texier, E/C.12/1987/SR.7, at 4, para.12. He commented that "Most domestic legislation provided for some period of prior notification, but the time-span was usually extremely short".

<sup>261</sup> Rattray, E/C.12/1987/SR.6, at 13, para.68. It is worth noting that a provision that provided for an eight-day delay after notification was not considered to be excessive by the Committee on Freedom of Association. *See*, Ben-Israel, *supra*, note 78, at 120.

<sup>262</sup> *But see*, Marchan Romero, E/C.12/1989/SR.10, at 7, para.34.



working in essential services.<sup>263</sup> It would seem that such restrictions are legitimised under article 8(2) where a general reference is made to members of the administration of the State. It is submitted that any such restrictions should also conform to the general criteria laid out in article 4, namely be determined by law, compatible with the nature of the right and be "solely for the purpose of promoting the general welfare in a democratic society". Reliance upon article 4 here is justified on the basis that article 8(1)(d) itself does not contain a specific limitation clause itself.<sup>264</sup> The Committee, although it has recognised the lawfulness of restrictions in general, has not defined which categories of workers are to fall under each heading, nor on what basis restrictions may be imposed. In this regard individual members have merely made enquiries into which categories of workers are covered by the restrictions that are employed.<sup>265</sup>

Given the practice of the ILO in this area,<sup>266</sup> it would seem appropriate if the Committee were to begin to define the categories of workers whose right to strike may be restricted. Clearly, if the article was to be read restrictively, members of the State administration should apply to civil servants alone. Those employed in State enterprises could not legitimately be deprived of the right to strike. This would certainly be the understanding of a number of States. For example, Japan declared upon ratification that 'members of the police' referred to in article 8(2) should be interpreted to include the fire service personnel of Japan.<sup>267</sup> In doing so, it clearly felt that the fire service personnel did not fall into the category of members of the administration of the state. It is considered that States would nevertheless be able to rely upon the general limitations clause in article 4 to impose restrictions upon the right to strike of those working in essential services.

The question of restrictions upon the right to strike arose notably

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<sup>263</sup> This has been the subject of a reservation by Trinidad and Tobago, which states with respect to article 8(1)(d) and 8(2) that it "reserves the right to impose lawful and/or reasonable restrictions on the exercise of the aforementioned rights by personnel engaged in essential services under the Industrial Relations Act or under any Statute replacing same which has been passed in accordance with the provisions of the Trinidad and Tobago Constitution". UN Doc. E/C.12/1988/1, at 16 (1987).

<sup>264</sup> It is argued above that article 4 does not in general apply to article 8, *see above*, text accompanying note 181.

<sup>265</sup> *See e.g.*, Alvarez Vita, E/C.12/1989/SR.10, at 7, para.33; Simma, E/C.12/1989/SR.18, at 2, para.2; Sparsis, E/C.12/1990/SR.44, at 12, para.56; Texier, E/C.12/1987/SR.5, at 6, para.26.

<sup>266</sup> *See*, Ben-Israel, *supra*, note 78, at 106-114.

<sup>267</sup> UN Doc.E/C.12/1988/1, at 13 (1987).



in the case of Panama. Following the comments of the ILO representative,<sup>268</sup> questions were asked as to the nature and scope of restrictions imposed upon the right to strike in Panama.<sup>269</sup> It was explained that certain restrictions were placed upon the exercise of the trade union rights of members of the civil service in Panama following a demonstration which coincided with an attempted *coup d'état*. Following the refusal of a request for them to rescind their decision to strike, the government had adopted Act No.25 authorising the dismissal of members of the civil service who jeopardised national security by taking part in strikes or demonstrations. There was, however, provision for administrative appeal which had been utilised by some public servants following their dismissal, a number of whom were subsequently reinstated.<sup>270</sup>

No real discussion of the matter was undertaken by the Committee, which seemed to accept the legitimacy of the Panamanian position as explained. Certainly, no mention was made of the matter in the Committee's concluding comments. The case is interesting in so far as it appears to be a situation that would normally be governed by a derogation clause. However, unlike the ICCPR,<sup>271</sup> the Covenant does not contain a derogation clause. Higgins explains this on the basis that derogation clauses are only necessary where there are strong implementation provisions.<sup>272</sup> It is clear, however, that article 8 is to be implemented in an immediate manner, and therefore does not contain the flexibility found in other articles.

The problem, however, is that although article 8(2) does allow restrictions to be made on the right to strike of members of the administration of the State, article 5(2) appears to provide that the provisions of the Covenant cannot be used as a justification for restricting the rights of individuals as currently enjoyed under national or international law.<sup>273</sup> If this is the case, then restrictions are valid only

<sup>268</sup> Swepston (ILO), E/C.12/1991/SR.3, at 6, para.23.

<sup>269</sup> See e.g., Sparsis, E/C.12/1991/SR.3, at 10, para.48.

<sup>270</sup> Ucros (Panama), E/C.12/1991/SR.3, at 13-14, para.64.

<sup>271</sup> Article 4 ICCPR provides that in time of public emergency which threatens the life of the nation, States Parties may take measures derogating from their obligations under the Covenant. On the operation of this provision see, Hartman J., "Working Paper for the Committee of Experts on Article 4", 7 *Hum.Rts.Q.*, 89 (1985); Meron T., *Human Rights Law-Making in the United Nations*, 86-100 (1986); McGoldrick D., *The Human Rights Committee*, 301-327 (1991).

<sup>272</sup> Higgins R., "Derogations under Human Rights Treaties", 48 *B.Y.I.L.*, 281, at 286 (1976-77). See also, Kiss, *supra*, note , at 291.

<sup>273</sup> See, Buergenthal, *supra*, note 254, at 89.



in so far as they are imposed before ratification, which would mean that Panama is acting in direct violation of the Covenant.

Although it is clear that States are less likely to resort to derogations in the case of economic, social and cultural rights,<sup>274</sup> if limitations cannot be placed upon the enjoyment of rights after ratification, States might be severely hampered from dealing with national emergencies in an effective manner. There is a case then for interpreting article 5(2) in a more restricted manner- perhaps subject to article 4 which provides for limitations for the purpose of promoting the general welfare in a democratic society.

Although this discussion presents no clear answers to the questions raised, it does suggest that the Committee has considerable work to do on defining the scope and application of the limitation clauses. The fact that little consideration was given to the Panamanian case is unfortunate not only because it deserved serious consideration by the Committee, but also because it provided the Committee with an opportunity to extrapolate certain principles for general application which was not taken.

#### **IV CONCLUSION**

In a number of respects, the Committee's task in evaluating State reports with respect to article 8 is considerably easier than for other articles. First, article 8 is confined to a relatively small area of State activity and is comparatively specific. Secondly, it is in general not subject to progressive implementation and therefore offers the Committee greater ease of assessment and evaluation of State performance. Thirdly, as with articles 6, 7 and 9, it is a subject area covered by the work of the ILO which has a plethora of standards that may readily be utilised by the Committee in developing the norms within the Covenant. Finally, the Committee has the opportunity of drawing upon the experience of other human rights supervisory bodies (such as the Committee of Independent Experts of the European Social Charter, the European Court of Human Rights and the HRC) in so far as they deal with the right to form and join trade unions or the right to freedom of association in general. In light of these considerations, the Committee's treatment of article 8 is a good indicator of how well the Committee has developed its role as a human rights supervisory body.

The Committee has got to the stage of establishing the broad nature of the obligations in article 8 and has taken a position on several important questions. In particular, one might note its opinion that a closed shop agreement operated in Zaire, was in violation of article 8 which guarantees the freedom of the individual to join the trade union of

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<sup>274</sup> See, Green L., "Derogations of Human Rights in Emergency Situations", 16 Can. Y.I.L., 92, at 103 (1978).



his or her choice. That this is but one of a number of cases in which Committee members have spoken out against States parties shows a willingness to enforce the standards within the Covenant and indicates that the Committee is receiving a certain amount of pertinent information. The Committee has been assisted in this regard by the representatives of the ILO, who have pointed out areas that have been of concern to ILO supervisory bodies. The statements of the ILO representatives have often appeared to "trigger" the interest of the Committee.

Whether or not the Committee will rely directly upon ILO standards it is clear that there is need for greater awareness and understanding of those standards and the general practice of States. As appeared from the Committee members' approach to Costa Rica and Panama, little attention was paid to the delicate manner in which the ILO generally approached the right of non-nationals to hold executive positions in trade unions. Similarly, their approach to the question of trade union diversity reflected a lack of sophistication that was out of place in the context of a complicated and sensitive issue. That the Committee should be aware of the need for greater delicacy is exemplified by Forde's comments on the European Court of Human Rights:

"The principal question... is the appropriateness of judges, many of whom possess relatively little industrial relations expertise, laying down common standards for collective bargaining systems of great complexity that often differ fundamentally from each other. Especially at the international level, there is a grave danger of amateurs, no matter how eminent they may be as jurists, tinkering with arrangements they do not fully understand, and tending to impose standards that may work in their countries upon the entirely different labour market systems of other States."<sup>275</sup>

Although premised by the perceived anti-union stance of the European Court, Forde's comments serve as a warning to the Committee.

To some extent the ability of the Committee to develop an understanding of article 8 is restricted by the lack of sufficient information and the general nature of the reporting procedure, but many of the faults of the system could be overcome by careful and considered questions both in the reporting guidelines and within the Committee itself. That article 8 is relatively detailed suggests

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<sup>275</sup> Forde, *supra*, note 179, at 332.



that particular attention should be paid to the specific wording of the provisions. In particular, an effort should be made to define the relative scope and meaning of the various limitation clauses. For example, consideration should be given to the term "members of the administration of the State" in article 8(2), and to the extent to which that provision as a whole overrides the specific terms of article 8(1)(a). As the terms of the constructive dialogue give little opportunity for discussion of the specific wording of article 8, it is clear that the Committee will need to adopt a General Comment on the question before any real headway is made.



## **CHAPTER 8: THE RIGHT TO AN ADEQUATE STANDARD OF LIVING**

### *Article 11*

*1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.*

*2. The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:*

*(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.*

*(b) Taking into account the problems of both food-importing and food exporting countries, to ensure an equitable distribution of world food supplies in relation to need."*

### **I) INTRODUCTION**

Article 11 is one of the most broad-ranging and general of the articles in the Covenant, encompassing a host of concerns that are usually addressed in the context of State "development". There is no doubt that the right to an adequate standard of living, including food, housing and clothing is of paramount importance not least because at minimum levels it represents a question of survival. It is also true to say that the right to an adequate standard of living has been violated "more comprehensively and systematically than probably any other right".<sup>1</sup> That the realisation of the right is overlaid by issues of economic development, agrarian reform, principles of nutrition, international trade and aid (to name but a few), poses a challenge to the Committee that may serve as an acid-test of its effectiveness as the principal supervisory body to the Covenant.

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<sup>1</sup> Alston P., "International Law and the Human Right to Food" in Alston P. and Tomasevski K.(eds), The Right to Food, 9-68, at 9 (1984). He speaks specifically about the right to food, but his comment would also seem to apply more generally to the right to an adequate standard of living.



Thus far the Committee has not shied away from addressing questions related to article 11. At its third and fourth sessions it conducted general discussions on rights contained within article 11, and at its sixth session adopted a General Comment on the right to housing. It would not be wrong to suggest that article 11 is the area in which the Committee's practice is most developed. Indeed, the growing confidence of the Committee in the area is highlighted by the fact that it was on the question of the right to housing that the Committee first found a State to be in violation of the Covenant.

## II) THE TRAVAUX PREPARATOIRES

### A) INTRODUCTION

Some of the earliest proposals relating to article 11 concerned the right to housing.<sup>2</sup> However, there is no doubt that article 25 UDHR probably played the most crucial role in determining its final content. At its seventh session in 1951, the Commission on Human Rights considered the rights in article 11 at its 203rd, 204th, 218th, 222nd and 223rd meetings.<sup>3</sup> In the following year, it resumed consideration of the rights at its 294th and 295th meetings.<sup>4</sup> The result of the Commission's deliberations on the question was two articles, the first recognising "the right of everyone to adequate food, clothing, and housing", and the second recognising "the right of everyone to an adequate standard of living and the continuous improvement of living conditions".<sup>5</sup>

The Third Committee then took over consideration of the article 11 at its 739th to 743rd meetings.<sup>6</sup> At its 741st meeting, the representatives of Ecuador and Mexico proposed the establishment of a Working Party on articles 11 and 12 for the purpose of drafting a compromise text in light of the amendments that had been proposed to that date. The Working Party met on a single occasion and produced a

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<sup>2</sup> See e.g., Koussoff (Byelorussian SSR), A/C.3/SR.299, at 186, para.18 (1950).

<sup>3</sup> UN Docs.E/CN.4/SR.203-4, 218, 222-3, 13 UN ESCOR, CN.4, (203-4, 218, 222-3 mtgs.), (1951).

<sup>4</sup> UN Docs.E/CN.4/SR.294-5, 14 UN ESCOR, CN.4, (294-5 mtgs.), (1952). See generally, UN Doc.A/2929, at 109-111, paras 29-32 (1955), 10 UN GAOR, Annexes, (Ag.Item 28), Pt.II, (1955).

<sup>5</sup> UN Doc.E/2573, Annex IA, 18 UN ESCOR, Supp.(No.7), (1954).

<sup>6</sup> UN Docs.A/C.3/SR.739-743, 11 UN GAOR, C.3, (739-743 mtgs.), at 293-311 (1957). See generally, UN Doc.A/3525, at 17-19, paras 120-144, 11 UN GOAR, Annexes, (Ag.Item 31), (1957).



mutually satisfactory formula with little dispute. Its report<sup>7</sup> was subsequently considered by the Committee and adopted in its entirety with two minor additions. The Third Committee's final draft of article 11 in 1955 contained merely the first of the four paragraphs.<sup>8</sup> Eight years later in 1963, the Third Committee came to discuss the matter again. A number of proposals were received and the final three paragraphs were adopted as article 11(2).<sup>9</sup>

## B) ARTICLE 11(1)

### 1) Two Separate Articles

In its first detailed discussion of the proposals, the Commission was split between those States that considered that the right to housing should be dealt with separately from the right to an adequate standard of living, and those who thought they should be dealt with together. Although there was no doubt that the right to housing fell within the concept of the right to an adequate standard of living the question was one of formulation. At one extreme, it was felt that the priority was to draft a provision on the right to an adequate standard of living. To single out housing as a separate provision would give it undue prominence,<sup>10</sup> especially in light of the fact that other elements such as health, clothing, food and transport were also relevant.<sup>11</sup> At the other extreme, it was argued that it would be difficult and indeed unnecessary, to include a provision outlining the general concept of an adequate standard of living.<sup>12</sup> A better policy would be to enunciate the elements of that standard in separate, specific and obligatory provisions.<sup>13</sup>

Although there was some support for the idea of a composite article outlining the right to an adequate standard of living "including

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<sup>7</sup> UN Doc.A/C.3/L.586, 11 UN GAOR, C.3, (1957).

<sup>8</sup> UN Doc.A/3525, *supra*, note 6, at 19, para.144.

<sup>9</sup> UN Docs.A/C.3/SR.1232, 1264, 1267-9, 18 UN GAOR, C.3, (1232, 1264, 1267-9 mtgs.), (1963). *See generally*, UN Doc.A/5655, at 20-23, paras 86-108, 18 UN GAOR, Annexes, (Ag.Item 48), (1963).

<sup>10</sup> *See e.g.*, Bowie (UK), E/CN.4/SR.222, at 18 (1951); Whitlam (Australia), E/CN.4/SR.222, at 20 (1951); Mehta (India), *ibid.*

<sup>11</sup> *See*, Yu (China), E/CN.4/SR.222, at 17 (1951).

<sup>12</sup> *See e.g.*, Valenzuela (Chile), E/CN.4/SR.222, at 19 (1951).

<sup>13</sup> *See*, Morosov (USSR), E/CN.4/SR.222, at 18 (1951).



adequate housing",<sup>14</sup> it was considered more convenient to adopt a separate provision on the right to housing without prejudice to its later position in the Covenant. Indeed certain States voted in favour of the text on the express condition that the Commission would not be bound by the decision to make it a separate provision.<sup>15</sup>

At the Commission's eighth session, the subject was reopened with a new proposal from the UK to delete the separate provision on the right to housing.<sup>16</sup> The UK argued that the concept was already implicit in other articles that related to conditions of work, standards of living and standards of health, and was therefore unnecessary and duplicitous.<sup>17</sup> It was also noted that the UDHR mentioned the right to housing as part of the right to an adequate standard of living.<sup>18</sup> On the other hand certain states argued that given the importance of the right to housing, the reference in article 12 (the right to an adequate standard of living) was not sufficient,<sup>19</sup> particularly as it might limit the right merely to the fulfilment of immediate needs.<sup>20</sup> Moreover, the question of whether or not housing formed part of an adequate standard of living depended upon demographic pressures and the availability of resources. Given this uncertainty, it was submitted that the right to housing should be stated in a separate article.<sup>21</sup> Although the UK was forced to withdraw its amendment over a question of procedure, it is apparent that the majority opposed the deletion of the article in any case.

In the Third Committee, it was decided almost immediately, upon the suggestion of the Swedish delegate, that articles 11 and 12 as drafted by the Commission should be discussed together.<sup>22</sup> During the discussion it was commented that the rights to food, housing and clothing could be seen as "illustrations" of the right to an adequate standard of living<sup>23</sup> or as "component elements".<sup>24</sup> Although China

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<sup>14</sup> See e.g., Roosevelt (USA), E/CN.4/SR.222, at 16 (1951); Cassin (France), *ibid.*

<sup>15</sup> See e.g., Roosevelt (USA), E/CN.4/SR.222, at 23 (1951).

<sup>16</sup> UN Doc.E/CN.4/L.83, 14 UN ESCOR, CN.4, (1952).

<sup>17</sup> See e.g., Hoare (UK), E/CN.4/SR.294, at 5 (1952).

<sup>18</sup> See, Whitlam (Australia), E/CN.4/SR.294, at 6 (1952).

<sup>19</sup> See e.g., Morosov (USSR), E/CN.4/SR.294, at 6 (1952); Mehta (India), E/CN.4/SR.294, at 8 (1952).

<sup>20</sup> See, Azkoul (Lebanon), E/CN.4/SR.294, at 11 (1952).

<sup>21</sup> See, Juvigny (France), E/CN.4/SR.294, at 9 (1952).

<sup>22</sup> A/C.3/SR.739, at 293, paras 1-8 (1957).

<sup>23</sup> Brena (Uruguay), A/C.3/SR.739, at 293, para.11 (1957).



objected that the right to an adequate standard of living was broader than these three rights and should stand alone,<sup>25</sup> the majority quickly decided to combine the two articles.<sup>26</sup> As the Indonesian representative noted, an adequate standard of living could not be achieved without adequate food, clothing and housing.<sup>27</sup>

## 2) The Right to Housing

The Commission had two draft articles before it: one from the USSR referring to a right to living accommodation,<sup>28</sup> and the other from the USA providing for a right to adequate housing. The USSR amendment was criticised for placing too much emphasis on the role of the State.<sup>29</sup> It was argued that other bodies should also assist in providing adequate housing and that "in many cases, indeed, such a measure would require international co-operation".<sup>30</sup> In the event, the USSR proposal was narrowly rejected.<sup>31</sup> However, following the rejection of an Egyptian amendment which referred to "living accommodation worthy of man", the USA proposal was adopted by a large margin.<sup>32</sup>

The draft article, finalised by the Commission in 1951 provided that "Each State Party to this Covenant recognises the right of everyone to adequate housing". It was unfortunate, and perhaps indicative of the drafting process as a whole,<sup>33</sup> that in concentrating on whether or not it was appropriate to draft such an article, the Commission failed to enter into a discussion as to the precise meaning of a right to "adequate housing".

At the Commission's eighth session, the USSR proposed an amendment to the effect that States parties would undertake to adopt all

<sup>24</sup> Hoare (UK), A/C.3/SR.740, at 299, para.26 (1957).

<sup>25</sup> *See*, Tsao (China), A/C.3/SR.739, at 295, para.32 (1957).

<sup>26</sup> A/C.3/SR.739, at 295, para.38 (1957).

<sup>27</sup> *See*, Sutanto (Indonesia), A/C.3/SR.740, at 298, para.23 (1957).

<sup>28</sup> UN Doc.E/CN.4/AC.14/2/Add.3, Sect.VI, at 4, 13 UN ESCOR, CN.4, (1951). The proposal read:  
"The State shall take the necessary legislative measures, to ensure to everyone living accommodation worthy of man".

<sup>29</sup> *See e.g.*, Cassin (France), E/CN.4/SR.222, at 21 (1951).

<sup>30</sup> Roosevelt (USA), E/CN.4/SR.222, at 19 (1951).

<sup>31</sup> Six votes to five, with seven abstentions. E/CN.4/SR.222, at 22 (1951).

<sup>32</sup> 12 votes to none with six abstentions. E/CN.4/SR.222, at 23 (1951).

<sup>33</sup> *See above*, Chapter 1, text accompanying notes 267-273.



necessary measures, particularly by legislation, to ensure to everyone a dwelling consistent with human dignity.<sup>34</sup> In defence of the provision it was argued that the State should be obliged not merely to recognise the right to housing, but should take "all necessary measures". This did not just imply the building of houses, but also measures such as subsidies, tax exemptions, loans, and the provision of the requisite materials on favourable terms.<sup>35</sup> In addition Chile argued that the general obligations in article 1 were not sufficient in the realm of housing. Housing was a field in which "the State as well as the community had a special responsibility to solve a problem affecting physical and moral welfare".<sup>36</sup>

On the other hand, this amendment was criticised for duplicating the obligations in article 1 (current article 2(1)). By doing so, the amendment would destroy the balance of the Covenant and imply that the right to housing was more important than other rights in the Covenant.<sup>37</sup> It was argued that the term "dwelling consistent with human dignity" was narrower than the term "adequate housing",<sup>38</sup> and if placed alone would provide an insufficient guarantee.<sup>39</sup> Moreover, some States considered that the amendment placed too great an emphasis on legislation which would be unacceptable to countries where private enterprise was involved.<sup>40</sup>

Although the amendment was finally rejected, this was done primarily on the basis that it duplicated article 2(1). That this was the case suggests that the measures outlined by the various members in the discussion, would nevertheless be applicable in relation to the implementation of the right to housing as it exists now.

### 3) Food and Clothing

Until the Commission's eighth session, no reference to clothing or food had been agreed upon. At that session however, an amendment was proposed by China which argued for the inclusion of the words "food,

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<sup>34</sup> UN Doc.E/CN.4/L.48, 14 UN ESCOR, CN.4, (1952).

<sup>35</sup> *See*, Boratynski (Poland), E/CN.4/SR.294, at 7-8 (1952).

<sup>36</sup> Santa Cruz (Chile), E/CN.4/SR.294, at 8 (1952).

<sup>37</sup> *See e.g.*, Juvigny (France), E/CN.4/SR.294, at 9 (1952); Azkoul (Lebanon), E/CN.4/SR.294, at 11 (1952).

<sup>38</sup> Azkoul (Lebanon), E/CN.4/SR.294, at 12 (1952).

<sup>39</sup> *See*, Bowie (UK), E/CN.4/SR.294, at 10 (1952).

<sup>40</sup> *See e.g.*, Roosevelt (USA), E/CN.4/SR.294, at 7 (1952); Juvigny (France), E/CN.4/SR.294, at 9 (1952).



clothing and..." before "housing".<sup>41</sup> The Chinese representative explained that although housing might be more important for industrialised countries, the need for food and clothing came first in countries with a rural economy, especially "underdeveloped countries".<sup>42</sup> There was considerable support for the inclusion of these other elements<sup>43</sup> to the extent that the amendment was finally adopted.

In the Third Committee, a proposal was made to include the term "adequate" before "food, clothing and housing".<sup>44</sup> A number of States had considered that the idea of "adequate" food, housing and clothing were implicit in an "adequate standard of living",<sup>45</sup> and therefore the repetition of the word was unnecessary.<sup>46</sup> However the amendment was favoured to the extent that it would clarify the text,<sup>47</sup> and would introduce the idea that those components of the standard of living should be maintained at a certain level.<sup>48</sup>

#### 4) An Adequate Standard of Living

An Australian proposal which provided for "the right to an adequate standard of living", had considerable support in the Commission<sup>49</sup> and was preferred to a US proposal which merely recognised the right to "improved standards of living".<sup>50</sup> The purpose of the Australian provision was to provide a text that was "concise and inclusive" and which could be seen to be a "kernel" to be expanded in later international agreements.<sup>51</sup>

There were, however, a number of critics of the article as proposed. As noted above, not all States were convinced as to the necessity of including a provision relating to the right to an adequate standard of living. In particular it was felt that the proposed right was "a very vague concept defying all attempts at definition" especially

<sup>41</sup> UN Doc.E/CN.4/L.57, 14 UN ESCOR, CN.4, (1952).

<sup>42</sup> Cheng Paonan (China), E/CN.4/SR.294, at 5 (1952).

<sup>43</sup> *See e.g.*, Hoare (UK), E/CN.4/SR.294, at 10 (1952).

<sup>44</sup> Oral amendment of the UK. UN Doc.A/3525, *supra*, note 5, at 18, para.136.

<sup>45</sup> *See e.g.*, Brillantes (Philippines), A/C.3/SR.743, at 309, para.4 (1957).

<sup>46</sup> *See e.g.*, Brena (Uruguay), A/C.3/SR.742, at 305, para.22 (1957).

<sup>47</sup> *See*, Mahmud (Ceylon), A/C.3/SR.742, at 306, para.35 (1957).

<sup>48</sup> *See e.g.*, Hoare (UK), A/C.3/SR.742, at 303, para.10 (1957).

<sup>49</sup> *See e.g.*, Bowie (UK), E/CN.4/SR.222, at 18 (1951).

<sup>50</sup> Roosevelt (USA), E/CN.4/SR.222, at 16 (1951).

<sup>51</sup> *See*, Whitlam (Australia), E/CN.4/SR.223, at 4 (1951).



given the different standards of living around the world.<sup>52</sup> Moreover, in some circumstances the standard of living had to be allowed to fall in order to carry out long-term economic development. The adoption of the proposal, it was thought, might prejudice further economic and social development.<sup>53</sup>

China argued that the formula should refer to "housing, health, clothing, food and means of transport".<sup>54</sup> It was initially pointed out that the question of health was to be dealt with at a later stage,<sup>55</sup> and that transport could not be seen to be "a first essential in an adequate standard of living".<sup>56</sup> Indeed India argued that whereas an adequate standard of living could be said to cover matters such as the right to health and education, only the essentials should be mentioned, namely food, clothing and housing.<sup>57</sup> Nevertheless, a Chinese amendment to this effect was rejected at the Commission's seventh session in 1951.<sup>58</sup> It was considered that there was a "general understanding of all that was implied by adequate standards of living"<sup>59</sup> and that the Commission should not attempt to define it as it would lead to "interminable and fruitless discussion".<sup>60</sup>

At the Commission's seventh session, a certain number of States noted that the concept of an adequate standard of living related to virtually all of the economic, social and cultural rights under discussion. In addition to the rights to food, housing and clothing, particular mention was made of the rights to work,<sup>61</sup> fair wages,<sup>62</sup> health,<sup>63</sup> and

<sup>52</sup> Valenzuela (Chile), E/CN.4/SR.222, at 19 (1951).

<sup>53</sup> *Ibid.*

<sup>54</sup> Yu (China), E/CN.4/SR.222, at 17 (1951).

<sup>55</sup> *See*, Chairman, E/CN.4/SR.222, at 18 (1951).

<sup>56</sup> Whitlam (Australia), E/CN.4/SR.223, at 4 (1951).

<sup>57</sup> *See*, Mehta (India), E/CN.4/SR.223, at 6 (1951).

<sup>58</sup> Seven votes to three with five abstentions. E/CN.4/SR.223, at 8 (1951).

<sup>59</sup> Bowie (UK), E/CN.4/SR.222, at 18 (1951).

<sup>60</sup> Bowie (UK), E/CN.4/SR.223, at 7 (1951).

<sup>61</sup> *See*, Cassin (France), E/CN.4/SR.223, at 7 (1951).

<sup>62</sup> *See*, Valenzuela (Chile), E/CN.4/SR.223, at 5 (1951).

<sup>63</sup> *See*, Yu (China), E/CN.4/SR.222, at 17 (1951). Later in the Third Committee, it was noted that article 11 had some relation to article 12, especially in as far as an adequate standard of living related to a person's "physical, mental and social well-being" mentioned in the latter article. Hoare (UK), A/C.3/SR.739, at 294, para.14 (1957).



education.<sup>64</sup> Given the broad scope of the concept of an adequate standard of living, several States suggested that it should perhaps be placed as a general article or "understanding" before the other rights.<sup>65</sup> The matter was not discussed further, it being decided that the order of the articles would be dealt with at a later stage.<sup>66</sup> Unfortunately no such rationalising process in fact took place.

Although it became apparent in the Third Committee that the rights to food, clothing and housing were to be considered at least as a partial definition of the right to an "adequate standard of living", the latter term was again subject to a certain amount of criticism. It was noted that the concept of an adequate standard of living varied considerably between countries and over time,<sup>67</sup> and accordingly, "the range of meaning covered by the term, which was very vague at the national level, was even harder to determine at the international level."<sup>68</sup>

The majority of the Third Committee, however, considered that "an adequate standard of living" was a "generally understood and accepted concept".<sup>69</sup> Not only had a Committee of Experts already defined some components of an adequate standard of living,<sup>70</sup> it was also a notion understood by the inhabitants of every country.<sup>71</sup> Additionally, the inclusion of the phrase was considered necessary to "impress upon States that the raising of the standard of living should be one of their constant preoccupations",<sup>72</sup> and to bring article 11 into line with article 25 UDHR.<sup>73</sup>

A proposal was made to replace the word "adequate" with the word "decent" in order to clarify the meaning of the right,<sup>74</sup> and make

<sup>64</sup> See, Mehta (India), E/CN.4/SR.223, at 6 (1951).

<sup>65</sup> See, Cassin (France), E/CN.4/SR.222, at 23 (1951); Valenzuela (Chile), E/CN.4/SR.223, at 5 (1951). A similar proposal was that the provisions should begin with an affirmation that human beings had the fundamental right to food and life, Cassin (France), E/CN.4/SR.223, at 7 (1951).

<sup>66</sup> See, Chairman, E/CN.4/SR.223, at 5 (1951).

<sup>67</sup> See, Hamilton (Australia), A/C.3/SR.743, at 310, para.16 (1957).

<sup>68</sup> Baroody (Saudi Arabia), A/C.3/SR.739, at 293, para.4 (1957).

<sup>69</sup> Brena (Uruguay), A/C.3/SR.742, at 303, para.9 (1957).

<sup>70</sup> Diaz Casanueva (Chile), A/C.3/SR.739, at 294, para.20 (1957).

<sup>71</sup> See, Diaz Casanueva (Chile), A/C.3/SR.739, at 294, para.21 (1957).

<sup>72</sup> Diaz Casanueva (Chile), A/C.3/SR.739, at 294, para.21 (1957).

<sup>73</sup> See, Brena (Uruguay), A/C.3/SR.742, at 303, para.9 (1957).

<sup>74</sup> Brena (Uruguay), A/C.3/SR.739, at 294, para.12 (1957).



it conform with article 7 which spoke of a "decent living".<sup>75</sup> The term "decent" was also considered to be more appropriate in that it connoted a higher standard of living than a merely adequate one, which could be interpreted as covering only the bare necessities of life.<sup>76</sup> The majority however did not think that replacing the term adequate with decent would make the matter any clearer.<sup>77</sup> The term "adequate" related to the physical, moral and mental development of the individual and linked the article with article 12 in relation to health standards. Moreover the term "adequate standard of living" had "clear and well-understood implications" and was to be found in article 25 UDHR.<sup>78</sup>

Given the broad definition of the concept of a standard of living, it is considered that there was questionable value in it being placed as a separate right in itself. The Commission (and the Third Committee) would have done better either to adopt the proposal of the USSR and leave it out entirely whilst enacting its component parts as rights in the Covenant,<sup>79</sup> or to adopt a form of the French proposal and include it as a general principle (perhaps in the preamble).<sup>80</sup> Either way it might have avoided the somewhat anomalous position of it being a right with little independent substance.

#### 5) For Himself and His Family

A joint amendment proposed by El Salvador, the Dominican Republic and Ecuador<sup>81</sup> aimed at harmonizing the text of article 11 with article 25 UDHR by including a reference to the "well being of the individual and his family".<sup>82</sup> A number of States considered this proposal unnecessary as the idea of the family was already taken care of by the use of the word "everyone".<sup>83</sup> Moreover certain States felt that

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<sup>75</sup> See, Brillantes (Philippines), A/C.3/SR.739, at 295, para.24 (1957). For the drafting of the term "decent living" in article 7, *see above*, Chapter 6, text accompanying notes .

<sup>76</sup> See, Brillantes (Philippines), A/C.3/SR.740, at 299, para.28 (1957).

<sup>77</sup> See e.g., Baroodi (Saudi Arabia), A/C.3/SR.739, at 295, para.36 (1957).

<sup>78</sup> See e.g., Brena (Uruguay), A/C.3/SR.740, at 299, para.29 (1957).

<sup>79</sup> See *above*, text accompanying note 13.

<sup>80</sup> See *above*, text accompanying note 65.

<sup>81</sup> UN Doc.A/C.3/L.583, 12 UN GAOR, C.3, (1957).

<sup>82</sup> See, Lima (El Salvador), A/C.3/SR.740, at 299, para.31 (1957).

<sup>83</sup> See e.g., Tsao (China), A/C.3/SR.742, at 303, para.4 (1957).



the proposal would raise questions about the scope of the provision<sup>84</sup> especially as regards individuals without families.<sup>85</sup>

The majority of the Third Committee, however, voted for the inclusion of the phrase. It appears that States felt that the provision would be made clearer by a reference to the family,<sup>86</sup> and that it would have the advantage of stressing the fact that wages and salaries should be such as to afford a decent standard of living not only to the workers themselves, but also to their families.<sup>87</sup> A suggestion that the phrase should be followed by the words "if any" to stress that it did not exclude those without families<sup>88</sup> was not taken up. The assumption seems to have been that they would nevertheless be included under the term "everyone".

#### 6) The Continuous Improvement of Living Conditions

At the Commission's seventh session, Yugoslavia proposed that the Australian text on an adequate standard of living, should be amended to include the phrase "and the continuous improvement of living conditions" in order to give the provision a "dynamic character".<sup>89</sup> In response Australia argued that such a dynamic element should be expressed in a general clause and not a substantive article.<sup>90</sup> Greece noted that in any case the term "adequate" itself implied the idea of evolution.<sup>91</sup> Nevertheless the Yugoslavian amendment was adopted, albeit by a narrow margin.<sup>92</sup>

Like the text submitted by the Commission, the majority of amendments before the Third Committee referred to the "continuous improvement of living conditions".<sup>93</sup> There was little discussion of the phrase, it being considered entirely consistent with the principle of the

<sup>84</sup> See, Delhaye (Belgium), A/C.3/SR.743, at 310, para.9 (1957).

<sup>85</sup> See e.g., Brillantes (Philippines), A/C.3/SR.742, at 303, para.7 (1957).

<sup>86</sup> See, Bernadino (Dominican Republic), A/C.3/SR.742, at 303, para.5 (1957).

<sup>87</sup> See, Castaneda (Mexico), A/C.3/SR.742, at 304, para.27 (1957).

<sup>88</sup> See, Eustathiades (Greece), A/C.3/SR.742, at 304, para.19 (1957).

<sup>89</sup> Jevremovic (Yugoslavia), E/CN.4/SR.223, at 5 (1951).

<sup>90</sup> See, Whitlam (Australia), E/CN.4/SR.223, at 6 (1951).

<sup>91</sup> See, Eustathiades (Greece), E/CN.4/SR.223, at 8 (1951).

<sup>92</sup> Six votes to five against, with seven abstentions. E/CN.4/SR.223, at 8 (1951).

<sup>93</sup> See e.g., UN Docs.A/C.3/L.580, L.581, L.582, L.583, L.584, 12 UN GAOR, C.3, (1957).



progressive realization of economic and social rights,<sup>94</sup> and appropriate given the fundamental nature of the right concerned.<sup>95</sup>

However, certain States did raise particular objections with respect to this phrase that were left unanswered by the majority. One member considered that States were often powerless to ensure a continuous improvement of living conditions, as "it was primarily the responsibility of the individual himself to exert an effort towards that end".<sup>96</sup> Another member commented that "the primary aim should be to improve the living conditions of the most under-privileged; persons outside that category could hardly claim, at the current stage, to have a 'right' to 'continuous improvement'".<sup>97</sup>

The difficulties of this term, as the criticism implies, were generally overlooked. Certainly, the inclusion of the phrase "the continuous improvement of living conditions" does confirm that the standards are dynamic and State-specific rather than universal, but that much might have been inferred from the concept of an "adequate standard of living". It does raise questions as to the individual nature of the right, however, if it is conceded that only the poor have a right to the "continuous improvement of living conditions".

#### 7) Appropriate Steps to Ensure the Realisation of the Right

The general intention of States in the drafting process was that the rights in article 11 should be implemented in a progressive manner in accordance with the provisions of article 2(1). This is evidenced not only by specific statements to that effect,<sup>98</sup> but also by the fact that a considerable proportion of the discussion centred upon the compatibility of the draft article with specific elements of article 2(1). However, it was noted by more than one State<sup>99</sup> that the wording of the second sentence of paragraph 1, which speaks of the obligation "to ensure" the realization of the right, suggests that the implementation of article 11 should be immediate.<sup>100</sup> However, on closer examination, it would

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<sup>94</sup> See, Baroody (Saudi Arabia), A/C.3/SR.739, at 293, para.4 (1957).

<sup>95</sup> See, Radic (Yugoslavia), A/C.3/SR.743, at 310, para.10 (1957).

<sup>96</sup> Massoud-Ansari (Iran), A/C.3/SR.741, at 301, para.1 (1957).

<sup>97</sup> Delhay (Belgium), A/C.3/SR.743, at 309, para.8 (1957).

<sup>98</sup> See e.g., Hamilton (Australia), A/C.3/SR.743, at 310, para.16 (1957).

<sup>99</sup> See e.g., Afnan (Iraq), A/C.3/SR.743, at 311, para.32 (1957); Juvigny (France), A/C.3/SR.742, at 304, para.14 (1957).

<sup>100</sup> An "obligation of an immediate nature" is intended to mean one which provides for immediate implementation as opposed to progressive implementation. In a strict sense the obligation (as opposed to the implementation) in the latter case is also



appear that at most States considered that the immediate obligation referred to the "steps" to be taken as opposed to the full realisation of the rights.<sup>101</sup> and that there was an explicit intention on the part of a number of States that article 11 be bound by the provisions of article 2(1) as regards progressive realisation of the rights.<sup>102</sup> It was particularly evident for example that States considered the realisation of the rights to be dependent upon resources.<sup>103</sup>

The inclusion of the word "ensure" in the second sentence of article 11(1) reflects the rather superficial nature of the drafting process.<sup>104</sup> The argument centred on the more general question of whether or not specific implementation clauses should be included in the substantive articles,<sup>105</sup> rather than concentrating on the specific wording of those clauses.

In accordance with the progressive nature of the obligation, a number of States argued that "it was not intended that States should be directed to do anything specific",<sup>106</sup> rather, States would be under a duty to develop general conditions through which the rights in question might be secured to individuals.<sup>107</sup> However, an Afghan amendment which provided for the "opportunity to gain" the rights,<sup>108</sup> was criticised for concentrating on the "object" of the right rather than the

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immediate.

<sup>101</sup> For example Iraq rather controversially commented: "Article 2 provided that States were to take steps progressively, whereas the steps referred to in article 11 were to be taken immediately." Afnan (Iraq), A/C.3/SR.743, at 311, para.32 (1957). It is currently considered however that article 2(1) does require steps to be taken immediately. *See above*, Chapter 2, text accompanying notes 46-54.

<sup>102</sup> *See e.g.*, Castaneda (Mexico), A/C.3/SR.742, at 305, para.26 (1957); Hamilton (Australia), A/C.3/SR.743, at 310, para.16 (1957). It might be noted however that even if bound by the terms of article 2(1), there is room to argue for the immediate implementation of a right which involves minimal resource commitments. *See above*, Chapter 2, text accompanying notes 196-7.

<sup>103</sup> *See e.g.*, Diaz Casanueva (Chile), A/C.3/SR.739, at 294, para.21 (1957); Tsuruoka (Japan), A/C.3/SR.740, at 299, para.25 (1957).

<sup>104</sup> *See above*, Chapter 1.

<sup>105</sup> *See e.g.*, Hoare (UK), A/C.3/SR.740, at 299, para.27 (1957); Tsao (China), A/C.3/SR.742, at 303, para.3 (1957). For those who resisted particular implementation clauses, the battle had really already been lost following the adoption of article 6(2), *see above*, Chapter 5, text accompanying notes 53-63.

<sup>106</sup> *See*, Quan (Guatemala), A/C.3/SR.739, at 293, para.9 (1957).

<sup>107</sup> *See*, Tsuruoka (Japan), A/C.3/SR.740, at 299, para.25 (1957); Pazhwak (Afghanistan), A/C.3/SR.739, at 295, para.27 (1957).

<sup>108</sup> UN Doc.A/C.3/L.578, 12 UN GAOR, C.3, (1957).



right itself,<sup>109</sup> and was subsequently withdrawn. In rejecting an approach that centered upon the State playing a "facilitative" role (although it was not evident that States should not have that role at all), it would seem that the intention was for States to have a more positive "providing" role in the realisation of the rights to food, housing and clothing. One particular example was cited by a member of the Third Committee in which she argued that where private undertakings did not have sufficient capital to build houses for low-income groups, it was for the State to sponsor such housing.<sup>110</sup>

#### 8) International Co-operation

Perhaps the element of most controversy in the adoption of article 11 was the second sentence of article 11(1) drafted by the Working Party, which provided that "States Parties will take appropriate steps to ensure the realization of this right, recognising to this effect the essential importance of international co-operation based on free consent".<sup>111</sup>

Those who opposed this provision maintained that it was unnecessary, as reference to international co-operation was better dealt with in article 2(1)<sup>112</sup> and in Part IV of the Covenant.<sup>113</sup> The repetition of such an obligation might in turn detract from the general obligation<sup>114</sup> and imply that article 11 was more important than other rights.<sup>115</sup> Moreover, international co-operation was only one of several factors which governments would have to consider when they came to apply article 11,<sup>116</sup> and it might discourage States from taking independent action to implement the article.<sup>117</sup>

On the other hand it was argued that the reference to international co-operation "in no way" conflicted with the general provisions on the

<sup>109</sup> See, Tsao (China), A/C.3/SR.739, at 295, para.33 (1957).

<sup>110</sup> See, Afnan (Iraq), A/C.3/SR.739, at 295, para.30 (1957).

<sup>111</sup> *Supra*, note 7.

<sup>112</sup> See e.g., Hoare (UK), A/C.3/SR.742, at 304, para.11 (1957); Shoham-Sharon (Israel), A/C.3/SR.742, at 304, para.16 (1957).

<sup>113</sup> See e.g., Tsao (China), A/C.3/SR.742, at 303, para.3 (1957).

<sup>114</sup> See, Hamilton (Australia), A/C.3/SR.743, at 310, para.16 (1957); Paulus (India), A/C.3/SR.742, at 306, para.41 (1957).

<sup>115</sup> See e.g., Brillantes (Philippines), A/C.3/SR.743, at 309, para.5 (1957).

<sup>116</sup> See, Castaneda (Mexico), A/C.3/SR.742, at 304, para.26 (1957).

<sup>117</sup> See, Brillantes (Philippines), A/C.3/SR.742, at 303, para.8 (1957).



subject,<sup>118</sup> and in any case, as article 2 had not been adopted, it was not possible to guarantee that a reference to international co-operation would exist in that article.<sup>119</sup> Additionally, reference to international co-operation was "essential"<sup>120</sup> given the fundamental importance of the rights in article 11<sup>121</sup> and the need to impose precise obligations upon states.<sup>122</sup> Indeed the Greek representative commented that article 11 was "so basic and far-reaching that all the other rights might be regarded as specific aspects of it or as applying to certain categories of persons; there was therefore every justification for stressing international co-operation in that particular article".<sup>123</sup> Following the adoption, by a small margin,<sup>124</sup> of an amendment to the effect that international co-operation should be "based on free consent",<sup>125</sup> the second part of the second sentence was adopted by a considerable majority.<sup>126</sup>

Although there is no reason to consider that the reference to international co-operation in article 11 should necessarily conflict with that in article 2(1), if it were to do so, as a matter of interpretation the terms of the specific clause would prevail over those of the general. It appears that a number of members of the Third Committee considered that the rights in article 11 were "more fundamental" than other rights to be found in the Covenant,<sup>127</sup> however it is not clear whether it was intended that those rights should be afforded any form of priority, whether in terms of public expenditure or otherwise.

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<sup>118</sup> See, Brena (Uruguay), A/C.3/SR.742, at 305, para.22 (1957).

<sup>119</sup> See, Tsuruoka (Japan), A/C.3/SR.742, at 306, para.39 (1957); Tsuruoka (Japan), A/C.3/SR.743, at 310, para.14 (1957).

<sup>120</sup> Montero (Chile), A/C.3/SR.742, at 305, para.24 (1957).

<sup>121</sup> See e.g., Ahmed (Pakistan), A/C.3/SR.742, at 305, para.32 (1957); Tsuruoka (Japan), A/C.3/SR.742, at 306, para.39 (1957).

<sup>122</sup> See, Radic (Yugoslavia), A/C.3/SR.743, at 310, para.10 (1957).

<sup>123</sup> Eustathiades (Greece), A/C.3/SR.742, at 304, para.18 (1957).

<sup>124</sup> 20 votes to 19 with 21 abstentions. See, A/C.3/SR.743, at 311, para.23 (1957).

<sup>125</sup> See, Mufti (Syria), A/C.3/SR.742, at 306, para.33 (1957).

<sup>126</sup> 31 votes to 14 with 17 abstentions. See, UN Doc.3525, *supra*, note 6, at 19, para.143.

<sup>127</sup> For example, the Japanese representative commented: "...article 11 had a place distinct from other articles, for it was concerned with life and death; for example, education and hygiene were not as essential to survival, as food, clothing and housing were". Tsuruoka (Japan), A/C.3/SR.742, at 306, para.39 (1957).



## B) ARTICLE 11(2)

In 1963 the Director-General of the FAO submitted an informal proposal to the Third Committee for the inclusion of a draft article relating to the right to be free from hunger which would be included after the combined articles 11 and 12.<sup>128</sup> The proposal read as follows:

- "1. The States Parties to the present Covenant recognise the right of everyone to be free from hunger. They undertake, individually and through international co-operation, to develop programmes aimed at achieving freedom from hunger within the shortest possible time.
2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right, national and international action should be geared to the realisation of this right by paying attention to:
  - (a) Policies to ensure that world food supplies are shared on a rational and equitable basis;
  - (b) Economic, technical and other measures to increase the production of food;
  - (c) The adaptation of existing institutions, including systems of land tenure and land use, to the requirements of economic and social progress; and
  - (d) The promotion and full utilisation of scientific and technical knowledge and a massive education of the population in order to improve methods of production, conservation and distribution of food."

This suggestion came to be reflected in the proposal of Saudi Arabia to add an article on the right to freedom from hunger,<sup>130</sup> and in the combined proposal of Chile, Colombia, Ecuador and Uganda to add a paragraph on the same subject in the combined articles 11 and 12 of the draft Covenant.<sup>131</sup> It was decided to set up a working group to produce a non-controversial text that could command unanimity. The Working Group produced a joint proposal on the right of everyone to be free from hunger.<sup>132</sup> The various proposals and amendments were

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<sup>128</sup> Sen (FAO), A/C.3/SR.1232, at 93-4, paras 4-10 (1963). *See generally*, Alston, *supra*, note 1, at 30-31.

<sup>129</sup> UN Doc.A/C.3/SR.1232, at 94, para.10 (1963).

<sup>130</sup> UN Doc.A/C.3/L.1172, 18 UN GAOR, C.3, (1963).

<sup>131</sup> UN Doc.A/C.3/L.1175, 18 UN GAOR, C.3, (1963).

<sup>132</sup> UN Doc.A/C.3/L.1177, 18 UN GAOR, C.3, (1963).



considered by the Third Committee at its 1264th, 1267th, 1268th and 1269th meetings.<sup>133</sup>

#### 1) The Right to Freedom From Hunger.

The Director-General of the FAO made his proposal on the basis that although the right to freedom from hunger was mentioned, it was not clearly defined. The provision, he argued, should include a detailed enumeration of the measures to be taken to ensure the enjoyment of the right.<sup>134</sup> A large number of States considered it appropriate that such a provision be incorporated into the Covenant as being of "paramount importance".<sup>135</sup> As the Australian representative stated: "No human right was worth anything to a starving man".<sup>136</sup> Nevertheless, it was recognised that the question of hunger was more appropriately dealt with by the Second Committee and that provisions on the subject were not entirely appropriate to a legal instrument such as the draft Covenant.<sup>137</sup> Indeed the Philippines commented that "it was hard to predict what practical effect a provision of that kind would have, but it was bound at least to draw national attention to the problem and offer some hope of relief to the hungry of the world".<sup>138</sup>

Opponents of the proposals argued that the draft Covenants should be restricted to outlining the fundamental human rights and the basic principles that underlay them. Although freedom from hunger was an important principle, the Covenant should not contain any specific measures of implementation.<sup>139</sup> Not only would measures to ensure freedom from hunger differ from country to country, questions such as increasing world food supplies and ensuring their equitable distribution, or reforming systems of land tenure, were properly subjects to be dealt with by the Second Committee and by specialised

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<sup>133</sup> UN Docs.A/C.3/SR.1264-5, 1267-9, 18 GAOR, C.3, (1264-5, and 1267-9 mtgs.), (1963). *See generally*, UN Doc.A/C.3/5655, *supra*, note 9, at 20-23, paras 86-108.

<sup>134</sup> Sen (FAO), A/C.3/SR.1232, at 94, para.10 (1963).

<sup>135</sup> *See e.g.*, Yapou (Israel), A/C.3/SR.1264, at 271, para.7 (1963).

<sup>136</sup> Gilchrist (Australia), A/C.3/SR.1267, at 287, para.8 (1963).

<sup>137</sup> *See e.g.* Gilchrist (Australia), A/C.3/SR.1267, at 287, para.8 (1963).

<sup>138</sup> Quiambao (Philippines), A/C.3/SR.1267, at 287, para.6 (1963).

<sup>139</sup> *See*, Ataullah (Pakistan), A/C.3/SR.1264, at 271, para.4 (1963); A/C.3/SR.1269, at 300, para.9 (1963).



agencies.<sup>140</sup> The provisions as adopted were unfortunately "vague and general considerations" which were capable of different interpretations<sup>141</sup> and which reflected considerations that would be included more appropriately in a separate declaration on the question rather than in the Covenant.<sup>142</sup> Furthermore it was thought wrong for the Third Committee to single out just one of the rights in the second paragraph of article 11(2).<sup>143</sup>

Much as the arguments against the provisions suggest that there was a considerable division within the Third Committee, the fact that no one voted against the provision in the final analysis indicates that this was not the case. In fact the final text seems to reflect a cautious approach which, whilst outlining certain principles, did not prejudice the development of more specific policies by international agencies or the State concerned. As the Australian representative commented:

"While it would have been unwise of the Third Committee to act as a body of economic experts or put forward detailed proposals on the economic means of achieving the realisation of the right in question, it was quite fitting that it should indicate the general areas in which Governments must take action".<sup>144</sup>

The crucial characteristic of article 11(2) appears to have been that although certain objectives and methods of implementation were outlined, they were considered sufficiently general as not to bind a State to any particular course of action.

## 2) The Fundamental Right of Everyone

The word "fundamental" is first to be found in the joint proposal drafted by the Working Group. There, States Parties recognised the "fundamental importance of the right of everyone to be free from hunger". It was later pointed out that there was a difference between recognising a right and recognising the importance of a right- the latter being a far weaker obligation. It was accordingly suggested that the words "fundamental

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<sup>140</sup> See, Ataullah (Pakistan), A/C.3/SR.1264, at 271, para.4 (1963); Beaufort (Netherlands), A/C.3/SR.1266, at 285, para.60 (1963); Alatas (Indonesia), A/C.3/SR.1268, at 293, para.4 (1963).

<sup>141</sup> See, Monod (France), A/C.3/SR.1269, at 300, para.7 (1963).

<sup>142</sup> See, Beaufort (Netherlands), A/C.3/SR.1266, at 285, para.62 (1963); Herndl (Austria), A/C.3/SR.1268, at 294, para.9 (1963).

<sup>143</sup> See, Beaufort (Netherlands), A/C.3/SR.1266, at 285, para.61 (1963).

<sup>144</sup> Gilchrist (Australia), A/C.3/SR.1267, at 287, para.8 (1963).



importance" be deleted from the proposal.<sup>145</sup> The sponsors of the proposal suggested in reply that the paragraph should be amended so as to refer to "the fundamental right of everyone to be free from hunger".<sup>146</sup> This became the final revised text which was adopted by the Third Committee.

Much as the right to be free from hunger is the only right in either Covenant that is explicitly referred to as "fundamental", the travaux préparatoires give no indication that it be given any pre-eminence among the range of human rights. In absence of explanation, it is to be assumed that the drafters did not intend to invest in the word "fundamental" any particular legal significance. As such, it represents another example of the unevenness of the drafting process which was left uncorrected by the failure of the Third Committee to undertake a "rationalising study" of the two Covenants.<sup>147</sup>

### 3) Measures and Specific Programmes

One member of the Committee was concerned that the measures envisaged within article 11(2) should not be pursued at the expense of other development policies. Accordingly it suggested the inclusion of the words "within the context of national programmes of economic and social development" after the word "measures", or at least that the provision should be interpreted in that manner.<sup>148</sup> The silence of the other members of the Committee on this matter might imply their general agreement with such an interpretation. Accordingly it could be said that the measures undertaken in pursuance of the provisions of article 11(2) should not be such as to compromise other development objectives,<sup>149</sup> but should be taken up as an integral part of the development process.

A number of proposals were made for the inclusion of the word "necessary" before the word "measures".<sup>150</sup> In particular, it was thought that this might reflect the optional nature of the

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<sup>145</sup> See, Kabbani (Syria), A/C.3/AR.1268, at 293, para.1 (1963).

<sup>146</sup> See, Eluchans (Chile), A/C.3/SR.1268, at 294, para.12 (1963).

<sup>147</sup> See *above*, Chapter 1, text accompanying note 271.

<sup>148</sup> See, Alatas (Indonesia), A/C.3/SR.1268, at 293, para.5 (1963).

<sup>149</sup> It should be noted that this does not in any way legitimise the prioritisation of development objectives over the requirement to ensure people's freedom from hunger.

<sup>150</sup> See *e.g.*, Capotorti (Italy), A/C.3/SR.1268, at 294, para.18 (1963).



measures outlined in the final paragraphs.<sup>151</sup> However, Chile forcefully argued that such an amendment would weaken the text by implying that the need for measures was merely hypothetical rather than absolute.<sup>152</sup> The position of the majority appears to have been that the text should be read to imply that all States, irrespective of their situation, are under an obligation to take appropriate measures and specific programmes within the areas stipulated. The form of those measures and programmes however would be determined by the social and economic circumstances that pertained to the situation in the country concerned.

#### 4) Paragraph (a)

The debate in the Third Committee rarely touched upon the main elements of paragraph (a) apart from the question of agrarian reform. It was generally accepted that food production, conservation and distribution were objectives of fundamental importance with a view to ensuring freedom from hunger. Specific comments merely stressed the importance of agricultural self-reliance<sup>153</sup> and of adequate modern systems of marketing of agricultural produce.<sup>154</sup>

As regards agricultural reform, the original five-power amendment used the phrase "adapting or reforming existing systems of land tenure and land use and systems for the exploitation of natural resources".<sup>155</sup> This was then rationalised by the Working Party to its current form. Following a request for an explanation of the phrase, Chile explained that in paragraph (a) the sponsors "wished to point out suitable measures to be taken by States Parties in order to implement the right to be free from hunger".<sup>156</sup> The representative continued:

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<sup>151</sup> A Greek oral amendment initially suggested the replacement of the words "which are needed" with "if and where needed", Mantzoulinos (Greece), A/C.3/SR.1268, at 294, para.10 (1963). It was later withdrawn in favour of the inclusion of the word "necessary". Mantzoulinos (Greece), A/C.3/SR.1268, at 294, para.22 (1963).

<sup>152</sup> *See*, Eluchans (Chile), A/C.3/SR.1268, at 294, para.13 (1963).

<sup>153</sup> *See e.g.*, Herrera (Costa Rica), A/C.3/SR.1269, at 299, para.3 (1963).

<sup>154</sup> *See e.g.*, Zalamea (Colombia), A/C.3/SR.1267, at 288, para.11 (1963).

<sup>155</sup> *Supra*, note 131.

<sup>156</sup> Eluchans (Chile), A/C.3/SR.1267, at 287, para.3 (1963).



"Among those measures was the development or reform of agrarian systems, with a view to improving the use of agricultural resources. States Parties were given an alternative: they could either develop or reform agrarian systems, depending on their needs. Moreover, 'agrarian systems' implied both improved techniques of land exploitation and legal questions, such as those of ownership".<sup>157</sup>

If a just agrarian system existed then the State was not obliged to undertake land reform- in such cases only the improvement of farming methods would be required.<sup>158</sup>

This interpretation was supported by a large number of States whose main concern seemed to be that they should not be bound to undertake land reform. Two unsuccessful proposals were made to introduce the phrase "if necessary" before the reference to land reform.<sup>159</sup> Their rejection did not so much reflect the idea that land reform was essential in all cases, rather that the existing text already sufficiently provided for alternative approaches. The amendments would merely have complicated the provision.<sup>160</sup>

As regards land reform, States stressed that each country should find the approach best suited to its conditions,<sup>161</sup> and that it should be carried out "wherever necessary, desirable and acceptable to the majority of those to be affected".<sup>162</sup> It appears to be suggested that priority should be placed upon democratic participation in land-reform programmes, with particular emphasis being placed upon those most directly affected.

Given the choice over whether agricultural reform is necessary, it is submitted that the measures outlined in paragraph (a) are of such a general and innocuous nature that they offer little of substance to the article as a whole. As one State noted, paragraph (a) was unnecessary given that those measures were "perfectly well known to even the most backward country",<sup>163</sup> a

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid.*, para.4.

<sup>159</sup> *See*, Aujay de la Dure (France), A/C.3/SR.1267, at 288, para.18 (1963); Mantzoulinos (Greece), A/C.3/SR.1268, at 294, para.10 (1963).

<sup>160</sup> *See*, Eluchans (Chile), A/C.3/SR.1268, at 294, para.13 (1963).

<sup>161</sup> *See e.g.*, Mendez (Guatemala), A/C.3/SR.1267, at 288, para.12 (1963).

<sup>162</sup> Attlee (UK), A/C.3/SR.1267, at 287, para.5 (1963).

<sup>163</sup> U Myat Tun (Burma), A/C.3/SR.1267, at 288, para.14 (1963).



matter that seems to have been reflected in the cursory nature of the discussion on paragraph (a).

#### 5) Paragraph (b)

Both of the original proposals for article 11(2) referred to the sharing of the world food supplies on a rational and equitable basis.<sup>164</sup> In order to clarify the notion of sharing resources, it was proposed that reference be made to "the interests of both food producers and consumers".<sup>165</sup> This concern was taken up in the joint proposal which stressed that States take into account the problems of both food-importing and food-exporting countries. Chile argued that the term "problem" was preferable to that of "interests" because "the distribution of food supplies should be based not solely on the interests of the countries involved or on purely economic grounds, but also on social and humanitarian considerations which were implicit in the word 'problems'".<sup>166</sup> Moreover, it was pointed out that freedom from hunger should not be interpreted as freedom to dispose of agricultural surpluses to the detriment of the economies of the less developed countries.<sup>167</sup>

### III) THE APPROACH OF THE COMMITTEE

#### A) AN ADEQUATE STANDARD OF LIVING<sup>168</sup>

As was made clear in the travaux préparatoires, the concept of an adequate standard of living was intended to have a broad and general meaning. Although the rights to food, clothing and housing expressly form a partial definition of the right, mention was also made to the rights to health, education, and transport. States, however, showed great reluctance to define the right in any greater detail relying *inter alia* upon the argument that the right to an adequate standard of living was a term whose meaning was generally understood.<sup>169</sup>

It is clear, however, that the Committee, in assessing the degree of compliance with the right to an adequate standard of

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<sup>164</sup> *Supra*, notes 130, 131.

<sup>165</sup> *See*, U Myat Tun (Burma), A/C.3/SR.1264, at 271, para.6 (1963).

<sup>166</sup> *See*, Eluchans (Chile), A/C.3/SR.1268, at 294, para.16 (1963).

<sup>167</sup> *See*, U Myat Tun (Burma), A/C.3/SR.1267, at 288, para.15 (1963).

<sup>168</sup> *Cf.* Article 25(1) UDHR. *See*, Eide A., "Article 25", in Eide A. *et al* (eds), The Universal Declaration of Human Rights: A Commentary, 395 (1992).

<sup>169</sup> *See above*, text accompanying notes 69-71.



living, cannot rely merely upon an intuitive understanding of the notion. Some attempt has to be made to define it in more detail if only for the purpose of measurement. Whether or not the Committee manages to give the provision substantial meaning will be the most significant test of its capabilities, not least because, as Sen notes, the notion of a standard of living is "full of contrasts, conflicts and even contradictions".<sup>170</sup>

An important consideration for the Committee is the degree to which the right to an adequate standard of living actually contributes to the protection offered by the Covenant. If, as the travaux préparatoires indicate, the right is primarily an agglomeration of other economic, social and cultural rights, then it arguably will have little utility as an independent human right. If on the other hand, it is read to include concerns that are not already addressed by other rights, it might usefully extend the scope of the Covenant.

Thus far, the Committee has not assigned to the right to an adequate standard of living a meaning that substantially extends the protection offered by other rights. In discussing article 11, little mention is ever made of an adequate standard of living *per se*, rather, the Committee has concentrated on the rights to adequate housing and food. Moreover, when dealing specifically with the right to an adequate standard of living, Committee members have generally concentrated upon questions relating to social security,<sup>171</sup> unemployment<sup>172</sup> and income levels.<sup>173</sup> In doing so, it seems to duplicate much of its work in respect to articles 6 to 9 of the Covenant. Part of the problem seems to have been the former reporting system in which States would report on article 11 independently from articles 6 to 9. However, whilst the introduction of global reports has reduced the problem of duplication, it has meant that article 11, and in particular the right

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<sup>170</sup> Sen A., The Standard of Living, at 1 (1985).

<sup>171</sup> See e.g., Sparsis, E/C.12/1988/SR.5, at 6, para.24, and E/C.12/1988/SR.6, at 5, para.32; Badawi El Sheikh, E/C.12/1988/SR.18, at 4, para.17.

<sup>172</sup> See e.g., Texier, E/C.12/1988/SR.12, at 10, para.49, and E/C.12/1988/SR.13, at 13, para.81; Sparsis, E/C.12/1988/SR.13, at 14, para.85; Jimenez Butragueno, E/C.12/1989/SR.12, at 13, para.71; Fofana, E/C.12/1990/SR.7, at 3, para.8.

<sup>173</sup> See e.g., Texier, E/C.12/1987/SR.9, at 7, para.28, and E/C.12/1988/SR.18, at 3, paras 6 and 8; Simma, E/C.12/1988/SR.5, at 7, para.30; Sparsis, E/C.12/1988/SR.10, at 10, para.55.



to an adequate standard of living, has been given considerably less consideration.

Even where questions have been asked specifically on the question of an adequate standard of living, they have been general and unfocused. The main practice of the Committee has been to call upon States to establish benchmarks to define an adequate standard of living<sup>174</sup> (such as a "poverty-line"<sup>175</sup>), pinpoint and direct action in favour of the disadvantaged,<sup>176</sup> ensure non-discrimination<sup>177</sup> and greater equality,<sup>178</sup> and establish legal remedies where appropriate.<sup>179</sup>

In the Committee's reporting guidelines, however, it is possible to identify a number of questions which appear to relate particularly to the right to an adequate standard of living. Information is requested as to the current standard of living of the population both in the aggregate and as to different groups within the population. In addition, States are required to indicate the per capita GNP of the poorest 40% of the population and their Physical Quality of Life Index (PQLI).<sup>180</sup>

It is notable that the Committee does not stipulate itself how the standard of living of the population upon which States are to report is to be measured, but rather leaves it to the State concerned to adopt its own criteria for evaluation. Moreover, the indicators referred to by the Committee do not give a great deal of insight into the content of the right. First, the PQLI is a composite indicator intended to "measure the performance of the world's

<sup>174</sup> See e.g., Sparsis, E/C.12/1987/SR.16, at 12, para.56; Sparsis, E/C.12/1988/SR.5, at 6, para.24; Rattray, E/C.12/1989/SR.19, at 7, para.41; Sparsis, E/C.12/1990/SR.44, at 12, para.58.

<sup>175</sup> See, Alston, E/C.12/1988/SR.16, at 7, para.29; Alston, E/C.12/1990/SR.2, at 10, para.64; Alston, E/C.12/1990/SR.7, at 3, para.7.

<sup>176</sup> See, Konate, E/C.12/1987/SR.19, at 12, para.58; Alston, E/C.12/1988/SR.13, at 13, para.71; Badawi El Sheikh, E/C.12/1989/SR.5, at 11, para.65; Texier, E/C.12/1989/SR.16, at 14, para.66.

<sup>177</sup> See, Texier, E/C.12/1989/SR.5, at 9, para.51; Jimenez Butragueno, E/C.12/1990/SR.44, at 13, para.61.

<sup>178</sup> See, Texier, E/C.12/1988/SR.12, at 10, para.50; Sparsis, E/C.12/1988/SR.12, at 12, para.63; Alston, E/C.12/1988/SR.13, at 6, para.25.

<sup>179</sup> See e.g., Sparsis, E/C.12/1987/SR.9, at 10, para.49; Sparsis, E/C.12/1987/SR.20, at 5, para.18.

<sup>180</sup> Reporting guidelines, UN ESCOR, Supp.(No.3), Annex IV, at 11, UN Doc.E/1991/23 (1991). For the PQLI see, Morris M., Measuring the Conditions of the World's Poor: The Physical Quality of Life Index, (1979).



poorest countries in meeting the most basic needs of people".<sup>181</sup> It uses as measurements, infant mortality, life expectancy and literacy. Quite apart from the technical limitations of the PQLI,<sup>182</sup> from the point of view of the Committee it has serious shortcomings. It was designed to be a macro-economic indicator measuring the physical welfare of the total population, not individual welfare or social and psychological welfare. Moreover the components, which roughly concentrate upon the degree of enjoyment of the rights to health and education, were chosen primarily for their utility as indicators rather than the degree to which they encompassed the range of concerns that fall within the notion of "quality of life".<sup>183</sup>

Secondly, the UNICEF indicator (the per capita GNP of the poorest 40 per cent of the population) is considered to be a broad measure of poverty.<sup>184</sup> The use of this indicator, together with its request that States establish a "poverty line",<sup>185</sup> suggests that the Committee defines the deprivation of an adequate standard of living in terms of poverty.<sup>186</sup> However, identifying the relationship between two concepts does little to rectify the present problem. Poverty is as resistant to precise definition as is an adequate standard of living.<sup>187</sup>

The indicators to which the Committee refers will provide it with an insight into the general welfare of the population as a whole. At a State level, the PQLI, like the Human Development Index of United Nations Development Programme (UNDP),<sup>188</sup> will rank countries according to their aggregate level of "social development". Their utility is primarily in providing a

<sup>181</sup> Morris, *ibid*, at 34.

<sup>182</sup> For a discussion on the relative value of the PQLI as a human rights indicator *see*, Türk D., The New International Economic Order and The Promotion of Human Rights: Realisation of Economic, Social and Cultural Rights, UN Doc.E/CN.4/Sub.2/1990/19, at 27, para.83 (1990).

<sup>183</sup> Morris, *supra*, note 180, at 34-35, and 94.

<sup>184</sup> *See*, Türk, *supra*, note 182, at 28.

<sup>185</sup> Reporting guidelines, *supra*, note 180, at 99.

<sup>186</sup> The World Bank clearly defines poverty as "the inability to attain a minimal standard of living". IBRD (World Bank), World Development Report 1990, at 26 (1990).

<sup>187</sup> For a discussion of the notions of absolute and relative poverty, *see*, United Nations Development Programme, Human Development Report 1990, 106-108 (1990).

<sup>188</sup> *Ibid*, at 9-16.



comparative picture of social development between countries with a view to managing economic growth "in the interest of the people".<sup>189</sup> Such indicators do not provide information as to specific human rights nor are they orientated to the position of the individual. If viewed in this light, the right to an adequate standard of living becomes merely a right of the State (or the people) to social development.<sup>190</sup>

The Committee appears to be content to leave the precise definition of an adequate standard of living to the State concerned. However, it is considered that whilst it is entirely appropriate for the State to establish their own quantitative benchmarks to determine what is considered to be "adequate" in light of the current level of economic and social development of the State concerned,<sup>191</sup> the Committee itself should specify the qualitative matters that comprise the notion of a "standard of living". Following the Committee's discussion on statistical indicators,<sup>192</sup> it may be assumed that the Committee will at some stage in the future, specify particular rights-oriented indicators for use by States that will, to some degree, outline what the Committee perceives to be the content of the right.

As suggested above, there is a need for the Committee to explain the utility of the right to an adequate standard of living from the point of view of how it extends the protection offered by

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<sup>189</sup> *Ibid*, at 10.

<sup>190</sup> As McChesney commented:

"The comprehensive right to an 'adequate standard of living' under ICESCR Article 11 invokes the essence of development, and ... would appear to justify almost any action in the name of economic progress."

McChesney A., "Promoting the General Welfare in a Democratic Society: Balancing Human Rights and Development", 27 *Neth.I.L.R.*, 283, at 289 (1980).

<sup>191</sup> It is worth noting that the World Bank utilises country-specific poverty lines. It reasons:

"The perception of poverty has evolved historically and varies tremendously from culture to culture. Criteria for distinguishing poor from non-poor tend to reflect specific national priorities and normative concepts of welfare and rights. In general, as countries become wealthier, their perception of the acceptable minimum level of consumption- the poverty line- changes."

IBRD, *supra*, note 186, at 27.

<sup>192</sup> *See*, UN ESCOR, Supp.(No.3), at 81-86, paras 332-351, UN Doc.E/1992/23, (1992). *Cf.* E/C.12/1991/SR.20-21.



the Covenant.<sup>193</sup> One possibility with much to recommend it, is for the Committee to interpret the concept as encompassing, as a minimum, the "basic needs" of the individual.<sup>194</sup> The 1976 World Employment Conference of the ILO defined basic needs in the following manner:

"First, they include certain minimum requirements of a family for private consumption: adequate food, shelter and clothing, as well as certain household equipment and furniture. Second, they include essential services provided by and for the community at large, such as safe drinking water, sanitation, public transport and health, educational and cultural facilities."<sup>195</sup>

Some of these concerns (such as food, clothing and housing) are already specifically enumerated by the Covenant itself. The category of basic needs, however, also includes matters that do not fall easily within the compass of the enumerated human rights, such as "safe drinking water" and "public transport",<sup>196</sup> and "sanitation".<sup>197</sup> It would be entirely appropriate for the Committee to concentrate upon these matters under the heading of an adequate standard of living in so far as they are not dealt with

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<sup>193</sup> See above, text accompanying notes 170-171.

<sup>194</sup> On the developmental aspect of "basic needs" see, International Labour Office, Employment, Growth and Basic Needs: A One World Problem, (1976); Ghai D., and Alfthan T., "On the Principles of Quantifying and Satisfying Basic Needs", in Ghai D. *et al* (eds), The Basic-Needs Approach to Development: Some Issues Regarding Concepts and Methodology, 19 (1978); Hopkins M. and Van Der Hoeven R., Basic Needs in Development Planning, (1983). For the legal and human rights aspects of basic needs see, Alston P., "Human Rights and Basic Needs: A Critical Assessment" 12 H.R.J., 19 (1979); Green R., "Basic Human Rights/Needs: Some Problems of Categorical Translation and Unification", 26 I.C.J.Rev., 53 (1981); Trubeck D., "Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs", in Meron T.(ed), Human Rights in International law, 205 (1984); Muchlinski P., "'Basic Needs' Theory and 'Development Law'" in Snyder F. and Slinn P., International Law of Development: Comparative Perspectives, 237 (1987); Stewart F., "Basic Needs Strategies, Human Rights, and The Right to Development", 11 Hum.Rts.Q., 347 (1989).

<sup>195</sup> International Labour Office, Target Setting for Basic Needs, at 2 (1982).

<sup>196</sup> It is relevant to note that "transport" was one of the rights suggested in the drafting but was considered not important enough to be given specific recognition. See above, text accompanying notes 54-56.

<sup>197</sup> See, Alston, *supra*, note 195, at 36.



elsewhere. It remains to be seen, however, whether the Committee does adopt such a methodology.

## B) THE RIGHT TO ADEQUATE FOOD

### 1) Introduction

Article 11(1) provides for a general right to an "adequate standard of living" which is defined specifically as "including adequate food". As such, the right to food emanates from and contributes to the realisation of the more general right to an adequate standard of living. The conditions for the realisation of the right to an adequate standard of living would thus appear to be directly applicable to the right to food.

Conversely, action taken to achieve the realisation of the right to food should be viewed from the perspective of how it contributes to the realisation of an adequate standard of living. This would seem to require an approach in which action in favour of providing adequate food, over and above the fulfilment of basic needs, would have to be balanced with competing priorities such as housing. In cases where resource allocation is not driven by the fulfilment of basic needs, a State would be required to assess the most effective utilisation of resources to achieve the general realisation of an adequate standard of living. This might mean for example, that preference be given to housing rather than food.

### 2) Freedom from Hunger

The general notion of the right to food would seem to have more explicit recognition in article 11(2) which provides for a right "to be free from hunger". It is not clear in what way this provision relates to the right to adequate food or indeed the right to an adequate standard of living. The Committee, by the construction of its general guidelines, appears to consider that the elements of article 11(2) relate to the achievement of the right to food.<sup>198</sup> Indeed it makes no clear distinction between the right to food and the right to freedom from hunger (the latter notion not even being mentioned).

However, there would seem to be tacit approval by members of the Committee of a distinction between the meaning of the two norms.<sup>199</sup> Far from being synonymous with the right to food, the right to freedom from hunger is considered to be merely a "sub-

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<sup>198</sup> See, Reporting guidelines, *supra*, note 180, at 12-13.

<sup>199</sup> See *e.g.*, Simma, E/C.12/1989/SR.20, at 7, para.26.



norm". Whereas freedom from hunger implies freedom from starvation, or the fulfilment of basic needs necessary for survival, the right to food goes further in requiring a level and type of food that is consonant with human dignity.<sup>200</sup>

One reason for maintaining a distinction between freedom from hunger and the right to food is that the former is specifically referred to as "fundamental". No other right in either of the two Covenants is referred to in this manner, nor does the ICESCR make apparent any specific legal consequence that may derive from it being termed "fundamental". It has been suggested in the Committee that this term implied that the State, assisted if necessary by the international community, had an obligation (of an immediate as opposed to progressive nature) to avoid starvation, and that it was so closely linked to article 6 ICCPR that it should be respected under all circumstances.<sup>201</sup>

However, there are a number of arguments against giving the provision priority. First, the travaux préparatoires do not demonstrate an intention to give the provision any form of priority.<sup>202</sup> Secondly, much as famines are often presented as essentially man-made phenomena, it is as yet unrealistic to consider the obligation to prevent starvation as one requiring immediate implementation. Finally, it is legally incorrect to assume a provision is non-derogable merely because it resembles a non-derogable right in another treaty. Indeed that matter is of little importance given the lack of a derogation clause in the ICESCR.

Thus, on a strictly legal level, although the right to freedom from hunger is said to be "fundamental" there is little justification for interpreting it as having any form of priority over other rights. This does not mean, however, that the right is not important. Certainly, as commentators have pointed out, at one level at least, the right to food is a "basic right" upon which the enjoyment of other rights depend. As Shue noted:

"Any form of malnutrition, or fever due to exposure, that causes severe and irreversible brain damage, for example, can effectively prevent the exercise of any right requiring clear thought and may, like brain injuries caused by assault, profoundly disturb personality. And, obviously, any fatal deficiencies end

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<sup>200</sup> See, Alston, *supra*, note 1, at 32-34.

<sup>201</sup> See, Dobbert (FAO), E/C.12/1989/SR.20, at 6, para.18.

<sup>202</sup> See *above*, text accompanying notes 145-147.



all possibility of the enjoyment of rights as firmly as an arbitrary execution."<sup>203</sup>

It is clear that the fundamental nature of the right to freedom from hunger relates to its association with survival. In this sense it might be distinguished from a right to "adequate food" that extends beyond basic needs. The term "fundamental" then, would appear to require that action taken towards the realisation of the right to adequate food (in its widest sense), should be directed primarily towards the enjoyment of minimum levels of subsistence. In other words, action should be prioritised in favour of the realisation of the "minimum core-content" of the right to food.<sup>204</sup>

### 3) The Meaning of "Adequate Food"

As has been implied above,<sup>205</sup> the right to adequate food would seem to extend beyond that which is required for survival. Indeed article 11 speaks of "adequate" food. Some commentators have suggested that adequacy should be measured not merely by what is necessary for survival, but by a person's health or by their ability to pursue a normal, active existence.<sup>206</sup> It is clear, however, that whatever criterion against which adequacy is to be measured will itself have to be defined. For example, the notion of "health" as a reference criterion "is limited by our inability to define a state of health which an adequate nutrient intake should sustain".<sup>207</sup>

In addition to the quantitative sufficiency of the food supply, it has also been considered that adequate food has a qualitative element,<sup>208</sup> namely that food should be culturally acceptable and

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<sup>203</sup> Shue H., Basic Rights: Subsistence, Affluence and US Foreign Policy, 24-25 (1980). *See also*, Konate, E/C.12/1989/SR.21, at 2, paras.6-7. It was noted in the Committee that in 1982 the Human Rights Committee had expressed the link between the right to life and malnutrition in its general comment on article 6. Eide, E/C.12/1989/SR.21, at 5. *See*, HRC General Comment 6(16), UN Doc.A/37/40, at 93 (1982).

<sup>204</sup> *See above*, Chapter 2, text accompanying notes 236-253.

<sup>205</sup> *See above*, text accompanying note 200.

<sup>206</sup> Alston, *supra*, note 1, at 22, 33. These are also the common criteria for defining malnutrition.

<sup>207</sup> Pacey A. and Payne P., Agricultural Development and Nutrition, at 23 (1985).

<sup>208</sup> It should be noted that this "qualitative" and "quantitative" distinction is not entirely watertight. The concept of adequate food for the maintenance of health not only requires a minimum calorific intake but also a certain balance of nutrients.



healthy (or in other words, safe).<sup>209</sup> An effort has thus been made to endow the concept of adequate food with a broad definition that extends beyond merely an analysis of calorific intake.

Accordingly, the mere presence or absence of malnutrition would not in itself be the sole determinant of whether a State was complying with its obligations.

In its guidelines, the Committee has not attempted to define what it considers to be adequate food. It requests States merely to provide information as to the extent to which the right to adequate food has been realised.<sup>210</sup> It could be assumed then that it expects States to form their own national benchmarks of what amounts to "adequate food".<sup>211</sup> The Committee does however refer to "malnutrition" which would seem to suggest that it understands the concept of adequate food to mean more than mere freedom from starvation.<sup>212</sup> Committee members themselves have frequently looked to measures of calorie intake as a means of assessing the adequacy of the food supply.<sup>213</sup> In doing so they have often requested disaggregated statistics according to vulnerable groups and individuals.<sup>214</sup> In particular, concern has often been expressed about declines in the average calorie intake over a period of time,<sup>215</sup> and occasionally in cases where the calorie intake seems excessively high.<sup>216</sup>

Despite considerable agreement during the Committee's General Discussion<sup>217</sup> that "the right to receive food was not

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<sup>209</sup> Alston, *supra*, note 1, at 33; Eide, E/C.12/1989/SR.21, at 6, para.18; Centre For Human Rights, Right to Adequate Food as a Human Right, 27 (1989).

<sup>210</sup> Reporting guidelines, *supra*, note 180, at 12.

<sup>211</sup> See e.g. Muterahajuru, E/C.12/1989/SR.17, at 16, para.86.

<sup>212</sup> Reporting guidelines, *supra*, note 180, at 12.

<sup>213</sup> See e.g., Neneman, E/C.12/1988/SR.6, at 4, para.22.

<sup>214</sup> See e.g., Alston, E/C.12/1988/SR.10, at 11, para.59. See also, Eide, E/C.12/1989/SR.20, at 11, para.46.

<sup>215</sup> See e.g., Neneman, E/C.12/1988/SR.17, at 4, para.25; Simma, E/C.12/1989/SR.6, at 10, para.47; Neneman, E/C.12/1988/SR.12, at 11, para.55.

<sup>216</sup> See e.g., Alston, E/C.12/1988/SR.18, at 2, para.3.

<sup>217</sup> See generally, UN ESCOR, Supp.(No.4), at 68-72, paras 310-326, UN Doc.E/1989/22, (1989).



simply a question of calories but adequate nutrition",<sup>218</sup> Committee members seem to have concentrated rather heavily on calorific intake as a measure of adequate food. Such an approach may be subject to considerable criticism. First, it has been pointed out that estimates of calorific intake suffer from personal, inter-personal, and inter-temporal variations as measures of food adequacy.<sup>219</sup> Secondly, calorific intake may give an indication of "undernourishment" (defined as an inadequate intake of calories), but is insufficient as a measure of "malnourishment" which is defined more widely as a lack of essential nutrients (including vitamins for example),<sup>220</sup> and wholly fails to accommodate a wider sense of food "adequacy" that might be seen as relating to individual capabilities.<sup>221</sup>

That Committee members have only rarely requested information as to the nutritional status of the population,<sup>222</sup> or as to food quality and safety,<sup>223</sup> may be criticised as being unduly cautious. However, the Committee does face considerable problems in assessing the level of enjoyment of the right to food even in so far as it relates merely to malnutrition. Whereas a consumption survey would be the ideal method, it poses prohibitive logistical and financial obstacles.<sup>224</sup> Physical indicators of health are thought to offer "much promise" as measurements of malnutrition,<sup>225</sup> but even here there are difficulties in establishing that a restricted food intake is entirely responsible for the apparent health problems. It is clear that whatever form of measurement is

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<sup>218</sup> *Ibid*, at 71, para.320. Cf. Simma, E/C.12/1989/SR.20, at 7, para.26.

<sup>219</sup> Drèze J. and Sen A., Hunger and Public Action, 37-41 (1989).

<sup>220</sup> Huddleston B., "Approaches to Quantifying the World Food Problem", in Clay E. and Shaw J.(eds), Poverty, Development and Food, 1 at 11 (1987).

<sup>221</sup> *See above*, text accompanying note 206.

<sup>222</sup> *See e.g.*, Texier, E/C.12/1989/SR.9, at 7, para.30; Neneman, E/C.12/1989/SR.20, at 8, para.34.

<sup>223</sup> *See e.g.*, Taya, E/C.12/1988/SR.8, at 6, para.26; Simma, E/C.12/1989/SR.16, at 18, para.95; Alvarez Vita, E/C.12/1987/SR.19, at 13, para.69.

<sup>224</sup> Huddleston, *supra*, note 220, at 10.

<sup>225</sup> *Ibid*, at 11.



adopted, it is likely to display only a "probabilistic picture" of nutritional deprivation.<sup>226</sup>

#### 4) The Realisation of the Right to Food

Article 11(1) makes reference to the obligation of States to "take appropriate steps to ensure the realisation" *inter alia* of the right to food, whilst recognising "the essential importance of international co-operation based on free consent". This seems to parallel the obligation in article 2(1) with the exception of the use of the word "ensure". As was apparent in the drafting of the Covenant, there was no clear intention to oblige States to achieve the realisation of the rights in article 11 immediately.<sup>227</sup>

Unsurprisingly the Committee has taken a similar viewpoint. In its guidelines the Committee specifically asks for information as to the extent to which the right to adequate food has been realised in that country- the implication being that it is acceptable for full realisation not to have been achieved for the time being.<sup>228</sup>

The modalities of implementation were debated in the Committee's General Discussion on the right to food. The report of the discussion states:

"Some members of the Committee considered that every country should take immediate steps to ensure the realisation of the right to food; that ultimate realisation at the fullest acceptable level may in the circumstances of some countries be achieved progressively but the national and international obligations arising under the Covenant meant that with co-ordinated efforts a meaningful start could be made immediately in all States, whilst it was generally agreed that the primary responsibility for ensuring the right to food rested with the individual."<sup>229</sup>

Although only being the opinion of "some members", the form of obligation underlined here largely conforms to the Committee's general approach with respect to article 2(1).<sup>230</sup> One interesting point, however, is the statement that the "primary responsibility" for ensuring the right to food lay with the individual. Although

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<sup>226</sup> See, Drèze and Sen, *supra*, note 219, at 41.

<sup>227</sup> See *above*, text accompanying notes 98-110.

<sup>228</sup> Reporting guidelines, *supra*, note 180, at 99.

<sup>229</sup> *Ibid*, at 71, para.321.

<sup>230</sup> See *above*, Chapter 2.



individuals are certainly responsible for buying or growing food for themselves and their families under normal conditions, to say that they have "primary responsibility" in times of famine is to understate the State obligations with respect to food.

It is considered that the Committee members intended to stress the importance of individual access to food rather than the provision of food by the State. As the General Discussion shows, "[i]t was generally agreed that the right to food was much more extensive than the right to stand in line for food".<sup>231</sup> The role of the State then, is one of ensuring that the external conditions are such that individuals have the ability to feed themselves.<sup>232</sup> In particular it might be said that the principal State obligation "is not, at least initially, to give food to others. Instead, it is a duty not to restrict unduly the right of others to obtain an adequate diet."<sup>233</sup>

People's access to food quite clearly depends upon a number of factors relating to their own social and economic situation (such as their income), and upon "external" factors such as the availability of necessary food-stuffs and their prices. One well-known approach has been to assess a person's command over food through an analysis of his or her "entitlements".<sup>234</sup> Members of the Committee have rightly recognised the importance here of income,<sup>235</sup> especially as might be secured through the rights to work and to social security.<sup>236</sup> However, it is apparent that in the great majority of countries, the absence of full and adequately remunerated employment and of a comprehensive social security system requires that independent action be taken to secure access to food. The rights to work, to a minimum income and social

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<sup>231</sup> General Discussion, *supra*, note 217, at 71, para.320.

<sup>232</sup> See, Tomasevski K., "Human Rights: The Right to Food", 70 Iowa L.R., 1321, at 1325 (1985). As Christensen comments:

"...the emphasis lies, *not* on 'feeding' or 'maintaining' people, but on creating a social and economic environment which fosters development and hence need not depend upon charity."

Christensen C., The Right to Food: How to Guarantee, at 33 (1978).

<sup>233</sup> Brockett C., "The Right to Food and United States Policy in Guatemala", 6 Hum.Rts.Q., 366, at 367 (1984).

<sup>234</sup> Sen A., Poverty and Famines: An Essay on Entitlements and Deprivation, (1981).

<sup>235</sup> See e.g., Neneman, E/C.12/1989/SR.20, at 9, para.36.

<sup>236</sup> See e.g., Simma, E/C.12/1989/SR.20, at 7, para.26.



security are thus not sufficient in themselves to satisfy the right to food.<sup>237</sup>

In so far as the individual's access to food is dependent upon his or her control over resources, there is clearly a need for decisions, strategies and policies affecting resources to be taken with the active participation of those affected. As has been noted in the Committee, the realisation of the right to food is thus also dependent upon participatory rights such as the right to organise,<sup>238</sup> and the right to self-determination.<sup>239</sup>

In the context of malnutrition however, commentators have gone considerably further in linking the right to food with a whole range of other rights.<sup>240</sup> In particular, it has been commented that "a person's capability to avoid undernourishment may depend not merely on his or her intake of food, but also on the person's access to health care, medical facilities, elementary education, drinking water, and sanitary facilities".<sup>241</sup> The fulfilment of other basic needs would also seem to be necessary in order to realise the right to food not only because of the physiological interrelationships between them (for example between health and nutrition<sup>242</sup>) but because they are mutually interdependent for their realisation.<sup>243</sup> This has led one commentator to the conclusion that "a

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<sup>237</sup> See, Alston, *supra*, note 1, at 17; Kassahun Y., "The Food Questions Within the Prism of International law of Development", 38 Oklahoma L.R., 863, at 882 (1985).

<sup>238</sup> This would seem to be the case particularly in respect to agricultural workers.

<sup>239</sup> See e.g., Simma, E/C.12/1989/SR.20, at 7, para.26.

<sup>240</sup> Alston, *supra*, note 1, at 10. See also, Tomasevski, *supra*, note 232, at 1324-5.

<sup>241</sup> Drèze and Sen, *supra*, note 219, at 13.

<sup>242</sup> Christensen cites a number of examples of the interdependence between food and health: physical and mental health depend upon adequate nutrition (especially in the case of children); malnourished adults have a greater susceptibility to disease; illness diminishes the physiological benefits of "adequate" food supplies, may increase the body's nutrient requirements and may deplete the body's nutrient supply. Christensen, *supra*, note 232, at 31-32.

<sup>243</sup> Lustig comments for example that households would not necessarily use the extra income (that was intended for food) to eliminate malnutrition, but would use it to fulfil other subsistence needs. Lustig N., "Direct and Indirect Measures to Ensure Access to Food Supplies", in World Food Security: Selected Themes and Issues, 38 at 46 (1985).



compartmentalised approach to the right to food is both empirically unworkable and theoretically unacceptable".<sup>244</sup>

However, the recognition of connections between the right to food and other rights may lead in two directions. On the one hand it might be concluded that it is impractical to assess the right to food without consideration of the level of realisation of other rights. On the other hand it might be argued that the right to food may be realised merely by ensuring the other rights and need not be referred to itself.

The Committee has not been consistent in its approach in this regard. Although the guidelines require the same information to be provided by every State, the Committee has generally only concentrated on the question of the right to food in relation to poorer developing countries. With regard to the more wealthy States, the Committee seems to concentrate on the questions of employment, income and social security, reflecting the assumption that if these rights are fully provided for, the individual would have no problem with access to food. Thus, no questions were asked as to the right to food in the consideration of the report of Luxembourg<sup>245</sup>, and even in the case of Costa Rica, few direct questions were asked.<sup>246</sup>

The margin of appreciation given to such States seems to reflect the assertions of a number of Western States which maintain that the central problem relating to food in those countries is over-consumption rather than under-consumption.<sup>247</sup> In those States efforts are concentrated on encouraging people to eat more healthily, through *inter alia* the provision of public

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<sup>244</sup> Alston, *supra*, note 1, at 19. Christensen gives three supporting arguments:

"First, there are physiological interrelationships which limit the effectiveness of efforts that fulfill only one physical need while bypassing others. Second, a right to food may be more sustainable if it is part of a 'package' of subsistence rights which provides minimal guarantees of economic security. Third, common duties are associated with the provision of all subsistence rights. Violations of one right are likely to generate difficulties with regard to others as well."

Christensen, *supra*, note 232, at 31.

<sup>245</sup> See, E/C.12/1990/SR.33-36.

<sup>246</sup> See, E/C.12/1990/SR.38, 40, 41 and 43.

<sup>247</sup> See e.g., Steel (UK), E/C.12/1989/SR.16, at 9, para.43; Walkate (Netherlands), E/C.12/1989/SR.14, at 9, para.36. It has been maintained, however, that inadequate food remains a problem in Canada, see, Robertson R., "The Right to Food: Canada's Broken Covenant", 6 *Can.H.R.Y.*, 185, at 191-194 (1989-90).



information as to healthy diets.<sup>248</sup> Unfortunately, outside the requirement that States disseminate knowledge of the principles of nutrition, the Committee has not developed an understanding of the manner in which the right to food is applicable to wealthy States with well-developed social security systems.

In its general approach to the realisation of rights in the Covenant, the Committee looks in particular at the legal regulation of the rights, the degree to which monitoring and targeted policy-making has been undertaken.<sup>249</sup> These matters will be considered individually in the context of the right to food.

#### a) Legal Regulation

Although it is not immediately clear how a legal system may affect an individual's access to food, it is apparent that a number of States do recognise a right to food in their constitutions.<sup>250</sup> In addition, those States that have adopted or incorporated the Covenant into their domestic law, will also have an expression of the right in their legal systems.<sup>251</sup> These moves find support with a number of commentators who consider that the most effective or direct route to secure the right to food is through constitutional enactment or specific legislation.<sup>252</sup>

This approach has not been evident in the work of the Committee. There, the role of law in the realisation of that right has been given a relatively low profile. In contrast to the right to housing, the guidelines do not ask for detailed information as to legal provisions that may affect a person's access to food,<sup>253</sup> and only occasionally has the matter been raised at all.<sup>254</sup> A lack of concern with the role of law in the realisation of the right to food is also reflected in the State reports. For example, it was noted in

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<sup>248</sup> See e.g., Opdahl (Norway), E/C.12/1988/SR.15, at 6, para.22; Willers (FRG), E/C.12/1987/SR.20, at 10, para.41.

<sup>249</sup> See above, Chapter 2, text accompanying notes 74-90.

<sup>250</sup> See e.g., Ecuador, UN Doc.E/1986/3/Add.14, at 11, para.55 (1986); Netherlands, UN Doc.E/1986/4/Add.24, at 1, para.2 (1986). Ganji cites in addition: Pakistan, Turkey, Uruguay and Yemen. Ganji M., "The Realisation of Economic, Social and Cultural Rights: Problems and Perspectives", UN Docs.E/CN.4/1108/Rev.1, and E/CN.4/1131/Rev.1, at 16 (1975).

<sup>251</sup> See above, Chapter 3.

<sup>252</sup> See e.g., Alston, *supra*, note 1, at 16; Robertson, *supra*, note 247, at 215.

<sup>253</sup> See, Reporting guidelines, *supra*, note 180, at 12.

<sup>254</sup> E/C.12/WG/1991/CRP.2, at 3, para.22.



the United Kingdom report to the Committee that "there are no laws, regulations or agreements, nor court decisions bearing on the right of everyone to adequate food in the United Kingdom".<sup>255</sup>

It is considered that the Committee is wrong to overlook the relationship between law and the realisation of the right to food. Even in absence of a specific legal recognition of a right to food, it is clear that the legal framework will condition the access of individuals and groups to the resources necessary to feed themselves.<sup>256</sup> As has been noted in the context of famines:

"The legal system that precedes and survives through the famine may not, in itself, be a particularly cruel one. The standardly accepted rights of ownership and exchange are not... authoritarian extravaganzas... [t]hey are, rather, parts of the standard legal rules of ownership and exchange that govern people's lives in much of the world. But when they are not supplemented by other rights (eg. social security, unemployment insurance, public health provisions), these standard rights may operate in a way that offers no chance of survival."<sup>257</sup>

According to the general requirements for the implementation of the Covenant, States are obliged to ensure that no laws or regulations exist which operated to deprive people of their rights in the Covenant.<sup>258</sup> This would be clear in cases where, for example, a State discriminated against certain groups as regards access to State-subsidised food. Greater attention, however, needs to be paid to cases where the existing system of exchange and ownership serves to impede the access of individuals to adequate food.<sup>259</sup>

#### b) Monitoring Malnutrition

As outlined in its general comment, the Committee has placed considerable emphasis on the importance of monitoring the

<sup>255</sup> UN Doc.E/1980/6/Add.16, at 2 (1980).

<sup>256</sup> See, Alston, *supra*, note 1, at 16.

<sup>257</sup> Drèze and Sen, *supra*, note 219, at 23.

<sup>258</sup> See *above*, Chapter 2, text accompanying notes 131.

<sup>259</sup> For an analysis of the influence of land law on the right to food, see, Plant R., "The Right to Food and Agrarian Systems: Law and Practice in Latin America", in Alston P. and Tomasevski K.(eds), The Right to Food, 187 (1984).



extent of realisation of the rights.<sup>260</sup> Thus in its reporting guidelines it requests States to provide information as to the general realisation of the right to food with reference to sources "including nutritional surveys and other monitoring arrangements".<sup>261</sup> In addition it asks for information as to the extent of hunger and malnutrition in the country concerned, with specific reference to the situation of vulnerable and disadvantaged groups, and for the establishment of time-related goals and nutritional bench-marks for measuring achievements in guaranteeing access to food by vulnerable groups and sectors or within worse-off regions.<sup>262</sup>

Individual members of the Committee have consistently asked for information as to the incidence of hunger and malnutrition<sup>263</sup> and their possible causes.<sup>264</sup> Despite the general tendency to ignore the food situation in developed countries,<sup>265</sup> individual members have occasionally insisted upon the need for monitoring such countries to ensure that there was no significant amount of malnutrition, and have criticised States where they have failed to do so.<sup>266</sup>

As noted above, nowhere does the Committee define what it means by either "adequate food" or "malnutrition", nor does it request specific indicators.<sup>267</sup> It is assumed that in the process of monitoring and evaluation, States will have to define these matters for themselves. Currently, the statistical information provided to the Committee by States is partial and generalised indicating no regular pattern of monitoring. In its discussion on the use of indicators, there would appear to be an intention on the part of the Committee to establish a list of indicators that should be utilised in

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<sup>260</sup> General Comment No.1, UN ESCOR, Supp.(No.4), Annex III, at 88, para.3, UN Doc.E/1989/22, (1989). *Cf also*, Centre for Human Rights, *supra*, note 209, at 51, paras 257-261.

<sup>261</sup> Reporting guidelines, *supra*, note 180, at 12.

<sup>262</sup> *Ibid.*

<sup>263</sup> *See e.g.*, Alston, E/C.12/1988/SR.17, at 8, para.46; Alston, E/C.12/1988/SR.10, at 5, para.19; Texier, E/C.12/1990/SR.2, at 9, para.55; Alston, E/C.12/1990/SR.2, at 10, para.64.

<sup>264</sup> *See e.g.*, Alston, E/C.12/1988/SR.17, at 8, para.46.

<sup>265</sup> *See above*, text accompanying notes 245-248.

<sup>266</sup> *See*, Alston, E/C.12/1988/SR.8, at 6, para.23, and E/C.12/1989/SR.17, at 7, para.32.

<sup>267</sup> *See above*, text accompanying notes 205-226.



monitoring.<sup>268</sup> It is submitted that this would considerably increase the Committee's control and supervision of State compliance with their obligations.

### c) Vulnerable Groups

The guidelines require States to provide information on the extent of hunger and malnutrition in that country with particular reference to the vulnerable or disadvantaged groups in society. It stipulates that information should at least cover the position of landless peasants, marginalised peasants, rural workers, rural unemployed, urban unemployed, urban poor, migrant workers, indigenous populations, children, elderly people and other "especially affected groups". It should also address whether there is any significant difference in the situation of men and women in the above groups, and requires information as to changes over the past five years for each group.<sup>269</sup> This general concern for vulnerable and disadvantaged groups has been reflected in the questions of the pre-sessional working group.<sup>270</sup> In addition, members of the Committee have looked to the disparities in the relative position of those in rural and urban districts.<sup>271</sup>

In so far as the effectiveness of the guidelines has not truly been tested, it is as yet too early to say whether States will be able or willing to provide the amount of disaggregated data required by the Committee. Thus far States have rarely volunteered information as to the position of particular disadvantaged groups. The statistical information provided generally relates to the aggregate position of the population as a whole. It is important to note, however, that the emphasis on vulnerable groups is of primary importance for the adoption of targetted and considered policies. It will not necessarily be the case that all of the specified groups will have insufficient access to food. What is important, however, is that the State identify those groups in society that are vulnerable in this respect.

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<sup>268</sup> See below, Chapter 9.

<sup>269</sup> Reporting guidelines, *supra*, note 180, at 12.

<sup>270</sup> E/C.12/WG/1991/CRP.1, at 4, para.24(a);  
E/C.12/WG/1991/CRP.4, at 6, para.37.

<sup>271</sup> See, Alston, E/C.12/1987/SR.22, at 6, para.21;  
E/C.12/WG/1991/CRP.4, at 6, para.36.



### 5) Specific State Obligations

Although article 11 as a whole was intended to be governed by the general obligation clauses in article 2(1) under which States parties are obliged to take steps to achieve progressively the full realisation of the rights,<sup>272</sup> it was decided nevertheless to include certain specific obligations in article 11(2) relating to the right to food. Those obligations were not intended to detract from the general State obligations found in article 2(1), but merely provided a more detailed outline of the measures to be taken and the objectives to be achieved in the context of the right to food. However, as a result of the uneven, over-hasty and badly co-ordinated drafting process, article 11(2) appears to be a "relatively confused and by no means all-embracing mixture of means and ends."<sup>273</sup> Three objectives seem to be specifically outlined, namely to improve methods of production, conservation and distribution of food; to achieve the most efficient development and utilisation of natural resources;<sup>274</sup> and to ensure an equitable distribution of world food supplies in relation to need.<sup>275</sup> Whereas the first two objectives are national ones, the third relates to the international plane.<sup>276</sup>

States are under an obligation to take the necessary measures and programmes, both individually and through international co-operation, to achieve these objectives. Specifically however, with respect to the two national objectives (in article 11(2)(a)), States should make full use of technical and scientific knowledge, disseminate knowledge of the principles of nutrition and develop or reform their agrarian systems. Given the general obligation to take the necessary measures to achieve the stated objectives, there is no reason to consider that the measures specifically enumerated are exhaustive.<sup>277</sup>

It is unclear whether the specified measures are intended to relate to the right to food as a whole, or merely to the right to be

<sup>272</sup> See above, text accompanying notes 101-103.

<sup>273</sup> Alston, *supra*, note 1, at 34.

<sup>274</sup> Article 11(2)(a).

<sup>275</sup> Article 11(2)(b).

<sup>276</sup> Kassahun, however, reads sub-paragraphs (a) and (b) together. He argues that the objectives in sub-paragraph (a) are to be read in light of the limits imposed by the problems of food-importing and food-exporting States, and comes to the conclusion that "the formulation of article 11 appears to maintain the status quo in terms of food production". Kassahun, *supra*, note 237, at 888.

<sup>277</sup> See, Alston, *supra*, note 1, at 34.



free from hunger. However, on the basis that the right to be free from hunger acts as a "sub-norm" of the right to food as a whole, progress made in achieving the subsidiary ends in article 11(2) must always be judged against the objective of realising everyone's right to adequate food and ultimately their right to an adequate standard of living.<sup>278</sup> It would not be sufficient, for example, to argue that agrarian reform was not necessary merely because no-one was dying of hunger.

#### a) The Subsidiary Objectives

In dealing with the questions of production, conservation and distribution, the Committee seems to confine itself to assessing the degree of realisation of the right to food and ensuring that a policy has been adopted to alleviate the position of the poor and disadvantaged.<sup>279</sup> It has not entered into an analysis of the relative merits of the programmes undertaken, nor has undertaken to make recommendations as to specific courses of action even on a State by State basis.

#### i) Production

In order for everyone to have adequate supplies of food, it is clear that food production should be increased to keep pace with population growth.<sup>280</sup> Although article 11(2) speaks of an improvement in "methods" of production, rather than an increase in production itself, it would seem obvious that the provision was intended to be directed towards the latter concern. The Committee's guidelines do nothing to resolve this question and make rather a bland reference to the objective in asking what

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<sup>278</sup> *Ibid.*

<sup>279</sup> Reporting guidelines, *supra*, note 180, at 12; Fofana, E/C.12/1991/SR.7, at 13, para.54.

<sup>280</sup> In areas such as Sub-Saharan Africa, the population growth and increasing urbanisation have placed considerable strain on food resources to the extent that an increase in food production is vital. *See e.g.*, Christensen C. and Hanrahan C., "African Food Crisis: Short-, Medium-, and Long-Term Responses", 70 *Iowa L.R.*, 1293, at 1294-5 (1985); Kumar G., "Ethiopian Famines 1973-1985: A Case Study" WIDER Working Paper No.26, (1987); Green R., "Sub-Saharan Africa: Poverty of Development, Development of Poverty", in Clay E. and Shaw J.(eds), Poverty, Development and Food, 78, at 87-88 (1987). However, for the view that access to food is one of distribution not production *see*, George S., How the Other Half Dies, 53-68 (1986).



measures had been taken to improve methods of food production.<sup>281</sup>

There are clearly a great number of ways in which food production may be increased and improved, such as through improving access to agricultural inputs (high yield crops, fertilisers, pesticides and machinery), increasing the area of arable land, providing farmers and fishermen with incentives for production, undertaking soil conservation and improvement, and increasing agricultural research and the transfer of technology,<sup>282</sup> to name but a few.<sup>283</sup> Clearly, the measures taken will depend upon the agricultural and economic situation in the country concerned.

Members of the Committee have rarely entered into a discussion of the policies pursued in this direction, and have generally looked only to the existence of such policies.<sup>284</sup> Occasionally comments have been made as to type of policy undertaken. One member, for example, argued that large-scale State food subsidies often led to insufficiently profitable output and hence to lower food production, and that it was therefore essential to provide sufficient incentives to make food production profitable and hence to ensure that there was enough food on the market.<sup>285</sup> However in no way can there be presumed that the Committee has formulated any coherent policy in this regard.

In terms of food production it has often been considered that States should have as their objective food self-sufficiency. It is clear that a number of States have set food self-sufficiency as a target for achieving the realisation of the right to food, and to a large extent, members of the Committee have endorsed such an objective.<sup>286</sup> The Committee has not gone so far as to analyse whether "self-sufficiency" in terms of producing all the food for

<sup>281</sup> Reporting guidelines, *supra*, note 180, at 12.

<sup>282</sup> See, Boerma A., *A Right to Food*, 87-97 (1976).

<sup>283</sup> See, Huddleston, *supra*, note 220, at 18; Christensen, *supra*, note 232, at 6-17.

<sup>284</sup> See e.g., Badawi El Sheikh, E/C.12/1988/SR.5, at 4, para.15; Texier, E/C.12/1989/SR.5, at 9, para.50; E/C.12/WG/1991/CRP.2, at 3, para.23.

<sup>285</sup> See, Neneman, E/C.12/1989/SR.20, at 9, para.35.

<sup>286</sup> See e.g., Alston, E/C.12/1988/SR.17, at 8, para.46; Muterahajuru, E/C.12/1989/SR.6, at 12, para.60; Dobbert (FAO), E/C.12/1989/SR.21, at 10, para.41.



domestic consumption is indeed a realistic or desirable proposition.

Members of the Committee have occasionally noted that given their dependence on international trade, poorer agricultural countries were often unable to ensure self-sufficiency,<sup>287</sup> and that it would at any rate involve a certain amount of agricultural protectionism.<sup>288</sup> However it is not at all clear that food self-sufficiency would necessarily guarantee food security in the first place given the vulnerability of such an economy to domestic surpluses and deficits.<sup>289</sup> Moreover, a great number of States that are not self-sufficient do not suffer from serious food shortages. This has led some commentators to argue that food "self-reliance" (which involves the import of a certain amount of food to be paid for by exports) through diversification, is a more stable and effective method of securing sustained access to food for all.<sup>290</sup>

Nevertheless, whereas the availability of sufficient food resources is clearly important, it is by no means clear that alone it is enough to guarantee access to food. As one member rightly pointed out "it was not unusual for individuals to go hungry even though food production was high."<sup>291</sup> The essential question is the extent to which an individual has an adequate "command" over food, which has to be assessed through an analysis of both the supply and consumption of food.<sup>292</sup>

## ii) Conservation

The term "conservation" in the context of article 11(2)(a) is specifically confined to the preservation of food-stuffs before they reach the market place. The term seems to have been included to remedy the problem of loss and deterioration of food that has been particularly apparent in developing countries.<sup>293</sup> Although being given a passing comment in the Committee's guidelines, the issue

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<sup>287</sup> See, Muterahjuru, E/C.12/1989/SR.21, at 2, para.4.

<sup>288</sup> *Ibid*, para.1.

<sup>289</sup> Mangahas M., "Relative Emphasis on Food Self-Sufficiency and Trade-Oriented Self-Reliance", World Food Security: Selected Themes and Issues, 1 at 16 (1985).

<sup>290</sup> *Ibid*, at 13; Drèze and Sen, *supra*, note 219, at 165-176.

<sup>291</sup> Alston, E/C.12/1987/SR.12, at 9, para.35. See also, Drèze and Sen, *supra*, note 219, at 27-8.

<sup>292</sup> Centre For Human Rights, *supra*, note 209, at 27.

<sup>293</sup> See, Dobbert, "The Right to Food", Academie de Droit International, Colloque 184 at 200 (1978).



of conservation of food-stuffs has not been the subject of any specific comment by the Committee or individual members. Given the role that conservation could have in increasing food self-reliance (by decreasing the need for food imports), in improving nutritional standards (by preventing nutritional deterioration), and in contributing to the effective use of human and physical resources, it would surely be worth more detailed consideration.

### iii) Distribution

"Distribution" in article 11(2)(a) would seem to relate to distribution within the territorial limits of each country in contrast with article 11(2)(b) which refers primarily to international distribution. The area of State action covered by the term distribution would seem to include marketing arrangements (such as the transport infrastructure<sup>294</sup>), price controls, rationing, food subsidies<sup>295</sup> and direct food or cash relief. Clearly the objective of "improving" the distribution of food should be read in light of ensuring access to food for everyone, and its effectiveness may be measured by consumption levels.

As with the question of production, the Committee has not endeavoured to discuss or analyse specific distributional methods, and clearly lacks the necessary knowledge, and technical expertise to do so. It has rather enquired as to how measures taken to improve distribution have "contributed towards, or have impeded the realization of the right to adequate food"<sup>296</sup> particularly as regards vulnerable groups in society.<sup>297</sup>

### b) Development and Utilisation of Natural Resources.

Although the efficient development and utilisation of natural resources appears to relate solely to agrarian development, commentators have generally considered that, despite the absence of a comma, it should be read to relate to the whole of article

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<sup>294</sup> Kumar G., Ethiopian Famines 1973-1985: A Case Study, 57 (1987).

<sup>295</sup> The World Bank notes that a number of forms of food subsidy are used by developing countries including: general food price subsidies, food rations, food stamps, food distribution policies and food supplementation schemes. IBRD, *supra*, note 186, at 92-96.

<sup>296</sup> Reporting guidelines, *supra*, note 174, at 12.

<sup>297</sup> E/C.12/WG/1991/CRP.2, at 3, para.23.



11(2)(a).<sup>298</sup> The Committee appears to have adopted this interpretation in asking what effect the measures of implementation have had on the protection and conservation of food producing resources.<sup>299</sup>

In addition however, the Committee has laid an emphasis on the phrase that perhaps was not envisaged at the time of drafting. The drafters, in making reference to the development and utilisation of natural resources, were arguably concerned merely that resources should be utilised to their maximum extent without unnecessary wastage. The Committee however, in line with more recent environmental awareness, has stressed "ecological sustainability" and the "protection and conservation of food producing resources".<sup>300</sup> At a very general level, the Committee seems to be concerned that the utilisation of natural resources should be consistent with their future, long-term, sustainability.<sup>301</sup>

In its questions to States however, the Committee has not pursued such environmental issues. It would, however, be open for the Committee to enquire into action being taken to ensure such concerns enter into the planning debate, particularly as regards the regeneration of living resources, the productivity of soils (including action to combat desertification), the effective use of water resources, and the control of silviculture.<sup>302</sup>

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<sup>298</sup> Dobbert considers that this is the necessary implication of a teleological interpretation given that the development and utilisation of natural resources is a concomitant of methods of production, distribution and conservation of food. Dobbert, *supra*, note 293, at 193. *See also*, Alston, *supra*, note 1, at 35.

<sup>299</sup> Reporting guidelines, *supra*, note 180, at 12.

<sup>300</sup> *Cf.* Declaration of the United Nations Conference on the Human Environment, Stockholm 1972, 11 I.L.M. 1416 (1972). Principle 13 which states:

"In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the environment for the benefit of their population".

<sup>301</sup> For the notion of "sustainable development" *see*, Environmental Protection and Sustainable Development (1986).

<sup>302</sup> The clearance of forest land for agricultural purposes perhaps illustrates most poignantly the competing concerns of food production and environmental protection. In many such cases it would seem that the short-term benefits of increased food-production are outweighed by the far more drastic environmental problems that ensue.



## 6) Specified Measures

### a) Science and Technology

Scant mention is made within the Committee of the requirement that "full use" be made of "technical and scientific knowledge". It has been given a passing reference in the guidelines, and has only rarely been mentioned by members of the Committee.<sup>303</sup> Whilst the provision would appear to require, at minimum, the institution of national education and training programmes and research to engender the effective utilisation of existing expertise, it has been noted that the provision could also be seen to have an international dimension.<sup>304</sup> Specifically, it might be interpreted as obliging States to co-operate internationally in the dissemination of such knowledge whether through the auspices of the FAO or through the transfer of knowledge to developing countries.<sup>305</sup>

### b) Principles of Nutrition

The requirement in article 11(2)(a) that States "disseminate knowledge of the principles of nutrition" has been expressly taken up by the Committee in its guidelines.<sup>306</sup> In addition, the Committee requests information as to whether "any significant groups or sectors within society seem to lack such knowledge".<sup>307</sup> This would seem to be principally an educational objective aimed at enabling people to feed themselves in a healthy manner. Members of the Committee have taken up such educational questions particularly in regard to developed countries, where problems often relate to over-consumption.

A related field, not directly covered by the express terms of the Covenant, is the establishment and enforcement of food standards.<sup>308</sup> It is clear that there is a considerable potential State role in ensuring food safety. Legislative standards could be enacted to ensure that food production and marketing are undertaken in a safe and healthy manner, and that the food available is free from adverse alien substances.<sup>309</sup>

<sup>303</sup> See e.g., Muterahajuru, E/C.12/1988/SR.17, at 6, para.34.

<sup>304</sup> There are however objections to importing into a provision that deals primarily with national obligations, obligations that operate on the international level.

<sup>305</sup> Dobbert, *supra*, note 293, at 196-7.

<sup>306</sup> Reporting guidelines, *supra*, note 180, at 13.

<sup>307</sup> *Ibid.*

<sup>308</sup> See, Dobbert, *supra*, note 293, at 198-200.

<sup>309</sup> See, Center for Human Rights, *supra*, note 209, at 27, para.133. On the international plane cf. FAO/WHO Codex Alimentarius Commission.



Moreover, a system of inspection and control could be established at the national level to enforce such standards.

Although the Covenant makes no reference to food quality, or measures to control it, it would be natural to infer from the concept of "adequate food" a qualitative element. Similarly, it is clear that the measures envisaged in article 11(2) are not exhaustive and therefore could not be said to exclude an obligation to take action as regards food quality. Unfortunately, although a number of members have made reference to food quality issues, the Committee as a whole has not taken up this question in any coherent manner.

### c) Agrarian Reform

According to the travaux préparatoires, it was not intended that every State should undertake a programme of agrarian reform, but only in cases where the existing land-tenure system required it.<sup>310</sup> For those States that did not need to undertake agrarian reform, it seems to have been considered that they should nevertheless "develop" their agrarian systems. This distinction is not immediately apparent in the Committee's guidelines. No mention is made of the development of agrarian systems—merely reform. It might be inferred that all countries are required to reform their agrarian systems to ensure the right to food. This would, of course, be an unreasonable proposition. What the Committee has to establish is an idea of the type of agrarian system that is adequate from the point of view of realising the right to food.

Some Committee members do seem to have been concerned with attempting to evaluate whether or not agrarian reform is necessary. Principally they have directed their attention towards the existing system of land tenure and the number of peasant farmers without their own land.<sup>311</sup> Although it has been asserted that any developing country which had not carried out agrarian reform would be considered automatically to have violated the Covenant,<sup>312</sup> there have been no occasions in which members have expressly stated that land reform is necessary.

The purpose of agrarian reform in the context of the right to food is not always clear. The travaux préparatoires make clear that it

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<sup>310</sup> See above, text accompanying note 158.

<sup>311</sup> See e.g., Muterahjuru, E/C.12/1989/SR.9, at 6, para.19; Fofana, E/C.12/1991/SR.7, at 13, para.54.

<sup>312</sup> See, Texier, E/C.12/1990/SR.22, at 13, para.81.



was deemed necessary to improve the utilisation of agricultural resources.<sup>313</sup> More indirectly, however, existing inequalities in land distribution can contribute to social marginalisation, poverty, unemployment, homelessness and may increase rural-urban migration. Given that malnutrition (and even starvation) have significant links with poverty, all of these factors would have significant effects on the enjoyment of the right to food.

The Committee, in its guidelines, requests information as to the measures of agrarian reform that have been taken to ensure that "the agrarian system is efficiently utilised in order to promote food security at household level without negatively affecting human dignity both in rural and urban settings taking into account articles 6 and 8 of the Covenant".<sup>314</sup> In addition, it wishes to know what measures have been taken to legislate, enforce and to monitor in this regard.<sup>315</sup> The Committee quite rightly appears to consider that agrarian reform is only relevant in so far as it is related to the enjoyment of the right to food- it is not sufficient on its own. As one Committee member commented: "agrarian reform might be sweeping yet result in severe deprivation of food for a significant part of the population".<sup>316</sup> In referring to human dignity (and particularly articles 6 and 8 of the Covenant), the Committee would seem to stress the necessity of ensuring access to food in a manner that does not conflict with the satisfaction of other rights or needs. As one study argues:

"Food procurement should be possible for all without conflicting with the satisfaction of other material and non-material basic human needs. Otherwise food procurement may not be viable over time for the household concerned, whose members will chose their final strategies based on a range of priorities".<sup>317</sup>

Whilst the reference to article 6 would seem to stress the need to ensure employment prospects in rural areas during reform, article 8 probably relates to the desirability of popular participation in rural development activities in general. As has been commented elsewhere:

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<sup>313</sup> See above, text accompanying note 157. For the utility of agrarian reform see, IBRD, *supra*, note 187, at 64-66; Brockett, *supra*, note 233, at 369; McChesney, *supra*, note 190, at 315.

<sup>314</sup> Reporting guidelines, *supra*, note 180, at 13.

<sup>315</sup> *Ibid.* On the importance of law in this area see, Plant, *supra*, note 259, at 187.

<sup>316</sup> Alston, E/C.12/1987/SR.19, at 8, para.43.

<sup>317</sup> Center for Human Rights, *supra*, note 209, at 27, para.134.



"Rural development strategies can realise their full potential only through the motivation, active involvement and organisation at the grass-roots level of rural people, with special emphasis on the least advantaged, in conceptualising and designing policies and programmes and in creating administrative, social and economic institutions, including cooperative and other voluntary forms of organisation for implementing and evaluating them".<sup>318</sup>

Questions of individual members have occasionally centered upon the level of participation in measures designed to promote the right to adequate food,<sup>319</sup> but none have done so in relation to agricultural reform *per se*.

#### 7) Article 11(2)(b)

Little comment has been made by the Committee on the purport of article 11(2)(b). The guidelines ask States to "describe and evaluate" the measures taken to ensure an equitable distribution of world food supplies in relation to need.<sup>320</sup> It is unlikely that the Committee will receive much useful information so long as the text is not explained, and the breadth of State obligations outlined. As was noted in the General Discussion, paragraph 2(b) appeared to refer not only to programmes financed by voluntary funds, but also to "international commodity arrangements under the auspices of the Committee on Commodity Problems, consultations within the Sub-Committee on Surplus Disposal and even GATT or UNCTAD negotiations on agricultural commodities".<sup>321</sup>

The assumption of the Committee, and certain commentators, has been that sub-paragraph (a) deals with national obligations and sub-paragraph (b) with the relevant international measures that have to be taken in order to achieve the fulfilment of the right to be free from hunger (and more generally the right to food).<sup>322</sup> Although reference is made to international problems

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<sup>318</sup> Programme of Action, World Conference on Agrarian Reform and Rural Development, Rome 12th-20th July 1979. *See also*, Alston, *supra*, note 1, at 20.

<sup>319</sup> *See e.g.*, Sparsis, E/C.12/1989/SR.7, at 2, para.2; Simma, E/C.12/1989/SR.16, at 18, para.95.

<sup>320</sup> Reporting guidelines, *supra*, note 180, at 101.

<sup>321</sup> Dobbert (FAO), E/C.12/1989/SR.20, at 6, para.21.

<sup>322</sup> *See e.g.*, Alston, *supra*, note 1, at 34.



and "world" food supplies, there is no reason why the obligation to ensure an equitable distribution of food in relation to need should not equally have a domestic element. As an objective, it applies equally well on the domestic level as on the international level. Indeed, a reference to international co-operation is to be found in the first paragraph of article 11(2) and should be read as applying to both sub-paragraphs.

Such an approach benefits from the fact that "need" does not have to be interpreted in terms of "State-need" but more appropriately in terms of "individual-need". This would conform more closely to the individual nature of human rights in general and avoid placing the "State" in a duplicitous position as the agent for realisation and the co-beneficiary of human rights provisions. What it does mean is that States would have both domestic and international obligations (or internal and external obligations) to ensure that the malnourished and starving world-wide have sufficient food.<sup>323</sup>

This question was raised in the Committee's general discussion. One member suggested that the duty to provide for international cooperation might lead to a point at which it could be asserted that the world's surplus food resources were the common heritage of mankind for meeting the needs of the hungry and impoverished.<sup>324</sup> That member, whilst admitting the proposal was "excessive", considered that it was the "only way in which an international legal obligation could be imposed upon States under the Covenant".<sup>325</sup> On a more realistic level, Mr Eide (the Special Rapporteur to the Sub-Commission) asserted that "it was increasingly possible to claim that States had external obligations at least to the extent of allowing other peoples in other countries to survive".<sup>326</sup>

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<sup>323</sup> It is worthy of note here that the Covenant does not have any territorial restrictions on the obligations of States. It could be argued that, in principle, every State is responsible for the position of every individual with respect to the right to food. This would in effect be a step towards seeing food resources as the common heritage of mankind. However, the implication of article 29 of the Vienna Convention on the Law of Treaties is that in absence of a specific provision otherwise "a treaty is binding upon each party in respect of its entire territory", and only that territory. Indeed, it is extremely unlikely that States would admit such an obligation, not least in so far as it might affect their own sovereignty.

<sup>324</sup> *See*, Rattray, E/C.12/1989/SR.20, at 11, para.48.

<sup>325</sup> *Ibid.*

<sup>326</sup> Eide, E/C.12/1990/SR.20, at 10, para.41.



Article 11(2)(b) refers specifically to the problems of food-importing and food-exporting countries. It has been asserted that such a reference was included to reflect the fear of grain-exporting States that the FAO Freedom From Hunger Campaign might interfere with the operation of the international grain markets, and as such is anachronistic today.<sup>327</sup> Nevertheless, the Committee makes reference to the phrase in its reporting guidelines without attempting to explain its meaning. Despite the unsatisfactory nature of the wording, probably the best interpretation today, given the fact that food-importing and food-exporting countries exist in both the developed and developing world, is to read the provision in light of the need to ensure an "equitable distribution of world food supplies". This would mean focussing particularly upon the position of developing countries of either category.<sup>328</sup> Although every State could claim to have some form of trade problems, the problems that are relevant here are those that directly relate to the ability of the State to ensure every individual access to adequate food.

The reference to exports and imports clearly relates to the terms of international trade. The Committee, however, reads the term "distribution" more widely. In the Committee's guidelines, reference is made to "an equitable distribution, in terms of both production and trade, of world food supplies".<sup>329</sup> Two main issues appear to be of concern to the Committee. First is that the location of greatest production of food resources (the developed world), does not coincide with the location of greatest need (the developing world). There is clearly a need for greater food production in developing countries and a transfer of human and material resources out of the agricultural sector in the developed world.<sup>330</sup> Secondly, the protectionist farm trade policies of the developed world, accompanied by an increasing number of tariff and non-tariff barriers, have served to reduce the export earnings of developing countries, have endangered developing countries' food security through destabilising food prices and have obstructed

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<sup>327</sup> Alston, *supra*, note 1, at 43.

<sup>328</sup> See, Dobbert, *supra*, note 293, at 194. This would avoid the criticism of Kassahun that the article does not address the question of "agribusiness" which "allows global food production for global markets that causes the hungry country to be a food-exporting state". Kassahun, *supra*, note 247, at 888.

<sup>329</sup> Reporting guidelines, *supra*, note 180, at 101.

<sup>330</sup> Boerma, *supra*, note 282, at 75-86.



agricultural development in developing countries.<sup>331</sup> Although such problems are commonly accepted, it is not entirely agreed that developing countries would reap significant benefits from agricultural trade liberalisation.<sup>332</sup>

It is notable, however, that the Committee members, in speaking of the question of international co-operation, rarely refer to trade issues. In the General Discussion mention was made of the inequitable terms of trade between primary producers of agricultural products and producers of manufactured products particularly in terms of prices. "It was therefore an important part of the solution of the problem of the right to food that there should be an adjustment in the terms of trade as called for by the new international economic and social order".<sup>333</sup> The Committee has not taken it upon itself to suggest the forms of adjustment that should be undertaken.

At the international level, although a great number of measures have been taken to stabilise food prices, volume of trade and to create buffer stocks where necessary, it is not apparent that in the short or medium term, a distribution of food supplies according to need would be provided by trade alone. This concern was expressly raised in the drafting of article 11. There, in rejecting the use of the word "interests" in place of "problems" in the drafting of article 11(2)(b), the States concerned wished to

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<sup>331</sup> See e.g., Carlson J., "Hunger, Agricultural Trade Liberalisation, and Soft International Law: Addressing the Legal Dimensions of a Political Problem", 70 *Iowa L.R.*, 1187, 1209-1220 (1985); IBRD, *supra*, note 186, at 121-123.

<sup>332</sup> Carlson argues that "liberalising the agricultural trade policies of developed nations is widely recognised as a critical international goal particularly important in the battle against hunger and underdevelopment." *Ibid*, at 1209. Similarly the World Bank claims that developing countries will reap "substantial gains" from trade liberalisation, IBRD, *supra*, note 186, at 123. However, sceptics have argued otherwise. Christensen concludes that "attempts to remove these limitations within the present 'rules of the game' are likely to achieve only marginal results. Liberalising agricultural trade, for example, would be largely ineffective. It would not significantly alter the underlying distribution of wealth which such a structure demands." Christensen, *supra*, note 280, at 31.

<sup>333</sup> General Discussion, *supra*, note 217, at 72, para.325. On the New International Economic Order and human rights generally, see, Ferrero R., "The International Economic Order and the Promotion of Human Rights", UN Doc. E/CN.4/Sub.2/1983/24/Rev.1, (1983); Baxi U., "The New International Economic Order, Basic Needs and Rights: Notes Towards Development of the Right to Development", 23 *Ind.J.I.L.*, 225 (1983). Van Hoof F., "Problems and Prospects with Respect to the Right to Food", in van Dijk P. *et al* (eds), Restructuring the International Economic Order: The Role of Law and Lawyers, 107 (1987).



stress social and humanitarian considerations as opposed to merely economic ones.<sup>334</sup> This would mean that an international strategy to achieve more equitable distribution should not be a narrow trade-orientated one, but should seek to ensure that access to food is a reality for all members of the population concerned.<sup>335</sup> It is an implication that the provision of food aid would be highly desirable in certain circumstances.

#### 8) International Co-operation and Assistance

Article 11 refers to international co-operation specifically on two occasions and implicitly on a third. First, article 11(1) provides that States parties shall take measures to realize the right to an adequate standard of living (and therefore the right to food) "recognising to this effect the essential importance of international co-operation based on free consent". In merely providing that States "recognise" the importance of international co-operation, the provision does not seem to set out a binding legal obligation. It should perhaps be seen as drawing attention to the correlative obligation found in article 2(1) of the Covenant.

The phrase "based on free consent", it might be assumed, was inserted as a safety clause against any assumption that food-surplus States have an automatic responsibility to make transfers to food-deficient States. It might also be read as requiring that food aid should only be provided with the consent of the recipient State.<sup>336</sup> Either way, given its hortatory nature, it cannot be interpreted as making co-operation entirely optional, nor can it defeat the general obligation in article 2(1).

Article 11(2), however, specifically provides that States should take "individually and through international co-operation" the measures necessary to achieve the objectives in sub-paragraphs (a) and (b). In so far as it merely repeats the general clause in article 2(1), this provision cannot be seen to add anything substantive to the existing State obligations. Indeed by the fact that it refers only to the two sub-paragraphs rather than the right to food itself, suggests that its scope is considerably less wide. In addition, article 11(2) does not refer to "international assistance" but merely "co-operation". No attempt has been made to distinguish these two concepts as far as the Covenant is concerned, either in the travaux préparatoires or in subsequent practice. It

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<sup>334</sup> See above, text accompanying note 166.

<sup>335</sup> Alston, *supra*, note 1, at 43.

<sup>336</sup> *Ibid*, at 40.



would seem from an ordinary reading of the terms that co-operation is the broader concept including not merely a positive duty to assist, but also a negative duty not to obstruct the realisation of the rights.

Finally, a duty to co-operate internationally may be inferred from article 11(2)(b) which refers to the duty to ensure an equitable distribution of world food supplies. However, as noted above, there is no need to interpret this provision in such a restrictive manner- especially as certain domestic obligations may be inferred therefrom. If the domestic and international obligations are seen as complementary, there is no necessity to determine whether or not a state "qualifies" for international assistance.<sup>337</sup> Thus the failure of a State to undertake the necessary distributional measures to ensure everyone has access to adequate food, although potentially signifying a violation of the Covenant, would not necessarily disqualify it from receiving aid. This is apparent not only because effective distribution may be an expensive and time-consuming goal, but also because the need relates to the individual not the State.

As noted above, the concept of international co-operation does not exclusively relate to the obligation to assist. In addition, it might be argued that States have a duty to desist from action that may impede the realisation of the right to food in other countries. More specifically, this could involve restraining itself from "dumping" food surpluses on developing countries where it may have the effect of undermining domestic food-production, and also perhaps the control of transnational agribusiness corporations.<sup>338</sup> Only scant reference has been made by the Committee to either of these obligations.<sup>339</sup>

With respect to the question of international assistance, there are clearly a large number of areas and fora in which this may take place, a number of which have been referred to elsewhere. The most obvious concern would seem to be the provision of international aid. Recently there has been a move away from the provision of large, long-term aid programmes, which have been

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<sup>337</sup> *Ibid*, at 36.

<sup>338</sup> See, George, *supra*, note 280, at 158-191; Kassahun, *supra*, note 237, at 864-868.

<sup>339</sup> With respect to Trans-National Corporations see, Wimer Zambrano, E/C.12/1989/SR.21, at 8, para.32. As regards "dumping" of unsafe food see, Alvarez Vita, E/C.12/1987/SR.19, at 13, para.69.



thought to increase dependence upon assistance,<sup>340</sup> impair domestic production and reinforce existing inequalities within the recipient States.<sup>341</sup> However, there are still a number of arguments in favour of the provision of food aid. One commentator has noted that food aid can: i) provide States with the ability to maintain nutritional and consumption status of the population. ii) relieve the impact of fluctuations in food supplies and build the necessary administrative capacity, and iii) allow for broad-based employment orientated development strategies to increase food-production.<sup>342</sup> In addition, there are clearly ways to prevent food aid diminishing the demand for local produce.<sup>343</sup>

Members of the Committee have however been wary of advocating the provision of food aid. They have stressed in particular the need for international co-operation to focus on assisting the production,<sup>344</sup> conservation and distribution<sup>345</sup> of food at the domestic level. It has been considered that the Committee should enquire into the extent to which States have contributed through international cooperation towards the realization of the right to adequate food.<sup>346</sup> However, the Committee's guidelines merely require information as to measures taken to ensure an equitable distribution of food supplies,<sup>347</sup> and the Committee members' questions have been general and infrequent.<sup>348</sup>

As has been noted that although there may be a duty to co-operate internationally, it is likely that "States will insist on a right

<sup>340</sup> Alston, *supra*, note 1, at 41; George, *supra*, note 280, at 192; Eide, E/C.12/1989/SR.20, at 10, para.44.

<sup>341</sup> Alston, *supra*, note 1, at 11 and 41.

<sup>342</sup> Mellor J., "Effective Food Aid for Effective Food Security", in World Food Security: Selected Themes and Issues, 18 at 30, (1985); and, "Food Aid for Food Security and Economic Development", in Clay E. and Shaw J.(eds) Poverty, Development and Food, 173 (1987).

<sup>343</sup> Dobbert (FAO), E/C.12/1989/SR.21, at 10, para.39.

<sup>344</sup> See e.g., Neneman, E/C.12/1989/SR.20, at 9, para.38; Eide, E/C.12/1989/SR.20, at 10, para.44.

<sup>345</sup> See, Sparsis, E/C.12/1989/SR.20, at 12, para.52.

<sup>346</sup> See, Dobbert (FAO), E/C.12/1989/SR.20, at 7, para.22; Simma, E/C.12/1989/SR.20, at 8, para.28.

<sup>347</sup> Reporting guidelines, *supra*, note 180, at 13.

<sup>348</sup> See e.g., Alvarez Vita, E/C.12/1987/SR.19, at 13, para.69; Muterahajuru, E/C.12/1989/SR.12, at 12, para.64; E/C.12/WG/1991/CRP.2, at 3, para.24;



to retain absolute discretion in determining the level of their contribution to world welfare requirements".<sup>349</sup> However, it is considered that the Committee might benefit from distinguishing between claims for the provision of food aid in the case of chronic malnutrition and claims that relate to a situation of famine. In the latter case, there is a more imperative moral obligation on the part of developed States to provide immediate assistance to the victims. Such a moral obligation could be assimilated to the "minimum core" of an obligation to provide international assistance.<sup>350</sup>

## C) THE RIGHT TO HOUSING

### 1) Introduction

The Committee has dedicated more attention to the right to housing than any other right.<sup>351</sup> At the end of its sixth session in 1991, the Committee had undertaken a general discussion and formulated a general comment to the right and had based its first express finding of a violation of the Covenant upon that subject. Its prominent concern with the subject of the right to housing has been driven primarily by the active participation of housing-oriented non-governmental organisations in the Committee's work. However, unlike the right to food, the right to housing does seem to allow for greater legal control and therefore be more susceptible to monitoring and quasi-judicial supervision.<sup>352</sup>

The right to adequate housing, although to be found in other international instruments, finds its broadest and most clear recognition in the Covenant.<sup>353</sup> Like the right to food, the right to adequate housing should be seen to be a component part of the right to an adequate standard of living. The Committee has noted

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<sup>349</sup> Bard R., "The Right to Food", 70 Iowa L.R., 1279, at 1289 (1985).

<sup>350</sup> Cf. Shelton D., "The Duty to Assist Famine Victims", 70 Iowa L.R., 1309 (1985).

<sup>351</sup> Note, however, earlier criticism that the Committee's perspective on the right to housing was at best partial. Leckie S., "The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach", 11 Hum.Rts.Q., 522, at 534-5 (1989).

<sup>352</sup> See below, chapter 9, text accompanying notes .

<sup>353</sup> See also at the universal level, Article 25(1) UDHR, article 5(e)(iii) of the Convention on the Elimination of All Forms of Racial Discrimination (1965), article 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women (1975), article 27(3) of the Convention on the Rights of the Child (1989), and article 21 of the Convention Relating to the Status of Refugees (1951).



that the right to housing "is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised".<sup>354</sup> In particular,<sup>355</sup> it has stressed the importance of the rights to freedom of expression,<sup>356</sup> freedom of association,<sup>357</sup> freedom to take part in public decision-making,<sup>358</sup> freedom to choose one's residence,<sup>359</sup> and freedom from arbitrary and unlawful interference with one's privacy, family, home or correspondence.<sup>360</sup> In addition, it might be argued that the rights to work,<sup>361</sup> to minimum remuneration,<sup>362</sup> and to social security,<sup>363</sup> all have an influence upon the degree to which the right to housing is enjoyed.<sup>364</sup>

## 2) Progressive Realization

Although everyone has a right to housing, the mere fact of homelessness is not sufficient to find a State to be in violation of its obligations. The Committee has recognised that "the steps required to be taken by States parties in order to promote realisation of the right to adequate housing will often be time-consuming, complex and costly".<sup>365</sup> This would particularly seem to be the case where States are themselves responsible for providing housing for all. However, as will be seen below, the Committee does not expect States to take such a central role in the provision of housing.

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<sup>354</sup> General Comment No.4 (1991), UN ESCOR, Supp.(No.3), Annex III, at 115, para.7, UN Doc.E/1992/23, (1992).

<sup>355</sup> *Ibid*, at 117, para.9.

<sup>356</sup> Article 19(2) ICCPR.

<sup>357</sup> Article 22(1) ICCPR.

<sup>358</sup> Article 25 ICCPR.

<sup>359</sup> Article 12(1) ICCPR.

<sup>360</sup> Article 17(1) ICCPR.

<sup>361</sup> Article 6, ICESCR.

<sup>362</sup> Article 7, ICESCR.

<sup>363</sup> Article 9, ICESCR.

<sup>364</sup> *See*, Sparsis, E/C.12/1990/SR.23, at 8, para.30; Dao (ILO), E/C.12/1990/SR.22, at 7, para.36.

<sup>365</sup> General Comment No.4, *supra*, note 354, at 117, para.10. As one Committee member noted, the inability of States to ensure the right to housing was firstly due to the lack of resources of the States and secondly due to the internal structure of the States concerned. Muterahajuru, E/C.12/1990/SR.23, at 9, para.35.



Accordingly States have to show that the measures being taken are sufficient "to realize the right of every individual in the shortest possible time in accordance with the maximum of available resources".<sup>366</sup>

In its General Comment No.4, the Committee has reiterated its general rationale as regards the implementation of the Covenant. It stresses that to the extent that States are required to restrain themselves from action that obstructs access to housing, or are required to "facilitate self-help", they should implement such obligations in an immediate manner.<sup>367</sup> States are thus under an obligation for example, to refrain from action that either arbitrarily deprives people of their own housing or prevents them from finding or building their home themselves. The Committee also comments that where these immediate obligations are beyond the powers of the State concerned, it should request international assistance.<sup>368</sup>

Perhaps as a reflection of the right to a "continuous improvement of living standards", or of the notion of progressive achievement, the Committee has noted that "a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations found in the Covenant".<sup>369</sup> It is interesting to note that a general decline in living and housing conditions alone does not involve State responsibility; only where it is "directly attributable" to State policies and where no "compensatory measures" are taken. For example, if a State were to find itself in an economic recession which had a negative effect on the housing market, it would not automatically be considered to be in violation of article 11.

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<sup>366</sup> *Ibid.*

<sup>367</sup> In the Committee's general discussion, one expert argued that States should undertake the following immediately: a) acknowledge that the right to housing was a human right; b) adopt legislation to prohibit all forms of discrimination; c) ensure that individuals and organisations were able to participate effectively in housing planning; d) annul or amend laws which prevented or hampered the implementation of the right to housing; e) grant all citizens equal rights in housing matters; f) change housing policies to take into account the needs of the most underprivileged groups. Leckie (International Habitat Coalition), E/C.12/1990/SR.22, at 9, para.55.

<sup>368</sup> General Comment No.4, *supra*, note 354, at 117, para.10.

<sup>369</sup> *Ibid.*, at 117, para.11.



However, the question of attribution is particularly interesting in so far as it is conditioned by the degree to which the State undertakes to provide housing through public as opposed to private channels. If a State which provided large amounts of public housing was forced to cut spending in an economic recession thereby instituting a decline in housing conditions, it would be forced to take compensatory measures to alleviate the adverse effects. If, on the other hand, housing was generally controlled by the private sector which experienced a recession, the State would no longer be considered directly responsible<sup>370</sup> and therefore would not have to provide compensatory measures. The difference between the two situations suggests that the test is slightly harsh for those States that take direct responsibility for the wellbeing of the population.

It is clear that States should take steps to the "maximum of available resources" in accordance with article 2(1). Accordingly the Committee requests information as to financial measures taken by the State "including details of the budget of the Ministry of Housing".<sup>371</sup> Although an aggregate figure of expenditure is in itself unhelpful,<sup>372</sup> where public expenditure on housing has declined appreciably, Committee members have been quick to criticise the State concerned.<sup>373</sup> Whilst the Committee clearly expects government expenditure to be at a reasonable level, it does not attempt to stipulate how that money should be spent.

### 3) Monitoring and Policy Formulation

In accordance with its approach to all rights in the Covenant, the Committee has outlined certain procedural obligations as part of States' duty to take appropriate steps. In particular the Committee considers that States have an obligation to undertake appropriate monitoring and policy formulation immediately. As regards monitoring, States are required to take "whatever steps are necessary, either alone or on the basis of

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<sup>370</sup> There is the possibility that the government concerned may be considered to be responsible for the economic recession. However, except in the most obvious cases this would be virtually impossible to establish.

<sup>371</sup> Reporting Guidelines, *supra*, note 180, at 15.

<sup>372</sup> See, Alston, E/C.12/1989/SR.17, at 7, para.31.

<sup>373</sup> For example, one member questioned whether Zaire was in compliance with its obligations under the Covenant in cutting expenditure on housing from 2% to 0.6% between 1972 and 1985. See, Alston, E/C.12/1988/SR.17, at 7, para.44.



international co-operation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction".<sup>374</sup>

In its guidelines, the Committee has attempted to outline this obligation in more detail. Detailed information is requested as to the housing situation of those groups in society that are vulnerable and disadvantaged. As a minor technical detail here, it is unclear whether the Committee wants information as to the housing position of all "vulnerable and disadvantaged groups" defined in a broad sense by their social and economic status, or rather to pinpoint those groups that are vulnerable and disadvantaged as regards housing specifically. Although the definition of "vulnerable or disadvantaged group" would vary from country to country, in relation to article 2(2) the Committee has outlined certain groups that are characteristically discriminated against. It might be appropriate for the Committee to request, as a minimum, information as to the housing situation of such groups.

In addition, the guidelines require information particularly as to the number of homeless individuals and families; the number of individuals and families inadequately housed; the number of persons living in "illegal" settlements; the number of persons evicted in the last five years (and those currently lacking protection against arbitrary eviction); the number of persons whose housing expenses are classified as unaffordable; the number of persons on waiting lists for accommodation; and the number of persons in different types of housing tenure.<sup>375</sup> Such considerations have been reflected in the questions of individual members of the Committee which have been directed primarily at ascertaining the extent of homelessness,<sup>376</sup> (or the size of the housing shortage<sup>377</sup>) the amount of sub-standard housing<sup>378</sup> and the percentage of people living in rented accommodation.<sup>379</sup>

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<sup>374</sup> General Comment No.4, *supra*, note 354, at 118, para.13.

<sup>375</sup> Reporting guidelines, *supra*, note 180, at 13-14.

<sup>376</sup> See e.g., Texier, E/C.12/1989/SR.6, at 12, para.62; Konate, E/C.12/1987/SR.10, at 2, para.3; Alston, E/C.12/1989/SR.15, at 7, para.41; Alston, E/C.12/1989/SR.17, at 7, para.31; Rattray, E/C.12/1991/SR.3, at 12, para.62; Rattray, E/C.12/1987/SR.16, at 9, para.39.

<sup>377</sup> See e.g., Muterahajuru, E/C.12/1988/SR.8, at 5, para.16; Alston, E/C.12/1988/SR.18, at 2, para.3.

<sup>378</sup> See e.g., Rattray, E/C.12/1987/SR.16, at 9, para.39; Simma, E/C.12/1989/SR.16, at 17, para.94; Rattray, E/C.12/1990/SR.34, at 6, para.43.

<sup>379</sup> See e.g., Jimenez Butragueno, E/C.12/1987/SR.9, at 9, para.44.



As a corollary to the monitoring strategy, States are expected to develop a policy directed at the relief of the situation of the most disadvantaged. According to the Committee's General Comment, this will "invariably require the adoption of a national housing strategy which, as stated in the Global Shelter Strategy, 'defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out responsibilities and time-frame for the implementation of the necessary measures'".<sup>380</sup> Moreover it appears that in drawing up this strategy, States should consult those affected including the homeless and the inadequately housed.<sup>381</sup>

Although the Committee presents these procedural conditions as "obligations" there is little indication that they are enforced in any way by the Committee. On no occasion has the Committee found a State to be in violation of the Covenant for failing to monitor effectively or to draw up a coherent policy with relevant participation. In the case of Panama, however, the Committee did criticise the government for not having an accurate estimate of the number of persons affected by the bombing of El Chorillo during the US intervention.<sup>382</sup>

However much monitoring and policy formulation are posited as obligations upon States Parties, the recent nature of the reporting guidelines and the resource limitations on effective monitoring will mean that it will be some time before they are effectively put into effect everywhere.

#### 4) "Everyone"

According to the Covenant "everyone" has a right to housing. The right to an adequate standard of living, however, merely refers to "himself and his family". It is possible that this might be interpreted as excluding female-headed households and those without families. The Committee, in accordance with the travaux préparatoires,<sup>383</sup> has explicitly refuted such an interpretation in stating that the phrase "himself and his family" "cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed

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<sup>380</sup> General Comment No.4, *supra*, note 354, at 118, para.12.

<sup>381</sup> *Ibid.*

<sup>382</sup> UN ESCOR, Supp.(No.3), at 32, para.135, UN Doc.E/1992/23, (1992).

<sup>383</sup> *See above*, text accompanying notes 81-88.



households or other such groups".<sup>384</sup> Indeed it considers that the phrase merely "reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted".<sup>385</sup> Thus when considering the report of Mexico, members of the Committee criticised a Constitutional provision that posited the right to housing as a right of "families", and not of the individual.<sup>386</sup>

### 5) Adequate Housing

A right to housing would seem to require that every member of the population has access to some form of accommodation. At a general level this could be determined by an analysis of the quantity of housing in relation to the population size. On a more individually-oriented level, it would require an assessment of whether the distribution of housing is sufficient to enable every individual ready access to accommodation. Other factors that might affect such access are the affordability of the accommodation, its location, and any related discriminatory practices. In addition, a right to housing would also seem to require that persons should not be arbitrarily deprived of their housing.

In view of the fact that the right to housing is a sub-norm of the right to an adequate standard of living, the concept of "adequacy" would seem to import into the right a qualitative element that might otherwise have been absent.<sup>387</sup> The Committee has commented in this regard that "the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head. Rather it should be seen as the right to somewhere to live in security, peace and dignity".<sup>388</sup> Although the precise nature of adequate housing may be determined to an extent by climatic, sociological and other factors, the Committee has found there to be certain elements that should be taken into account at all time such as security of tenure, availability of

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<sup>384</sup> General Comment No.4, *supra*, note 354, at 115, para.6.

<sup>385</sup> *Ibid.*

<sup>386</sup> However, it was asserted that although the Constitution recognised the right to housing as a family right, in practice it was an individual right. Gonzales Martinez (Mexico), E/C.12/1990/SR.6, at 7, para.37.

<sup>387</sup> *See*, Leckie (International Habitat Coalition), E/C.12/1990/SR.22, at 8, para.51.

<sup>388</sup> General Comment No.4, *supra*, note 354, at 115, para.7.



services, affordability, habitability, accessibility, location and cultural adequacy.<sup>389</sup>

Despite outlining these qualitative elements in its General Comment, the Committee had not demonstrated a real commitment to the definition in either its prior practice in reviewing State reports, or its reporting guidelines. The main concern of Committee members had been as to those aspects that affect access to housing- namely issues relating to the provision of housing, its affordability and to security of tenure. The General Comment thus represents not so much an outline of current practice, but rather a bold new interpretative statement.

a) Access to Housing

i) The Provision of Housing

In looking at the number of homeless in each country, the Committee seems to place the primary obligation for ensuring the provision of housing upon the State. However, this does not mean that the State has to act as the sole provider of housing itself. In accordance with the provisions of article 2(1), States have a certain amount of discretion as to the means of realising the right to housing. The precise solution adopted will depend upon the economic, social, cultural, and political situation of the country concerned. In a sense, the main concern of the Committee, is with the results of that policy.

Although a number of governments have undertaken to provide all housing themselves, it is clear that the Committee does not expect this to be the case in all States. Accordingly, in its General Comment, the Committee comments that:

"Measures designed to satisfy a State party's obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. While in some States public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing".<sup>390</sup>

In cases where the State does have a central role in the provision of housing, members of the Committee have been concerned about

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<sup>389</sup> Whilst the Committee inferred all of these elements from the notion of "adequacy", it was not necessary to do so.

<sup>390</sup> General Comment No.4, *supra*, note 354, at 118, para.14.



the conditions for the allocation of such housing<sup>391</sup> and the extent of choice over the location.<sup>392</sup> In addition, questions have been asked as to whether there was a variety of types of housing available,<sup>393</sup> and whether legal remedies were available in disputes over allocation.<sup>394</sup>

In taking a balanced view of the question of provision of housing, the Committee requests information as to measures taken by the State to build housing units itself, and to increase "other construction" of affordable rental housing. In particular, it places an emphasis on "enabling strategies" whereby local community-based organisations and the "informal sector" are encouraged to build houses themselves.<sup>395</sup> Given the emphasis on such "enabling strategies" it would seem that it is not sufficient for the government concerned merely to build houses itself, it must also take positive steps to encourage private housing construction. This would appear to be the approach of individual Committee members,<sup>396</sup> who have also stressed the fact that private individuals or groups should be able to construct houses themselves<sup>397</sup> without undue conditions being placed upon them,<sup>398</sup> and should be given financial or other assistance to do so.<sup>399</sup> Private house construction not only promotes the construction of appropriate housing, but also can be seen as an

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<sup>391</sup> See, Mratchkov, E/C.12/1987/SR.21, at 10, para.44, and E/C.12/1987/SR.12, at 4, para.12; Rattray, E/C.12/1987/SR.16, at 9, para.39, and Rattray, E/C.12/1987/SR.9, at 9, para.42.

<sup>392</sup> See e.g., Rattray, E/C.12/1987/SR.12, at 8, para.31, E/C.12/1987/SR.21, at 13, para.63, and E/C.12/1987/SR.16, at 9, para.39; Taya, E/C.12/1987/SR.9, at 11, para.52. An NGO representative argued that individuals should have ultimate choice over the kind of house and the location in which they will live. Leckie (International Habitat Coalition), E/C.12/1990/SR.22, at 10, para.60.

<sup>393</sup> See, Rattray, E/C.12/1987/SR.9, at 9, para.42.

<sup>394</sup> See, Rattray, E/C.12/1987/SR.9, at 9, para.42.

<sup>395</sup> Reporting guidelines, *supra*, note 180, at 15.

<sup>396</sup> See e.g., Mratchkov, E/C.12/1988/SR.5, at 6, para.26, and E/C.12/1988/SR.10, at 11, para.58.

<sup>397</sup> See, Mratchkov, E/C.12/1987/SR.12, at 4, para.12; Muterahajuru, E/C.12/1987/SR.19, at 11, para.54.

<sup>398</sup> See, Marchan Romero, E/C.12/1988/SR.5, at 7, para.32.

<sup>399</sup> See, Konate, E/C.12/1987/SR.10, at 2, para.3.



economic activity which contributes to the growth and development of the country concerned.<sup>400</sup>

On the other hand, it would not be legitimate for States to absolve themselves entirely from responsibility for the provision of housing. Chile, for example, was criticised by members of the Committee following a sharp reduction in government low-cost-housing construction projects. In particular concern was expressed over the fact that Chile appeared to leave the housing problem entirely in the hands of the private sector.<sup>401</sup> One member commented that by encouraging private ownership of property the Government of Chile was ignoring the position of the poor.<sup>402</sup>

In the provision of housing, the State is clearly obliged to take into account the qualitative aspects of housing detailed below. It is also obliged to enforce similar requirements on the construction and provision of housing by private individuals and companies. Accordingly, the Committee expects to receive information as to legislation concerning building codes, regulations and standards.<sup>403</sup>

## ii) Discrimination and Disadvantaged Groups

Article 11, when read in conjunction with article 2(2), prohibits discrimination as regards all elements of the right to housing. Most crucially, the State is obliged to ensure equality of access to housing whether public or private.<sup>404</sup> In its concentration on disadvantaged groups, the Committee appears to assume that a certain amount of *de facto* discrimination (albeit indirect) as regards housing, exists in all countries.<sup>405</sup>

Although article 2(2) is indicative of the groups likely to be discriminated against, it is clearly not exhaustive. Thus in its General Comment, the Committee specifically mentions the elderly, children, the physically disabled, the terminally ill, individuals who are HIV-positive, persons with persistent medical problems and the mentally ill, as categories of people that should be afforded "some degree of priority consideration in the housing

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<sup>400</sup> See, Lugvigsen (UNCHR), E/C.12/1990/SR.22, at 6, para.33; Barsh (Four Directions Council), E/C.12/1990/SR.23, at 3, para.11.

<sup>401</sup> See *e.g.*, Marchan Romero, E/C.12/1988/SR.12, at 10-11, para.52.

<sup>402</sup> See, Neneman, E/C.12/1988/SR.12, at 11, para.56.

<sup>403</sup> Reporting guidelines, *supra*, note 180, at 14.

<sup>404</sup> See *above*, Chapter 3.

<sup>405</sup> See *above*, Chapter 4, text accompanying notes 25-41.



sphere".<sup>406</sup> Whilst not maintaining that all these groups are discriminated against in all cases or that they represent the only disadvantaged groups, the Committee appears to consider that States should at least be aware of the relative position of such groups.

In addition to refraining from discrimination itself, States are expected to enforce non-discrimination provisions with regard to private individuals. In its guidelines, the Committee expects information as to "legislation prohibiting any and all forms of discrimination in the housing sector, including groups not traditionally protected".<sup>407</sup> In referring to the "groups not traditionally protected", the Committee implies that States should reconsider their discrimination laws with a view to widening their scope. As a minimum, however, States should consider explicitly prohibiting discrimination against those groups identified by the Committee in its General Comment.

States are obliged to take positive action to allieviate the position of disadvantaged groups whether or not they are the objects of discrimination.<sup>408</sup> In particular, the Committee has stressed that such groups should be given "priority consideration" and that housing law and policy should take fully into account the special housing needs of those groups.<sup>409</sup>

Individual Committee members have specifically looked to the housing situation of non-nationals<sup>410</sup> and women,<sup>411</sup> and have requested information regarding cases of such discrimination that have been taken to court.<sup>412</sup> More frequently however, concern is expressed as to the position of those on low incomes<sup>413</sup> including

<sup>406</sup> General Comment No.4, *supra*, note 354, at 116, para.8(e).

<sup>407</sup> Reporting guidelines, *supra*, note 180, at 14.

<sup>408</sup> It has to be questioned whether people such as low-wage-earners could be said to be discriminated against merely because they do not have the same access to housing as other, more wealthy members of society.

<sup>409</sup> General Comment No.4, *supra*, note 354, at 116, para.8(e).

<sup>410</sup> See e.g., Alvarez Vita, E/C.12/1988/SR.17, at 2, para.8; Badawi El Sheikh, E/C.12/1988/SR.8, at 2, para.4.

<sup>411</sup> See e.g., Alston, E/C.12/1989/SR.15, at 7, para.41.

<sup>412</sup> See e.g., Rattray, E/C.12/1990/SR.2, at 10, para.63.

<sup>413</sup> See e.g., Rattray, E/C.12/1991/SR.3, at 12, para.62; Sparsis, E/C.12/1989/SR.16, at 17, para.91; Fofana, E/C.12/1989/SR.16, at 16, para.84; Alston, E/C.12/1990/SR.11, at 5, para.24.



the unemployed,<sup>414</sup> in respect to whom States are expected to undertake some form of targeted action.

### iii) Affordability

The cost of housing clearly has a significant impact upon each individual's access to adequate housing, their ability to continue living in their current residence and their standard of living in general. Indeed as the Committee noted:

"Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised".<sup>415</sup>

Whereas it is not necessary for States to fix all rents at a specified rate, it is clearly a priority to ensure that enough low-cost housing exists in order to cater for the needs of the whole population and in particular the poor and disadvantaged. The Committee appears to expect States to establish a "limit of affordability" based upon ability to pay or as a ratio of income, and to assess the number of persons whose housing expenses are higher than that limit.<sup>416</sup> For those unable to obtain affordable housing, the State is required to establish housing subsidies. It is also expected to establish "forms and levels of housing finance which adequately reflect housing needs".<sup>417</sup> Although it would be beyond the means of many States to undertake such programmes of State support immediately, it is important for the ultimate fulfilment of the right that such a long-term objective is spelt out.

Equally importantly, the Committee expects States to exercise some control over rent levels in the private sector. Tenants should be protected from rent levels or rent increases "by appropriate means".<sup>418</sup> Individual members of the Committee have similarly regularly requested information as to the means of rent control,<sup>419</sup> and have likewise refrained from stipulating any

<sup>414</sup> See e.g., Fofana, E/C.12/1991/SR.7, at 12, para.53.

<sup>415</sup> General Comment No.4, *supra*, note 354, at 116, para.8(c).

<sup>416</sup> Reporting guidelines, *supra*, note 180, at 13.

<sup>417</sup> General Comment No.4, *supra*, note 354, at 116, para.8(c).

<sup>418</sup> *Ibid.*

<sup>419</sup> See, Mratchkov, E/C.12/1988/SR.6, at 6, para.46; Simma, E/C.12/1989/SR.15, at 3, para.8; Fofana, E/C.12/1989/SR.18, at 3, para.9; Rattray, E/C.12/1991/SR.3, at 12, para.62.



specific means by which it should be achieved.<sup>420</sup> In one case, Committee members took a poor view of what seemed to be the abolition of rent control by the State.<sup>421</sup> It would seem that even where such a measure was designed to increase the amount of rented accommodation available, members were still concerned about the effect the legislation would have on those living on low incomes.

#### b) Security of Tenure and Evictions

Much as there is variety in forms of tenure such as owner-occupation, rented accommodation, co-operative housing and other informal settlements, there is variety in the degree of security offered to the occupier. The Committee requires that "notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats".<sup>422</sup> Given that the Committee speaks of "a degree of security of tenure", it leaves open the extent of protection required. It is certainly appropriate that tenants be entitled to legal protection from harassment and threats, but the question of protection against eviction is not so clear.

An absolute protection against forced eviction would not be sustainable in any legal system. By the nature of a lease, there must exist the possibility of reversion to the owner (for example at the effluxion of time or for non-payment of rent), and in certain circumstances this may have to be carried out through forcible eviction. The object of law in such a situation is not to prevent eviction from occurring at all, but rather to ensure that it occurs only in strictly defined circumstances and follows appropriate procedures to minimise the possibility of abuse. A careful balance has to be struck between the right of the tenant to a place to live and the right of the lawful owner to maintain control over the premises.

The Committee however has taken a rather strong stance on forced eviction. In its General Comment, it provides that forced evictions "are *prima facie* incompatible with the requirements of the Covenant and could only be justified in the most exceptional

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<sup>420</sup> One member rather ambiguously asked why regulation of rent increases been entrusted to the judiciary. It was unclear however whether it was felt that this was inappropriate. See, Muterahjuru, E/C.12/1990/SR.2, at 11, para.67.

<sup>421</sup> See e.g., Simma, E/C.12/1989/SR.16, at 18, para.94.

<sup>422</sup> General Comment No.4, *supra*, note 354, at 115, para.8(a).



circumstances, and in accordance with the relevant principles of international law".<sup>423</sup> It might be argued that the Covenant itself does not provide for a balance of individual interests. Article 4 provides that the rights may be subject only to such limitations as are "determined by law only in so far as this may be compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society". In that a right to ownership of property does not exist in either of the Covenants, such a concern is relevant only in so far as it coincides with the "general welfare in a democratic society".

Certain members of the Committee have taken cognisance of the competing interests of the right to housing and the right of ownership,<sup>424</sup> and have looked to the reform of the law of property.<sup>425</sup> Such an approach would appear to be particularly appropriate in those countries where the unequal ownership of land presents a significant problem for the realisation of the right to housing,<sup>426</sup> especially as far as "illegal settlements" are concerned. Although property rights certainly conflict with the right to housing in certain circumstances, it is somewhat unrealistic for the Committee to argue that the right to housing should be given precedence in all circumstances. Depending upon the circumstances, it is more appropriate for the Committee to look to State action in the form of rent-control, compulsory land purchase, and expropriation, than undermining the concept of property *per se*.

Most of the questions of the Committee members have been directed at ensuring that a system for the protection of tenants does exist and is operated in practice.<sup>427</sup> In particular, attention has been focused upon legal forms of protection<sup>428</sup> and means of

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<sup>423</sup> *Ibid*, at 119, para.18. A question may be raised as to what the Committee meant in referring to "the relevant principles of international law".

<sup>424</sup> *See*, Texier, E/C.12/1990/SR.22, at 13, para.83.

<sup>425</sup> *See*, Muterahjuru, E/C.12/1990/SR.23, at 9, para.37.

<sup>426</sup> *See*, Leckie (International Habitat Coalition), E/C.12/1990/SR.22, at 10, para.67.

<sup>427</sup> *See*, Mratchkov, E/C.12/1988/SR.10, at 7, para.27; Fofana, E/C.12/1989/SR.18, at 3, para.9; Simma, E/C.12/1990/SR.40, at 10, para.46; Neneman, E/C.12/1991/SR.3, at 9, para.41.

<sup>428</sup> *See e.g.*, Simma, E/C.12/1990/SR.38, at 3, para.15; Fofana, E/C.12/1988/SR.6, at 7, para.51.



dispute settlement.<sup>429</sup> Certain members have looked to the existence of protective measures specifically in cases of termination of leases,<sup>430</sup> eviction for the purposes of repairs,<sup>431</sup> and eviction for non-payment of rent.<sup>432</sup>

The question of eviction arose in perhaps the most important case in the Committee's work thus far. After considering the report of the Dominican Republic, the Committee found the Dominican Republic to be in violation of its obligations under article 11 of the Covenant. According to Non-Governmental Organisation sources, the Dominican Republic authorities had adopted plans for remodelling a number of cities, including Santiago and San Domingo, which had led to the eviction of nearly 15,000 families from their homes. These facts themselves were not disputed by the Dominican Republic. In its concluding comments, the Committee made the following statement:

"The information that had reached members of the Committee concerning the massive expulsion of nearly 15,000 families in the course of the last five years, the deplorable conditions in which the families had had to live, and the conditions in which the expulsions had taken place were deemed sufficiently serious for it to be considered that the guarantee in article 11 of the Covenant had not been respected."<sup>433</sup>

It is clear from the statement that the violation of the right to housing was not established solely by the fact of eviction. The Committee, in addition refers to two factors. First is that following the evictions, many of the families had been forced to live in "deplorable conditions".<sup>434</sup> The Summary Records show that although alternative accommodation was available, it was "very costly".<sup>435</sup> Secondly, the Committee was concerned with the "conditions in which the expulsions had taken place". Reference has to be made to the Summary Records to establish in what way the circumstances were objectionable. It appears that although

<sup>429</sup> See *e.g.*, Texier, E/C.12/1988/SR.13, at 14, para.83.

<sup>430</sup> See, Mratchkov, E/C.12/1988/SR.6, at 6, para.46.

<sup>431</sup> See, Fofana, E/C.12/1989/SR.15, at 5, para.23.

<sup>432</sup> See, Texier, E/C.12/1989/SR.14, at 16, para.72.

<sup>433</sup> UN ESCOR, Supp.(No.3), at 64, para.249, UN Doc.E/C.12/1990/8, (1991).

<sup>434</sup> Cf. Simma, E/C.12/1990/SR.44, at 10, para.48.

<sup>435</sup> Texier, E/C.12/1990/SR.44, at 11, para.53.



there was an established eviction procedure involving a conciliation meeting in the presence of a lawyer, with a right to appeal to a tribunal and from there to the State Attorney, it had not been followed.<sup>436</sup> Nor had the evicted tenants been given any legal assistance.<sup>437</sup> It is likely that factors contributing to the Committee's finding were the scale of the evictions, the fact that it was the public authorities undertaking the evictions, and that the overt purpose was to hide the people affected from public view rather than come to their assistance.

It is unclear whether each of the two specified factors constituted individual and separate violations of the Covenant, or only in so far as they were taken together. Perhaps the most crucial factor for this case was that the evictions had taken place in violation of domestic law. To the extent that the Covenant requires the establishment of a system for the protection of tenants, failure to comply with existing domestic mechanisms should be considered a *prima facie* violation of the Covenant.

It might be questioned whether these evictions would have amounted to a violation, had they taken place with due legal process. Given that the State is under an obligation to realise the right to housing for everyone, it is possible to argue that public authorities should, in any event, be required to show a legitimate purpose in undertaking the evictions. The fact that those evicted had not been provided with alternative accommodation or other assistance, suggests that the Dominican Republic did not have the interests of the population at heart in this case, and thus were not fulfilling their obligations under the Covenant. This would seem to be the position of one member who commented:

"The Dominican Republic had put itself in an entirely different position than other countries which, for their part, were unable to ensure observance of the right to housing because they did not have the means. The Dominican Republic was deliberately flouting the provisions of the Covenant".<sup>438</sup>

In so far as evictions represent a step away from the full realisation of the right to housing, public authorities should show an overriding justification for their action.<sup>439</sup>

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<sup>436</sup> See, Texier, E/C.12/1990/SR.44, at 11, para.53.

<sup>437</sup> See, Simma, E/C.12/1990/SR.44, at 10, para.48.

<sup>438</sup> Simma, E/C.12/1990/SR.44, at 10, para.48.

<sup>439</sup> It is to be noted that none of these considerations necessarily apply to the case of evictions by private land-owners.



More recently, the Committee has addressed the question of forced evictions in the context of the Panamanian report. Questions were asked on the basis of information from Non-Governmental Organisations<sup>440</sup> as to the destruction of half of El Chorillo<sup>441</sup> and the forced expulsion of people from their homes in Tucmen, San Miguelito and Panama Viejo,<sup>442</sup> following the US invasion of Panama.<sup>443</sup> Although the destruction of El Chorillo seems to have been accepted by the Committee as an inevitable aspect of the invasion, the forced expulsion of families from the other "Barrios" was not. Among other criticisms the Committee expressed the following opinion:

"the justification for the actions carried out by Panamanian and United States forces in Tocumen, San-Miguelito and Panama Viejo in early 1990, which affected over 5,000 persons, was unacceptable under the terms of the Covenant as a ground for forcibly removing people from their homes. During the actions concerned, a large number of houses were demolished, in spite of the affected persons having lived in the area for more than two years.

Additionally these evictions had not been accompanied by legal eviction orders. The Committee was of the view that evictions carried out in this way not only infringed upon the right to adequate housing but also on the inhabitants' rights to privacy and security of the home".<sup>444</sup>

From the Summary Records it is not clear what justification was offered by the Panamanian representative for the action of the combined forces. Reference is only made to El Chorillo. However, the comment suggests that, in certain circumstances (with sufficient justification), evictions may be legitimate under the Covenant. The main objection of the Committee appears to have

<sup>440</sup> See, UN Doc.E/CN.4/1991/NGO/34, which was widely available in the Committee's meeting.

<sup>441</sup> See *e.g.*, Simma, E/C.12/1991/SR.3, at 7, para.31.

<sup>442</sup> See, Simma, E/C.12/1991/SR.3, at 7, para.32; Wimer Zambrano, E/C.12/1991/SR.3, at 8, para.38; Rattray, E/C.12/1991/SR.8, at 2, para.6.

<sup>443</sup> For details of the invasion and analyses of the legal position see, Quigley J., "The Legality of the United States Invasion of Panama", 15 Yale J.I.L., 276 (1990); Henkin L., "The Invasion of Panama Under International Law: A Dangerous Precedent", 29 Colum.J.Trans.L., 293 (1991).

<sup>444</sup> UN ESCOR, Supp.(No.3), at 32, para.135(c), UN Doc.E/1992/23, (1992).



been to the manner in which the evictions took place. Like the case of the Dominican Republic, the Committee expressed particular concern over the illegitimacy of the evictions in domestic law, and the inadequacy of alternative accommodation arrangements.<sup>445</sup>

Finally, at its sixth session in 1991, the Committee undertook to make an ad hoc request for information from the Dominican Republic as to proposed new eviction plans. In doing so, the Committee noted that information received from a Non-Governmental Organisation, would, if accurate, "give rise to serious concern on the part of the Committee", and accordingly requested the State "to suspend any actions which are not clearly in conformity with the provisions of the Covenant".<sup>446</sup> In this case however, the evictions had been authorised by Presidential Decree and seemed to have some legal basis. The concern of the Committee was rather focused upon the fact that the 12,000 families of La Cienaga and Los Guandules would be housed in different places according to their "education, living habits and social level", and that the area from which they were evicted would be used for recreational purposes only.<sup>447</sup>

Given that in each of these three cases the Committee has been given considerable information from NGO sources, and (on two occasions at least) has had the opportunity to discuss the matters with the States concerned, it is unfortunate that it drafted such general concluding comments. The Committee might have taken the opportunity to establish certain principles that operate, for example, as regards the eviction of tenants by public authorities or private individuals. What needs to be considered, in such cases, is the desirability of establishing precise rules so a State may assess in advance whether its proposed action would be in conflict with the obligations under the Covenant, especially in so far as the Committee is intending to adopt a "quasi-judicial" approach to supervision.<sup>448</sup>

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<sup>445</sup> In its concluding observation the Committee noted that it "had received information which pointed to many complaints by the residents that had received alternative accommodation and which concerned the distance which now had to be travelled to and from places of employment on relatively expensive public transportation and the overall poor quality of the housing in the resettlement sites. Moreover, two years after the invasion, a large number of persons had yet to be rehoused." *Ibid*, at 32, para.135(b).

<sup>446</sup> UN ESCOR, Supp.(No.3), at 79, para.330, UN Doc.E/1992/23, (1992).

<sup>447</sup> See, Simma, E/C.12/1991/SR.19, at 4, para.15.

<sup>448</sup> See below, Chapter 9, text accompanying notes 187-195.



The current position of the Committee, however, could be described as follows. The legality of an eviction will be determined initially by reference to domestic law. The relevant procedures and safeguards established to protect tenants' rights must be complied with. However, even in cases where the relevant procedures are carried out, eviction may still be illegitimate under the Covenant if no sufficient justification is given for the action. The Committee has not given a precise indication of what form of justification will be acceptable. As a minimum the eviction should be undertaken in good faith, and should conform to the general objectives of the Covenant and in particular to the progressive realisation of the right to adequate housing. In determining whether the State is acting in good faith, consideration will be made to the alternative accommodation arrangements made for those deprived of their homes.

### c) Qualitative Aspects of Adequate Housing

As mentioned above, the Committee has addressed itself primarily to questions concerning access to housing and security of tenure. Less attention has been focussed upon the notion of "adequacy" in so far as it relates to the quality of housing. Individual members of the Committee have frequently looked to the qualitative aspects of the right to adequate housing<sup>449</sup> in the creation of national benchmarks,<sup>450</sup> and in ascertaining the number of persons housed in inadequate dwellings.<sup>451</sup> However, they have been less willing to establish what are the common elements of adequate housing. The approach seems to have been rather that the notion of adequacy differs from country to country.<sup>452</sup>

As a whole, however, the Committee has been more positive in its approach. In its guidelines, it requests information as to the "number of individuals and families currently inadequately housed and without ready access to basic amenities such as water, heating (if necessary), waste disposal, sanitation facilities, electricity, postal services, etc." (in so far as those amenities are relevant in

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<sup>449</sup> See, Rattray, E/C.12/1987/SR.12, at 8, para.31.

<sup>450</sup> See, Muterahajuru, E/C.12/1989/SR.12, at 12, para.64, and E/C.12/1989/SR.17, at 16, para.86; Simma, E/C.12/1989/SR.16, at 17, para.94; Rattray, E/C.12/1990/SR.34, at 6, para.43.

<sup>451</sup> See, Rattray, E/C.12/1987/SR.16, at 9, para.39; Texier, E/C.12/1990/SR.38, at 6, para.37.

<sup>452</sup> See e.g., Sparsis, E/C.12/1987/SR.9, at 10, para.49.



the country concerned). In addition information is requested as to the number of persons living in "over-crowded, damp, structurally unsafe housing or other conditions which affect health".<sup>453</sup> The Committee has further defined its notion of "adequacy" in its General Comment No.4. In addition to the aspects already referred to above, it specifies that States should take into account the availability of services, and the habitability, location and cultural adequacy of the housing.<sup>454</sup>

#### i) Availability of Services

According to the Committee "an adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to potable piped drinking water, sanitation and washing facilities, food storage, refuse disposal, site drainage and emergency services".<sup>455</sup> It would seem clear that several other services could also be included in this list such as postal services, fuel or energy for cooking, eating and lighting (for example electricity). The fact that these were not included in the General Comment (although to be found in the Reporting Guidelines) is not to be interpreted as if the Committee does not consider them to be important. Rather, the matters outlined are merely illustrative- the concept of adequate housing is in the final analysis to be determined at the domestic level.<sup>456</sup>

It would seem very clear that the realisation of the objectives outlined is a long-term aim. In many countries, the State does not have sufficient resources to provide much more than potable drinking water.<sup>457</sup> In such cases it would be appropriate for States to draw up intermediate objectives such as ensuring the provision of potable drinking water everywhere before the introduction of piped water. The type of prioritisation undertaken will have to depend upon the circumstances prevailing within the State concerned (for example in colder countries the provision of electricity for heat and light might be a priority), taking into account the fundamental necessity of providing for the basic needs of all members of the population at the earliest possible time.

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<sup>453</sup> Reporting guidelines, *supra*, note 180, at 13.

<sup>454</sup> General Comment No.4, *supra*, note 354, at 116-117, para.8.

<sup>455</sup> *Ibid*, at 116, para.8(b).

<sup>456</sup> *Ibid*.

<sup>457</sup> *See*, Muterahajuru, E/C.12/1990/SR.23, at 9, para.36.



## ii) Habitability

The Committee states that housing must be habitable "in terms of protecting the inhabitants from cold, damp or other threats to health, structural hazards, and disease vectors".<sup>458</sup> To a certain extent the requirement of habitability co-incides with the provision of services (such as electricity for heating), but it also relates to the physical structure of the building. In so far as inadequate and deficient housing often contributes to higher mortality and morbidity rates, this is a priority.

The State should take a number of forms of action in respect to habitability outside the provision of services. For example, it should ensure that all public housing conforms to adequate standards as regards habitability. This would mean that all new housing construction projects should automatically take such considerations into account, and that renewal operations should be undertaken to improve old unsatisfactory housing.

It is apparent that there is a role for legislation in enforcing such standards on the construction of private housing. Although this is certainly appropriate where construction firms are operating in the private sector for profit, it is not necessarily so where housing is built by local communities, or by the individuals for themselves. In such cases, excessively stringent conditions may serve to dissuade people from building their own homes and therefore contribute to a continued shortage of housing generally.

## iii) Location

According to the Committee's General Comment, housing "must be in a location which allows access to employment options, health care services, schools and other social facilities.... Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants".<sup>459</sup> Location of housing thus is of importance not only in so far as it has an effect on the ability of people to carry on normal lives, but also to the extent that it might prejudice the health of the inhabitants.

A major consideration for the Committee seems to be that governments should not build large, low-cost housing settlements far from centres of population merely because land is cheap. In any case in the long run, this would be a false economy given State

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<sup>458</sup> General Comment No.4, *supra*, note 354, at 116, para.8(d).

<sup>459</sup> *Ibid*, at 116-7, para.8(f).



obligations to provide accessible health care, education and full employment.

The Committee took up the question of location in its criticism of Panama. In its concluding observation the Committee noted *inter alia* that it "had received information which pointed to many complaints by the residents that had received alternative accommodation and which concerned the distance which now had to be travelled to and from places of employment on relatively expensive public transportation and the overall poor quality of the housing in the resettlement sites".<sup>460</sup> As noted above, this was one of the considerations taken into account in finding Panama to be in violation of its obligations under the Covenant.

#### iv) Cultural Adequacy

In its General Comment the Committee states that "the way housing is constructed, the building materials used and the policies supporting these must appropriately reflect the culture in which they are undertaken".<sup>461</sup> The rationale for this is not immediately apparent from the General Comment itself, and it may seem on face value to be a matter of lesser importance. However, traditional housing in each country often reflects the form and nature of social interactions. Failure to take such concerns into account in the provision of housing may contribute to the alienation and disruption of community life and thence undermine the traditional forms of community support.

#### 6) The Role of Law and Legislation

Unlike the right to food, the right to housing may be found in the Constitution of a number of States.<sup>462</sup> Although not often subject to judicial remedies, such constitutional entrenchment suggests quite rightly that housing as an issue does warrant a certain amount of legislative intervention. The Committee, in its guidelines, foresees the existence of a panoply of legislation relating to land use and distribution, security of tenure, housing finance, building codes and regulations, discrimination in housing,

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<sup>460</sup> UN ESCOR, Supp.(No.3), at 32, para.135(b), UN Doc.E/1992/23, (1992).

<sup>461</sup> General Comment No.4, *supra*, note 354, at 117, para.8(g).

<sup>462</sup> See e.g., Mexico, UN Doc.E/1986/3/Add.13, at 14, para.57; Ecuador, UN Doc.E/1986/3/Add.14, at 11, para.55; Netherlands, UN Doc.E/1986/4/Add.24, at 1, para.2.



prevention from eviction, property speculation and environmental health and planning.<sup>463</sup>

Although clearly desirable, the Committee does not specifically expect the right to housing to be provided for by the Constitution,<sup>464</sup> or that any specific legislative measure should be enacted.<sup>465</sup> Its approach has rather been directed to the provision of domestic remedies in case of violation of the right.<sup>466</sup> In its General Comment, the Committee has outlined a number of areas in which domestic legal remedies might be provided:

"(a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintainance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it might also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness".<sup>467</sup>

Although the Committee appears not to require the institution of such legal remedies, in a number of cases, such as discriminatory action by landlords, failure to provide remedies (whether legal or otherwise) would seem to be a major obstacle to the full realisation of the right.

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<sup>463</sup> Reporting guidelines, *supra*, note 180, at 14.

<sup>464</sup> *Contra see*, Von der Weid (Antenna Internationale), E/C.12/1990/SR.23, at 5, para.18.

<sup>465</sup> However, as one commentator noted, failure to repeal legislation which was clearly incompatible with the provisions of the Covenant, or the non-application of legislation could amount to a violation. Leckie (International Habitat Coalition), E/C.12/1990/SR.22, at 10, para.63.

<sup>466</sup> General Comment No.4, *supra*, note 354, at 119, para.16; *see also*, Alston, E/C.12/1987/SR.9, at 5, para.22; Rattray, E/C.12/1987/SR.12, at 8, para.31.

<sup>467</sup> *Ibid*, at 119, para.17.



## 7) International Co-operation

In addition to the general obligation in article 2(1) to take measures both domestically and through international co-operation to realise the rights in the Covenant, article 11(1) specifically provides that States should "recognise the essential importance of international co-operation based on free consent". As is apparent from the travaux préparatoires, there is no reason to suppose that this provision either adds to, or detracts from, the more general obligation.<sup>468</sup> Indeed, in using the term "recognise" there is room to argue that the obligation in article 11(1) is hortatory rather than one conferring binding legal obligations.

Whereas the Committee has not in practice placed much emphasis on the role of international co-operation in its questions, it seems that it will do so in future. The guidelines require the provision of information as to the role of international assistance in the full realisation of the rights in article 11, and that measures be taken to ensure that such assistance is used "to fulfil the needs of the most disadvantaged".<sup>469</sup> In addition, the General Comment provides that International Financial Institutions should ensure that structural adjustment measures should not compromise the enjoyment of the right to housing.<sup>470</sup>

## D) THE RIGHT TO CLOTHING

The right to clothing, although specifically included in the Covenant, has had little attention either from the Committee or independent commentators. As far as the Committee is concerned, no reference to clothing is to be found in the reporting guidelines, and only the occasional question has been asked of States by individual members. The impression given is that clothing is not a matter in which the State may exercise a great deal of control, nor one that the Committee feels is of great importance.

## IV) CONCLUSION

In comparison to other articles, the Committee has spent a considerable amount of its time addressing issues within article 11. Two of its general discussions have been on the subject of rights within article 11, and the third on the related issue of statistical indicators. In addition, it has adopted its first right-oriented General Comment on the right to housing. The prominence given

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<sup>468</sup> See above, text accompanying notes 98-103.

<sup>469</sup> Reporting guidelines, *supra*, note 180, at 15.

<sup>470</sup> General Comment No.4, *supra*, note 354, at 119, para.19.



to article 11 is a reflection of a number of considerations. First, article 11 contains rights that are closely associated with the "basic needs" of the individual. The enjoyment of a minimum level of the rights to food, housing and clothing, is a necessary condition for survival, and therefore warrants detailed consideration. Secondly, article 11 includes rights that are peculiar to the Covenant. Unlike articles 6-9, there is no other body equivalent to the ILO that has dealt with matters such as food and housing on an individual level or has established detailed legal standards that might be applied by the Committee. Article 11 thus presents itself as an area in which the Committee has considerable work to do and in which its work is innovative and particularly valuable.

Finally, a related point is that the article 11 is often viewed as being the epitome of economic, social and cultural rights. The rights are phrased in very general terms, they are accompanied by broad policy objectives and are clearly dependent for their realisation upon the economic resources of the State concerned. The extent to which the Committee deals effectively with article 11 will either sustain or destroy the criticisms of legal obligations in respect of economic, social and cultural rights in general. Article 11, to a large degree, is an acid-test of the Committee's effectiveness and of the fundamental utility of the Covenant.

The Committee has made headway in a number of areas. Its most significant achievement must be the General Comment on the right to housing. In its General Comment No.4, the Committee has clearly outlined the parameters of the right to adequate housing and has usefully described the qualitative considerations that must be taken into account in the realisation of the right. The General Comment is also a success in so far as it was produced with considerable collaboration by NGO representatives, not only in the previous general discussion but also in the drafting of the Comment itself. It is considered that this was an essential element in ensuring that the General Comment adequately reflected the interests and concerns of the disadvantaged worldwide.

The input of NGOs has also been significant in the cases of the Dominican Republic and Panama which the Committee found to be in violation of the Covenant. In each case, the Committee was only able to come to that opinion on the basis of the vast amount of material supplied by the NGO concerned. The significance of the decisions is not merely in the fact that it is the first time in which the Committee as a whole has found a State to be in violation of the Covenant, or that it signals a development in the role of the Committee itself, but that it clearly shows the justiciable nature (from an international point of view) of the rights in article 11.



Outside the specific question of the right to housing the Committee has made less headway. In particular, it has failed to give substantial meaning to the right to clothing and has yet to adopt an appropriate methodology with respect to the right to an adequate standard of living. It has been suggested that the Committee should attempt to identify those elements of the right to an adequate standard of living that are not already covered by other articles in the Covenant. As regards the right to food, the Committee has undertaken a useful general discussion which has generated awareness of a variety of issues which have occasionally arisen in its consideration of State reports. There is clearly a need, however, for more detailed consideration of the issues, with an emphasis upon the precise obligations to which States are bound.

Three main areas might be identified in which further work is necessary. First, the Committee will have to establish a means by which those persons without adequate food may be identified. This will require the establishment of qualitative criteria which define adequacy and the stipulation of means by which they may be measured. The Committee has begun to address the latter question at its sixth session, where there was a discussion of the use of statistical indicators. Secondly, although the method by which the rights are progressively realised is primarily within the discretion of the State, it would be useful for the Committee to identify the extent to which the State can be considered directly responsible for lack of adequate food. Thirdly, more consideration should be given to the question of international co-operation. For example, whereas developed States will not generally accept an obligation to provide a specific form of assistance to specific States, an exception could be made in the case of famines or other "natural" disasters.



## CHAPTER NINE: THE SYSTEM OF SUPERVISION

### D) INTRODUCTION

As has been pointed out, the concept of a human rights treaty is something of an anomaly.<sup>1</sup> In accordance with the horizontal nature of international law,<sup>2</sup> the large majority of treaties contain reciprocal obligations in which compliance by one State party is a condition for another State party to be bound by the terms of the treaty in their relations *inter se*.<sup>3</sup> Human rights treaties, however, are not premised upon the mutuality of State obligations, rather, they are intended to create a legal order in which States make binding unilateral commitments to protect the basic rights of all individuals within their jurisdiction. As was noted by the European Court of Human Rights, the European Convention (as a human rights treaty):

"...comprises more than mere reciprocal engagements between contracting States. It creates, over above a network of mutual bilateral undertakings, objective obligations which... benefit from a 'collective enforcement'".<sup>4</sup>

Although it is possible to identify reciprocal State interests in ensuring the enjoyment of human rights,<sup>5</sup> not least in so far as they contribute to international peace and security, the fact that human rights treaties essentially entail unilateral commitments, means that other States parties cannot be relied upon to ensure

<sup>1</sup> Sieghart P., The Lawful Rights of Mankind, 92-3 (1986).

<sup>2</sup> Henkin L., "The International Bill of Rights: The Universal Declaration and the Covenants", in Bernhardt R. and Jolowicz J.(eds), International Enforcement of Human Rights, 1, at 8 (1985).

<sup>3</sup> Brierly J., The Law of Nations, 62 (6th ed. 1963); Morgenthau H., Politics Among Nations, 290 (5th ed. 1973).

<sup>4</sup> Ireland v. United Kingdom, Eur.Court H.R., Series A, Vol.25, Judgement of 18 January 1978.

<sup>5</sup> State A may become concerned with the treatment of individuals in State B in a number of situations *inter alia*:

- i) where the systematic mistreatment of citizens in State B threatens to destabilise the region as a whole.
- ii) where there are close economic, social, political, or cultural links between the States (for existence the presence of large minority groups) such that there is internal pressure within State A to react in cases of mistreatment of individuals in State B.
- iii) where the exploitation of workers in State B may be seen to undermine the economic competitiveness of State A.



compliance.<sup>6</sup> The institution of international supervisory mechanisms through the creation of human rights committees has become the accepted form of effecting compliance with human rights treaty obligations.

At a superficial level the main function of such supervisory bodies is to ensure compliance with the relevant treaty obligations. What this entails and how it is to be achieved, however, requires more consideration.<sup>7</sup> Three basic functions of the supervisory process in relation to human rights may be identified. First, the clarification of the standards that are to be applied. Secondly, establishing the degree to which States parties are actually acting in conformity with their obligations. Thirdly, taking either remedial or preventive action to ensure compliance.<sup>8</sup> The degree to which emphasis is given to each of these functions and the method by which they are exercised, varies according to the type of system of supervision.

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<sup>6</sup> The fact that inter-state complaints systems have rarely been utilised is testament to the lack of commitment on the part of States to concern themselves with the human rights situation in other States. Henkin explains:

"While in legal principle every state party is a promisee and entitled to request compliance by any other state party, ordinarily no other state has any interest in doing so and is especially reluctant to demand compliance or threaten sanctions for violation at the expense of its friendly relations and diplomatic capital."

Henkin, *supra*, note 2, at 8. Cf. Bilder R., "Rethinking International Human Rights: Some Basic Questions", 2 *Hum.Rts.J.*, 557, at 569-574 (1969). Leary recognises:

"Reciprocity has traditionally been the most important enforcement mechanism in international law. It fails to function, however, when States do not perceive their own immediate interests as threatened by another State's non-compliance with international law."

Leary V., *International Labour Conventions and National Law*, 17 (1982).

<sup>7</sup> Cf. Alston P., "Appraising the United Nations Human Rights Regime", in Alston P.(ed), *The United Nations and Human Rights: A Critical Appraisal*, at 1 (1992).

<sup>8</sup> Cf. The analysis of supervisory functions in terms of the "review function", the "correction function" and the "creative function", van Dijk P. and Rood J., "Function and Effectiveness of Supervision in an Economically Interdependent World", in van Dijk P. *et al* (eds), *Restructuring the International Economic Order: The Role of Law and Lawyers*, 135, at 144 (1987). Each function is defined in the following manner:

"1) The review function: the process of judging whether behaviour conforms to a rule.

"2) The correction function: the function designed to ensure compliance with international legal obligations through outside pressure or persuasion.

"3) The creative function: the function which consists of the clarification and elaboration of existing rules in order to make them sufficiently specific to be applied in a concrete case."



Two main forms of supervisory (or implementation) systems exist on the international plane: the reporting system and the petition system. Each of these systems is thought to have its own theoretical and practical basis. Reporting systems, the most common<sup>9</sup> and least politically sensitive method of supervision,<sup>10</sup> require States to submit periodic reports on the domestic situation with regard to the rights within the treaty concerned. Generally, the reports are considered by a supervisory body entitled to review the reports and make general recommendations.

Reporting systems are dependent, to a large extent, upon the good faith of the States concerned.<sup>11</sup> They are reliant upon the provision of accurate and relevant information by States parties and the supervisory body is mandated purely with the function of assisting and advising the States parties. Reporting systems are therefore considered as mechanisms for fact finding<sup>12</sup> and more

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<sup>9</sup> Currently there are seven universal human rights instruments that impose reporting obligations: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Convention on the Elimination of All Forms of Discrimination Against Women (1979), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) the International Convention on the Rights of the Child (1989), and the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families. In addition, the ILO, UNESCO and the WHO all have periodic reporting provisions on matters that relate to human rights.

<sup>10</sup> Buergenthal T., "Implementing the UN Racial Convention", 12 Tex.I.L.J., 187, at 189 (1977). Dormenval comments however that human rights are almost certain to be badly dealt with by UN supervisory bodies, "because the question of the relationship between a government and its nationals is, *par excellence*, political." Dormenval A., "UN Committee Against Torture: Practice and Perspectives", 8 N.Q.H.R., 26, at 27 (1990).

<sup>11</sup> Schoenberg H., "The Implementation of Human Rights by the United Nations", 7 Isr.Y.H.R., 22, at 37 (1977).

<sup>12</sup> Lippman M., "Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights", 10 Cal.West.I.L.J., 450, at 486-7 (1980); Vasak comments more specifically that reporting systems fall halfway between the functions of information and investigation. Vasak K., "The Distinguishing Criteria of Institutions", in Vasak K. and Alston P.(eds), The International Dimensions of Human Rights, 215, at 218 (1982).



specifically the "verification"<sup>13</sup> or the "promotion" of human rights in contrast to the protective functions of a petition system.<sup>14</sup> Such a comparison has led many commentators to criticise reporting systems as being "state centred",<sup>15</sup> "ineffective"<sup>16</sup> and "self-contradictory".<sup>17</sup>

Petition systems, on the other hand, are generally considered the most effective means for the protection of human rights. They involve the receipt of communications from individuals or States parties alleging violations of the treaty concerned.<sup>18</sup> The supervisory body takes on a "quasi-judicial" function<sup>19</sup> in

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<sup>13</sup> Tumanov V., "International Protection of Human Rights: Soviet Report", in Bernhardt R. and Jolowicz J. (eds), International Enforcement of Human Rights, 21, at 23 (1985).

<sup>14</sup> For a definition of the two opposed functions *see*, Vasak, *supra*, note 12, at 216.

<sup>15</sup> Mower A., "The Implementation of the UN Covenant on Civil and Political Rights", 10 Hum.Rts J., 271, at 285 (1977); Capotorti F., "The International Measures of Implementation Included in the Covenants on Human Rights", in Eide A. and Schou A. (eds), International Protection of Human Rights, 131, at 147 (1968).

<sup>16</sup> Schoenberg, *supra*, note 11, at 37.

<sup>17</sup> Vasak considers that the lack of the court gives the process a conciliatory character which "suggests that, despite their sacred and inviolable nature, human rights can be 'negotiated'". Vasak, *supra*, note 12, at 220.

<sup>18</sup> The main universal human rights treaties that possess petition systems are: The International Covenant on Civil and Political Rights (under its Optional Protocol); The UN Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment (art.22); The International Convention on the Elimination of All Forms of Racial Discrimination (art.14); the Apartheid Convention; and the Convention on the Rights of Migrant Workers and Their Families (art.77). As regards petition systems in general *see*, Cancado Trindade A., "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights", 202 Hague Recueil, (1987); Tardu M., Human Rights: The International Petition System, (1985).

The inter-State complaints facility is not as effective, probably as a result of the unwillingness of States to sacrifice their good relations with other States for the sake of human rights. Leary, *supra*, note 6, at 17. *See generally*, Leckie S., "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?", 10 Hum.Rts Q., 249 (1988).

<sup>19</sup> There might be objections to use of the term "quasi-judicial" as it was never the intention for any of the UN human rights monitoring bodies to be considered "courts". It has been commented that the Human Rights Committee, when operating under its Optional Protocol, is "neither a court nor a body with a quasi-judicial mandate". However it is admitted that it does perform functions similar to those of the European Commission of Human Rights and "applies the provisions of the Covenant and Optional Protocol in a judicial spirit". de Zayas



interpreting the convention and making decisions or recommendations on the merits of each case. As regards the individual complaints system, which is generally optional for States parties,<sup>20</sup> the procedure may also be seen to provide the victim of a violation with an international "remedy" where a domestic remedy is unforthcoming. Although the supervisory body may not necessarily have the power to enforce its decision, this is generally not decisive as to its impact.<sup>21</sup>

It is often assumed, probably as a result of over-simplified analogies with domestic law, that the only really effective mechanism for supervision is the petition procedure. However, to really assess the utility of each mechanism they should be analysed in terms of the degree to which they fulfil the essential functions of a supervision.

First, in terms of review or the assessment of compliance, whereas the petition procedure allows for in depth analysis of particular situations, it cannot compare with the breadth and scale of action that takes place under the various reporting mechanisms. It has been noted that even in those cases where petition systems are operative, the reporting system has formed the mainstay of supervision<sup>22</sup> in providing an essential form of continuous monitoring. This is partially due to the limited number of States that have agreed to be bound by the petition systems (which are generally optional), but also because the specific procedures for the receipt and consideration of complaints (including extensive

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A., Möller J., and Opsahl T., "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee", 28 Ger.Yrbk.I.L., 9, at 11 (1985). It is considered, however, that the CESCR has begun to exercise quasi-judicial functions in the context of the reporting system. *See below*, text accompanying notes .

<sup>20</sup> However the American Convention on Human Rights (1969), 1144 U.N.T.S. 123, has a compulsory individual petition procedure (art.44).

<sup>21</sup> For changes in the domestic situation related to the work of the Human Rights Committee, *see*, Report of the Human Rights Committee, 45 UN GAOR, Supp.(No.A/45/40), Vol.II, Annex XII, at 207-211 (1990); Cohn C., "The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights", 13 Hum.Rts.Q., 295 (1991).

<sup>22</sup> See generally, Fischer D., "International Reporting Procedures", in Hannum H.(ed), Guide to International Human Rights Practice, 165 (1984). Such a point has been noted by Robertson with regard to the ICCPR. Robertson A., "The Implementation System: International Measures", in Henkin L.(Ed), The International Bill of Rights, 332, at 341 (1981). *See also*, with respect to the ILO. Leary, *supra*, note 6, at 18.



admissibility criteria),<sup>23</sup> mean that they are not always readily accessible to the disadvantaged who might be the victims of violations.<sup>24</sup>

Secondly, in terms of enforcement or correction, both systems ultimately depend for their effectiveness upon the force of national and international pressure. Petition procedures are generally accompanied by greater public interest and therefore could be said to be more effective in "the mobilisation of shame". However, it cannot be maintained that the principal objective is to condemn and alienate States.<sup>25</sup> Supervisory bodies may play a much more constructive role in assessing the situation and advising countries as to possible remedial action.<sup>26</sup> Indeed petition procedures themselves require a certain amount of co-operation from States parties that may disintegrate if it was thought that the burdens of participation outweighed the benefits.

Additionally, it is often easy to overlook the importance of the promotional or preventive aspects of implementation. This has been most clearly pointed out by the Committee in its General Comment No.1 of 1989.<sup>27</sup> The reporting process has a number of objectives at its heart, namely that the State should monitor and

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<sup>23</sup> For the operation of the Optional Protocol of the ICCPR in particular, see, McGoldrick D., The Human Rights Committee, 120-246 (1991); Ghandi P., "The Human Rights Committee and the Right of Individual Petition", 57 B.Y.I.L., 201 (1986); Prounis O., "The Human Rights Committee: Toward Resolving the Paradox of Human Rights Law", 17 Col.H.R.L.R., 103, (1985/6); Brar P., "The Practice and Procedures of the Human Rights Committee Under the Optional Protocol of the International Convention on Civil and Political Rights", 25 Ind.J.I.L., 506 (1985); de Zayas A. *et al*, *supra*, note 20.

<sup>24</sup> Alston cites in particular: i) ignorance of the existence of an applicable international procedure; ii) a lack of time and/or resources; iii) the physical impossibility of lodging a complaint; iv) the difficulty of demonstrating sufficient individual, as opposed to general community, standing to justify lodging a complaint; and v) the assumption that the international body in question is unlikely to stand in favour of the victim in a given situation. Alston P., "Discussion Note", UN Doc. E/C.12/1991/WP.2, at 8, para.26 (1991).

<sup>25</sup> As Mower commented:

"The cardinal objective is to gain, for individuals and groups, the most complete enjoyment of rights which can possibly be obtained, not to find and punish 'criminal' governments."

Mower, *supra*, note 15, at 285.

<sup>26</sup> See, Gaer F., "First Fruits: Reporting by States under the African Charter on Human and Peoples' Rights", 10 N.Q.H.R., 29, at 31 (1992).

<sup>27</sup> General Comment No.1, UN ESCOR, Supp.(No.4), Annex III, at 87-89, UN Doc.E/1989/22, (1989).



undergo a thorough review and evaluation of the actual situation prevailing within the country as concerns the rights within the Covenant. In doing so it should stimulate public scrutiny of government policy in the areas concerned and pinpoint difficulties and shortcomings in the existing arrangements. Higgins remarks, in this regard, that the reporting process can be a very "salutary exercise" for States in which failure to comply with substantive obligations is often "inadvertent".<sup>28</sup> Such considerations support the idea that reporting systems should form the basis of any supervisory mechanism, to be supplemented by petition systems where possible and appropriate. The "promotion" of human rights could be said to be "the first, and the necessary, stage leading to protection."<sup>29</sup>

Finally, in terms of standard setting or normative development, it is clear that petition systems are particularly effective mechanisms for the creation of standards for application in specific cases. In comparison, the process of considering State reports does not give rise to similar opportunities for the specification of the norms in the treaty concerned. There has been a tendency, however, among supervisory bodies to adopt a distinct interpretative role in the guise of "general comments". Although still lacking in the specificity offered by a petition system the use of General Comments does give the supervisory body an opportunity to develop an understanding of the norms within the treaty concerned.

## **II) BACKGROUND TO THE COMMITTEE'S ESTABLISHMENT**

### **A) THE DRAFTING OF THE IMPLEMENTATION SYSTEM**

During the drafting of the Covenant, there was considerable disagreement as to the nature of the implementation procedure that should accompany the substantive articles. At one stage or another, three forms of supervision were mooted: the possibility of supervision through a petition procedure; supervision by the

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<sup>28</sup> Higgins R., "Some Thoughts on the Implementation of Human Rights", Bull.H.R., 60, at 63 (1989).

<sup>29</sup> *Ibid.* See also Vasak who comments:

"If an international body for the promotion of human rights is successful, it cannot help but assume the task of protection."

Vasak, *supra*, note 12, at 218.



Specialised Agencies; and supervision by an expert committee specifically set up for that purpose.<sup>30</sup>

### 1) A Petition Procedure

Despite the division of the draft Covenant into two separate texts over the question of implementation,<sup>31</sup> the discussion over whether the Human Rights Committee procedure should apply to economic, social and cultural rights continued. Two proposals were submitted at the Commission's tenth session for the application of such a procedure to selective economic, social and cultural rights in certain circumstances.<sup>32</sup> Doubts were expressed about the capability of the Committee to exercise its quasi-judicial functions with regard to rights that were of a programmatic nature.<sup>33</sup> The suggestions were also opposed by the Specialised Agencies who considered that they were technically better qualified to implement economic, social and cultural rights, and such a procedure would only lead to duplication of work.<sup>34</sup>

On the other hand it was argued that certain rights could be subjected to the Human Rights Committee procedure "and, in time, most of the rights might become enforceable."<sup>35</sup> Accordingly it was argued that States should have the option to accept the jurisdiction of the Human Rights Committee of the ICCPR with

<sup>30</sup> *See above*, Chapter 1, text accompanying notes 201-227. *See also*, Alston P., "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights", 9 *Hum.Rts.Q.*, 332, at 335-340 (1987) (henceforth "Abyss"); and "The Committee on Economic, Social and Cultural Rights", in Alston P.(ed), The United Nations and Human Rights: A Critical Appraisal, 473, at 475-479 (1992).

<sup>31</sup> *See above*, Chapter 1, text accompanying notes 126-143.

<sup>32</sup> For the French proposal *see*, UN Doc.E/CN.4/L.338, 18 ESCOR, Supp.(No.7), UN Doc.E/2573, para.216 (1954). It was suggested that the States Parties might be given the opportunity of accepting the Human Rights Committee's complaints procedure for specific economic, social or cultural rights as they so desired. Such a procedure would be subject to reciprocal agreement by the States concerned.

<sup>33</sup> Not only was it considered that there was a lack of criteria to evaluate state compliance, it was argued that:

"Complaints relating to that covenant could only refer to insufficient programmes in the attainment of certain goals and it would be impossible for the committee to determine what the rate of progress in any particular case should be."

UN Doc.A/2929, 10 UN GAOR, C.3, Annexes, (Ag.Item 28), Pt.II, at 124, para.41 (1955).

<sup>34</sup> *Ibid* at 124, para.40.

<sup>35</sup> *Ibid*, at 124, para.42.



respect to certain rights. In case of competing procedures the Committee would defer to the authority of the Specialised Agency concerned.<sup>36</sup> However, as with a proposal to authorise ECOSOC to receive individual petitions,<sup>37</sup> in the face of significant opposition the suggestions were withdrawn before being taken to vote.

## 2) The Specialised Agencies<sup>38</sup>

As suggested above, the Specialised Agencies were somewhat jealous of their technical and formal jurisdictions. Accordingly, the ILO made a proposal for an implementation system in which the ILO itself would review the state reports.<sup>39</sup> This was rejected in favour of a Secretariat draft proposing the submission of periodic state reports to the United Nations with reference of relevant extracts to the Specialised Agencies.<sup>40</sup> Although the co-operation of the Specialised Agencies is clearly of considerable importance, in terms of their knowledge and technical expertise, to the implementation of the Covenant, it would have been inappropriate for one of them to take on the central supervisory role.

First, as not all States Parties are members of the relevant Specialised Agencies, the UN would still have to develop its capabilities in those areas. Secondly, a divergence both in standards and implementation systems would emerge between members and non-members of the competent Specialised Agencies. The universality of the rights within the Covenant and the essential element of reciprocity in obligations would inevitably be

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<sup>36</sup> *Ibid*, at 124, paras 42-45.

<sup>37</sup> The General Assembly requested the Commission on Human Rights in resolution 421 (V), Sect.F, to consider provisions "to be inserted in the draft Covenant or in separate protocols, for the receipt and examination of petitions from individuals and organizations with respect to alleged violations of the Covenant." GA Resn.421 (V), (Dec.4 1950), 5 UN GAOR, Resns, Supp.(No.20), at 42 (1950).

<sup>38</sup> *See generally*, Alston P., "The UN Specialised Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights", 18 Colum.J.Trans.L., 79 (1979); Samson K., "Human Rights Co-ordination within the UN System", in Alston P.(ed), The United Nations and Human Rights: A Critical Appraisal, 620, at 629-30 (1992).

<sup>39</sup> UN Doc. E/CN.4/AC.14/1 (1951).

<sup>40</sup> The Secretariat plan for implementation was inspired by the technical assistance program and "the idea that it was better to help governments to fulfil their obligations than to penalise them for violations", Humphrey J., Human Rights and the United Nations- A Great Adventure, at 143 (1984).



undermined. Thirdly, no single Specialised Agency could effectively take up supervisory duties with respect to the whole of the Covenant without extending their existing mandate.

### 3) An Expert Committee

Following earlier unsuccessful proposals to create a specialised Committee to supervise the implementation of economic, social and cultural rights,<sup>41</sup> two last-minute proposals were made in 1966. On the one hand, the US representative proposed the establishment of an expert committee of independent experts to oversee the implementation similar to the model created for the Convention on the Elimination of all Forms of Racial Discrimination.<sup>42</sup> Simultaneously, Italy proposed the creation of *ad hoc* Committees elected by ECOSOC.<sup>43</sup> Both proposals were based upon the premise that ECOSOC would not have the time or the expertise to examine the reports adequately<sup>44</sup> and would not properly represent the States Parties.<sup>45</sup> However, the suggestions were withdrawn at the General Assembly Third Committee's 1401st meeting when it became apparent that there was insufficient support.<sup>46</sup>

In light of the discussion within the Third Committee it is clear that some form of compromise solution could have been achieved. The fact that no attempt was made at compromise was a reflection of the political situation at that time. In 1966, the Socialist States were still suspicious of any international means of implementation, the African States were disillusioned with "expert bodies" in light of the ICJ's recent decision in the South West

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<sup>41</sup> See, Alston (Abyss), *supra*, note 30, at 335-338.

<sup>42</sup> A/C.3/L.1360, para.1., *in*, UN Doc.A/6546, 21 UN GAOR, C.3, Annexes, (Ag.Item 62) at 10, paras.13-14 (1966). It proposed that the reports should be considered by a "Committee on Economic, Social and Cultural Rights" consisting of independent experts elected by States Parties. It is considered that the independence of the proposed Committee and the fact it would have drawn on expert individuals from States Parties rather than ECOSOC, were matters that recommended the proposal, *see* Alston, *supra*, note 38, at 91-92.

<sup>43</sup> *Ibid*, at 11, paras 18 and 24.

<sup>44</sup> See *e.g.*, MacDonald (Canada), UN Doc.A/C.3/SR.1399, at 128, para.28 (1966).

<sup>45</sup> See *e.g.*, Capotorti (Italy), UN Doc.A/C.3/SR.1397, at 120, para.32 (1966).

<sup>46</sup> UN Doc.A/C.3/SR.1401, para.19; *ibid*, para.21.



Africa Cases<sup>47</sup> and the Western States had little political interest in economic, social and cultural rights. Essentially there was no "champion" to push for strong implementation procedures for the draft Covenant on Economic, Social and Cultural Rights.

However, the rejection of the proposals did not necessarily rule out the possibility of the subsequent creation of an expert committee. Schwelb comments:

"It appears, however, that the fact that the Italian amendment was withdrawn would not prevent the Council, which is the master of its own procedure (Art. 72 of the Charter) and which is empowered to set up 'such other commissions as may be required for the performance of its functions' (Art.68 of the Charter) from establishing a subsidiary body to study and report to it on the information transmitted by governments under the Covenant."<sup>48</sup>

Thus although there was insufficient political will to endorse the creation of an expert committee in 1966, "the door was not irretrievably closed".<sup>49</sup>

#### 4) The Result

The final intentions of the drafters as regards the provisions on implementation are quite obscure. States parties are required to submit reports "in stages", in accordance with a programme to be established by ECOSOC after consultation with the States parties and the specialised agencies concerned.<sup>50</sup> The reports should indicate the "measures... adopted" and the "progress made" in achieving observance of the rights within the covenant.<sup>51</sup> They may additionally indicate the factors and difficulties affecting the degree of fulfilment of the obligations.<sup>52</sup> Such reports are to be submitted to the Secretary-General, who is required to transmit

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<sup>47</sup> (1966) I.C.J.Rep., at 6.

<sup>48</sup> Schwelb E., "Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights", 1 H.R.J., 363, at 367 (1968). In particular *see e.g.*, Mr Richardson (Jamaica), A/C.3/SR.1401, at 142, para.26 (1966).

<sup>49</sup> Alston, *supra*, note 30, at 479.

<sup>50</sup> Article 17(1).

<sup>51</sup> Article 16(1).

<sup>52</sup> Article 17(2).



copies of the reports to ECOSOC "for consideration",<sup>53</sup> and copies of the relevant parts of the reports to the specialised agencies in so far as they relate to their responsibilities.<sup>54</sup> Where information has already been submitted to a specialised agency it is sufficient to refer thereto.<sup>55</sup> Arrangements may be made for the specialised agencies to report to ECOSOC on the progress made in achieving the observance of the rights within the Covenant including particulars of decisions and recommendations on such implementation adopted by their competent organs.<sup>56</sup> ECOSOC may also transmit the State reports to the Commission on Human Rights "for study and general recommendations or, as appropriate, for information".<sup>57</sup> Any such recommendation submitted by the Commission is open to comment by the specialised agencies and the States parties.<sup>58</sup>

Finally ECOSOC may submit "from time to time" to the General Assembly, reports and recommendations "of a general nature" together with a summary of the information received from the States parties and the specialised agencies.<sup>59</sup> It may also bring to the attention of other organs of the UN or specialised agencies concerned with furnishing technical assistance, any matters that may help those bodies decide what measures are likely to contribute to the effective progressive implementation of the Covenant.<sup>60</sup>

The system outlined in the Covenant is thus unclear as to the nature, purpose or degree of supervision to be given and as to the extent to which the bodies mentioned should involve themselves. First although ECOSOC is mandated with the "consideration" of the State reports, the Commission on Human Rights may similarly "study" the reports and make general recommendations. It is unclear on the face of it, as to which body has the primary responsibility for undertaking supervision. Given that the

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<sup>53</sup> Article 16(2)(a).

<sup>54</sup> Article 16(2)(b).

<sup>55</sup> Article 17(3).

<sup>56</sup> Article 18.

<sup>57</sup> Article 19.

<sup>58</sup> Article 20.

<sup>59</sup> Article 21.

<sup>60</sup> Article 22.



Commission is a subsidiary body to ECOSOC it might be assumed that it would play the most significant role.

Secondly, although many assumptions may be made about the nature of reporting systems generally, the Covenant itself only provides for the submission of reports and their consideration. The periodicity, form and specific content of those reports are left open, as is the nature of the consideration undertaken. The most significant limits however are first that States parties are only obliged to submit reports on the measures adopted and the progress made in achieving observance of the rights; any further participation in the consideration of the reports is purely voluntary. Moreover, ECOSOC is at most authorised to submit recommendations to the General Assembly; it is in no way empowered to make decisions binding on States parties.

## B) THE SESSIONAL WORKING GROUP

As noted above, ECOSOC has considerable discretion in the conduct undertaken in the consideration of reports.<sup>61</sup> Accordingly, following the entry into force of the Covenant on Economic, Social and Cultural Rights on January 3rd 1976, ECOSOC undertook to consider the best means to supervise the implementation of the Covenant. Although there appears to have been considerable support for the idea that the Commission take on a central role in the supervisory process,<sup>62</sup> the Council adopted an alternative strategy.

In Resolution 1988(LX) of 11th May 1976 ECOSOC laid down the implementation procedures that were to accompany the Covenant. It created a three-stage, biennial reporting process with a cycle of six years. For the first stage States would be required to

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<sup>61</sup> As Sohn commented:

"The Covenant does not specifically foresee the establishment of a specialist Working Group charged with responsibility for scrutinising reports submitted by the States Parties and the specialised agencies. That responsibility is vested in the Council itself which, in turn, must exercise its own discretion as to the most appropriate arrangements for ensuring effective supervision."

Sohn L., "The Role of the United Nations Organs in Implementing the International Covenant on Economic, Social and Cultural Rights", Background Paper, at 39-40 (1985).

<sup>62</sup> See, Alston, *supra*, note 30, at 483. He comments:

"The Commission's already overcrowded agenda, its reluctance to take economic, social and cultural rights very seriously, and the undoubted need for specialist expertise in monitoring such rights would all seem to confirm the wisdom of that approach now that a committee of independent experts has been given the principal responsibility."



submit reports on the rights covered by articles six to nine. Two years later, States would be required to report on articles 10 to 12, and two years following that on articles 13 to 15. The reports were to be forwarded by the Secretary-General to ECOSOC which would be "assisted" in its consideration of the reports by a "Sessional Working Group" (the Working Group). The Specialised Agencies were also to receive the State reports as appropriate and could submit their own reports in response and have representatives take part in the proceedings of the Working Group.<sup>63</sup>

The initial plans for a Sessional Working Group were criticised for having insufficient provision for the consideration of the reports by persons of requisite expertise<sup>64</sup> and for making no provision for enlisting the services of the Commission on Human Rights.<sup>65</sup> Notwithstanding such objections ECOSOC formally created the "Sessional Working Group" in Decision 1978/10 of 3rd May 1978.<sup>66</sup> Much of the discussion that preceded the decision was concerned with the composition and membership of the Working Group whilst its actual role in the consideration of the reports was left unclear.<sup>67</sup> The rather haphazard way the Working Group began was somewhat indicative of how it continued.<sup>68</sup> Following a review of its operation, the Working Group was renamed the

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<sup>63</sup> See ECOSOC Resn.1988(LX), 11 May 1976, *found in* UN Doc.E/C.12/1989/4, at 3 (1988). *See generally*, Ramcharan B., "Implementing the International Covenants on Human Rights" in Ramcharan B.(ed), Human Rights: Thirty Years After the Universal Declaration, 159, at 163-165 (1978).

<sup>64</sup> Massip (Canada), UN Doc.E/SR.1999, at 71, para.16, 60 UN ESCOR, (Ag.Item 4), (1976).

<sup>65</sup> *See e.g.*, Sucharipa (Austria), *Ibid*, at 72, para.19.

<sup>66</sup> ECOSOC Decn.1978/10, (May 3 1978), *in* UN Doc.E/C.12/1989/4, at 6 (1988).

<sup>67</sup> *See e.g.* Ramcharan, *supra*, note 63, at 169. The French representative commented in the discussion:

"The form and composition of the sessional working group would be determined by the nature of the tasks entrusted to it and could therefore be determined only after the methods of work and the procedure for considering reports had been established."

UN Doc.E/1978/SR.9, para.5.

<sup>68</sup> *See generally*, Sohn, *supra*, note 61, 1-66; Commentary, "Implementation of the International Covenant on Economic, Social and Cultural Rights: ECOSOC Working Group", 27 ICJ Rev., 26 (1981); Alston (Abyss), *supra*, note 30, at 340-342; Westerveen G., "Towards a System for Supervising States' Compliance with the Right to Food", in Alston P. and Tomasevski K.(eds), The Right to Food, 119 (1984).



"Sessional Working Group of Governmental Experts" and its members were elected for three years from nominees put forward by states parties to the Covenant. The change did not seem to have any significant effect on the work that the group produced. The barrage of criticism that has been directed at the Working Group in both of its forms can be summarised as the following:

- a) The examination of reports was superficial.<sup>69</sup> In particular it was marked by poor quality of questioning<sup>70</sup> and political disagreement.<sup>71</sup>
- b) The Working Group failed to establish standards for the evaluation of reports<sup>72</sup> or an effective procedure.<sup>73</sup>
- c) The Working Group reports were purely procedural, giving little indication of the substance of the reports or discussion.<sup>74</sup> Neither did they indicate any conclusions or recommendations.<sup>75</sup>
- d) There was continual dispute over the participation of the Specialised Agencies.<sup>76</sup>
- e) The State representatives presenting the reports were often not sufficiently qualified to answer the questions of the Working Group,<sup>77</sup> (members often presenting the reports themselves).
- f) Disagreements within regional caucuses led to difficulty in filling its 15 membership position.<sup>78</sup>

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<sup>69</sup> Commentary, *ibid*, at 35.

<sup>70</sup> See e.g. Yakolev (USSR), who seems to respond to the questions of other members of the Working Group rather than pose questions himself, E/1985/WG.1/SR.9, at 6, para.29-30.

<sup>71</sup> See e.g. Altercations between Texier (France) and Yakolev (USSR) over the Polish report, E/1986/WG.1/SR.26, at 2-4; and between Yakolev (USSR) and Hoppe (Denmark) over the restrictions on Solidarnosc in Poland, E/1986/WG.1/SR.27, at 7-8.

<sup>72</sup> Westerveen, *supra*, note 68, at 125.

<sup>73</sup> Sohn, *supra*, note 61, at 45.

<sup>74</sup> Alston (Abyss), *supra*, note 30, at 342. See e.g. the comments of: Walkate (Netherlands), E/1981/SR.15, para.90; Bell (Canada), E/1981/SR.15, para.98.

<sup>75</sup> Westerveen, *supra*, note 68, at 341; Fischer, *supra*, note 22, at 175.

<sup>76</sup> Commentary, *supra*, note 68, at 36 and 38. It was finally agreed that the representatives of the Specialised Agencies should be able to make general statements but not pose questions to State representatives.

<sup>77</sup> *Ibid*, at 35.

<sup>78</sup> Sohn notes that two members were lacking in 1984, one member in 1983, and two members in 1982, Sohn, *supra*, note 61, at 42.



- g) The attendance of the Working Group members was poor,<sup>79</sup> and there was excessive use of alternates.<sup>80</sup>
- h) The initial one year tenure of the members, and the later high turnover of members led to a lack of continuity and consistency.<sup>81</sup>
- i) State reports were considered too quickly due to the lack of time available to the Group.<sup>82</sup>
- j) The Working Group was handicapped by the lack of publicity.<sup>83</sup>
- k) The Working Group was not even-handed in its consideration of State reports.<sup>84</sup>
- l) The Working Group's discussions often ignored the broader context in which the realisation of economic, social and cultural rights operates.<sup>85</sup>
- m) The Working Group was insufficiently supported by the Secretariat.<sup>86</sup>
- n) The lack of technical expertise on the part of States parties and the absence of sufficiently detailed reporting guidelines led to a poor level of compliance with the reporting obligations.<sup>87</sup>

The general dissatisfaction with the effectiveness of the Working Group as a supervisory body, combined with the increasing interest being placed upon economic, social and cultural rights in the UN and a more conciliatory stance on the part of the Eastern European States,<sup>88</sup> all combined to put fresh impetus into the creation of a truly independent committee of experts. However, although the decision to create the Committee indicated the possibility of a fresh start, it was clear that the form of supervision would remain largely the same.

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<sup>79</sup> One member noted that there was rarely more than ten members present at one time. Texier (France), E/1985/WG.1/SR.19, para.17.

<sup>80</sup> Alston (Abyss), *supra*, note 30, at 341.

<sup>81</sup> Sohn, *supra*, note 61, at 43.

<sup>82</sup> Initially the Working Group only had a two-week session. After 1980 this was extended to three weeks. *See*, Commentary, *supra*, note 68, at 37.

<sup>83</sup> *Ibid*, at 33.

<sup>84</sup> Certain States for example were given considerably harsher treatment. Indeed the Working Group actually refused to ask questions of the Chilean report in light of its general human rights abuses. *Ibid*, at 38.

<sup>85</sup> Alston (Abyss), *supra*, note 30, at 342.

<sup>86</sup> Sohn, *supra*, note 61, at 35.

<sup>87</sup> *Ibid*, at 39.

<sup>88</sup> *See*, Alston (Abyss), *supra*, note 30, at 345-349.



The Committee on Economic, Social and Cultural Rights did not so much replace the Working Group as inherit and develop the existing system. ECOSOC Resolution 1985/17 under which the Committee was formally established, states merely that the Working Group shall be "renamed" the Committee on Economic, Social and Cultural Rights.<sup>89</sup> Similarly paragraph (h) of the same resolution states that the procedures and methods of work established previously for the Working Group continue to remain in force in so far as they are not superseded by that resolution.<sup>90</sup> More importantly, there was no substantial reevaluation of the basic system of supervision such as to give effect to articles 19-21. The Committee merely inherited the existing procedures of the Working Group (such as the "constructive dialogue" approach to the consideration of reports), which it has attempted to undertake in a more effective manner.

### **III) THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

#### **A) THE COMPOSITION OF THE COMMITTEE**

The Committee on Economic, Social and Cultural Rights was created in ECOSOC Resolution 1985/17.<sup>91</sup> Paragraph (b) of that decision reads:

"(b) The Committee shall have 18 members who shall be experts with recognised competence in the field of human rights, serving in their personal capacity, due consideration being given to equitable geographical distribution and to the representation of different forms of social and legal systems, to this end, 15 seats will be equally distributed among the regional groups, while the additional three seats will be allocated in accordance with the increase in the total number of States parties per regional group;"

#### **1) Size of the Committee**

The decision to create a Committee with 18 members was not necessarily an automatic one, particularly in light of the fact that its predecessor, the Sessional Working Group, had 15

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<sup>89</sup> ECOSOC Resn.1985/17, para.(a), UN ESCOR, Supp.(No1), at 15, UN Doc.E/1985/85, (1985).

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*



members. In contrast it might be noted that CAT has only 10 independent experts, the ILO Committee of Experts has 20, and CEDAW has 23. The increase in size of the Committee seems to have stemmed from a desire to emulate the Human Rights Committee and to satisfy the need for representation for the growing number of new States parties to the Covenant.

Smaller Committees arguably benefit from being able to operate by consensus,<sup>92</sup> come to decisions quickly, and maximize the use of time and resources. However absences in a small Committee can disrupt both the ability to form quorum and the quality of decision-making.<sup>93</sup> With respect to the wide range of issues that confront the Committee, it is in theory essential for the Committee to be of a size large enough to include members from all the necessary areas of technical expertise whilst maintaining its ability to operate by consensus.

The Committee has operated relatively smoothly at its present size. The ideological conflicts that beset its earlier sessions have not reoccurred and although there have been a number of minor disagreements between members, there has been no serious challenge to its ability to come to decisions by consensus. In light of the Committee members' increasing work-load over and above the consideration of State reports (such as attending meetings of the pre-sessional working group, monitoring activities of other human rights bodies, and the preparation of concluding observations and general comments), there might be an argument for increasing the size of the Committee to spread the burden. However, it is considered that the cost this would have on the ability of the Committee to function quickly and effectively and come to decisions by consensus would greatly outweigh any benefit. Moreover, it has to be noted that ideally, many of the tasks undertaken by the Committee should be the responsibility of the Secretariat.

## 2) The Appointment of Members

Under ECOSOC resolution 1985/17 paragraph (c) members of the Committee are elected by ECOSOC by secret ballot from a list of nominees submitted by States Parties.<sup>94</sup> The first elections took place in 1986 where 18 members were elected for a term beginning on 1st January 1987. Whereas the regular term of office

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<sup>92</sup> This has been a problem for larger Committees such as CEDAW.

<sup>93</sup> Dormenval, *supra*, note 10, at 33.

<sup>94</sup> ECOSOC Resn.1985/17, *supra*, note 89.



is four years,<sup>95</sup> the necessity of instituting a staggered membership meant that the President of the Council chose by lot the names of nine members whose term was to expire at the end of two years.<sup>96</sup> Accordingly half the membership is renewed every second year.<sup>97</sup> At the elections in 1988 ECOSOC elected nine members whose term of office runs until December 1992, and in 1990 another nine members were elected whose tenure continues until December 1994.<sup>98</sup> Due to the resignation of two members (Mr Sviridov and Mr Daoudy) in 1988, ECOSOC elected two members to fill those vacancies for the remainder of their terms of office, expiring in December 1990. The present and past state of membership may be found in the Appendices to this work.<sup>99</sup>

The fact that members of the Committee are elected for four-year terms allows the Committee an element of continuity.<sup>100</sup> It is apparent, particularly in light of the experience of the original Working Group, that changes in membership can be disruptive in terms of the Committee's efficient functioning.<sup>101</sup> Long terms of membership promote stability through allowing the development of inter-personal relationships which can help to avoid unnecessary friction. More importantly, it assists consistency and promotes the development of expertise by the individual Committee members so essential to the effective analysis of State reports.

The staggered membership of the Committee and the eligibility of existing members for re-election, has done much to ensure this vital continuity in the Committee's working methods.<sup>102</sup> Indeed, 14 members of the original Committee are still members as of 1992 and only three members have not been re-

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<sup>95</sup> *Ibid*, para.(c)(i).

<sup>96</sup> *Ibid*, para.(c)(iii).

<sup>97</sup> *Ibid.*, para.(c)(ii).

<sup>98</sup> *See generally*, Report of the Committee's Fifth Session, UN Doc.E/1991/23, at 2, paras 4-5, UN ESCOR, Supp.(No.3), (1991).

<sup>99</sup> Appendix III.

<sup>100</sup> Members of the HRC, CEDAW, CAT are all elected for four years.

<sup>101</sup> *See above*, text accompanying note 81.

<sup>102</sup> The ILO Committee of Experts is 20 members strong each of whom is elected for three years. "...their term of office is generally renewed since continuity makes it possible to acquire more thorough knowledge of matters dealt with by the Committee and also ensures the greater independence of its members." Valticos N., "The International Labour Organisation", in Vasak K. and Alston P.(eds), The International Dimensions of Human Rights, 363, at 369 (1982).



elected.<sup>103</sup> However, the desirability of maintaining continuity has to be balanced against the current need for new specific expertise in the Committee as intimated below.<sup>104</sup> It is perhaps possible that such expertise could be brought to the Committee on a limited scale in appointments following "natural wastage" such as resignations or retirements.

### 3) Representation and Distribution of Membership

Paragraph (b) of ECOSOC resolution 1985/17 stipulates that in the election of the experts "due consideration" should be given to "equitable geographical distribution and to the representation of different forms of social and legal systems". Although the Committee members are undoubtedly appointed as independent experts,<sup>105</sup> this provision appears to ensure that the interests of States are represented in a general manner through social and cultural affiliation.

However, from the point of view of the Committee, it is entirely suitable that membership should span geographical areas, legal and social forms in that its expertise would be seriously diminished if one aspect went unrepresented. The formula devised for the Committee stipulates that 15 seats shall be distributed equally among the five regional groups (Africa, Asia, Eastern Europe, Latin America and Western Europe) and that the additional three seats be allocated according to the increase in the total number of States parties per regional group. It has been argued that this formula is unduly inflexible.<sup>106</sup> Its emphasis on ideological groupings not only means that valid and relevant criteria for membership are ignored (such as ensuring a spread of expertise across the relevant disciplines), it places an unwarranted significance on the representation of States parties.

It must be admitted that the composition of the Committee does seem to fulfil, to a large extent, the three criteria of representation (geographical, legal and social distribution). As far as the regional distribution is concerned, it has three members from each of the regional groups with the extra members going to

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<sup>103</sup> In comparison, the Human Rights Committee has experienced some problems of continuity, *see*, Nowak M., "UN Human Rights Committee: Comment", 11 H.R.L.J., 139 (1990).

<sup>104</sup> *See below*, text accompanying note 119.

<sup>105</sup> *See below*, text accompanying note 122.

<sup>106</sup> Alston (Abyss), *supra*, note 30, at 349.



Africa, Asia and Latin America.<sup>107</sup> The weakest unit is perhaps that of Asia which only has three representatives, one of whom is from Cyprus.<sup>108</sup>

The variety of legal systems found on the international plane are generally well represented with a mixture of common-law and civil systems and a variety of constitutional forms with different philosophies. Similarly, there is a fairly wide representation of differing social structures, although stronger Asian representation would be beneficial.

Nevertheless, from the point of view of expertise, it is important that the Committee is composed of experts spanning the areas of concern within the Covenant. It is certainly true that there is a need for people with local knowledge of the various geographical areas and of the different social and legal systems of States parties, but the demands of knowledge and expertise within the Committee are considerably wider. Given that the Committee is in the best position to determine its needs as regards the expertise of its members, a more flexible arrangement would be appropriate in which the Committee could have greater control over membership.

The existing arrangement, especially in so far as it refers to ensuring the representation of States parties, reflects the misplaced idea that the experts are still representatives of States. The fact that members are elected from nominees of the States parties, despite leaving open the faint possibility of experts being elected from nationals of non-States parties,<sup>109</sup> similarly re-emphasises the unwillingness of States parties to abandon the control previously held over membership of the Working Group.<sup>110</sup>

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<sup>107</sup> For a list of the different groupings for the purposes of elections *see*, Hovet T. and Hovet E., A Chronology and Fact Book of the United Nations 1941-1985, 310 (7th Ed, 1986).

<sup>108</sup> Cyprus of course is a member of the Council of Europe. On political groupings generally *see*, Petersen M., The General Assembly in World Politics, 290-297 (1986); Bailey S., The General Assembly of the United Nations. A Study of Procedure and Practice, 21-40 (1960). It is assumed that the Eastern European group will disappear at some stage which will alter all the terms of election.

<sup>109</sup> As Alston comments, "although there appears to be nothing to prevent the nomination of an individual who is not a national of a State party, there have been no precedents and the chances of election would probably be slight". Alston (Abyss), *supra*, note 30, at 349.

<sup>110</sup> Whereas the Western States considered that the Working Group should consist of members of ECOSOC, the East European States argued that membership of the Working Group should be limited to States Parties to the



#### 4) The Expert Nature of the Committee

ECOSOC resolution 1985/17 requires that the Committee be composed of "experts with recognised competence in the field of human rights". The expertise of the membership is of importance not only in as far as it relates to the ability of the Committee to assess the State reports<sup>111</sup> but also in that it lends to the credibility of the Committee in the eyes of States parties.<sup>112</sup> The willingness of States parties to produce high quality reports is directly related to the quality of the supervision undertaken by the Committee.<sup>113</sup>

Although the Working Group was supposedly composed of competent members or experts, the quality of analysis shown in the consideration of State reports was manifestly poor.<sup>114</sup> The Committee, on the other hand, has demonstrated an ability to draw

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Covenant. *See generally*, Ramcharan, *supra*, note 63, at 165-167. UN Docs. E/1978/SR.5, 9 and 12, UN ESCOR, (Ag.Item 5), (1978).

The final solution was presented as a compromise: the Working Group should consist of 15 members elected from those States that were parties to the Covenant and members of ECOSOC (of whom there were only 20), other members of the Council and States Parties were invited to participate in the proceedings of the Working Group as observers. ECOSOC Decn.E/1978/10, paras.(a) and (c), *supra*, note 66.

At the creation of the Sessional Working Group of Governmental Experts under ECOSOC Resolution 1982/33 paragraph (b), the requirement for membership of the Council was dropped; the 15 members would be elected from the States Parties to the Covenant alone. ECOSOC Resn.1982/33, (May 6 1983), *in*, UN Doc.E/C.12/1989/4, at 11 (1988).

<sup>111</sup> As Mower said with respect to the HRC:

"Since a body like this is an aggregate of individuals, the attitudes and competence of individual members become matters of not little significance for the Covenant's effectiveness."

Mower G., "Organizing to Implement the UN Civil/Political Rights Covenant: First Steps by the Committee", 3 *Hum.Rts.Rev.*, 122, at 123 (1978). The point is equally relevant with respect to the CESCR.

<sup>112</sup> The Netherlands representative commented in ECOSOC:

"The requirement that members of the Group should be experts in the matter to which the State reports related was of great importance. If reporting States hesitated to submit reports or did not submit reports at all because they believed that they would be discussed by a less than competent group of individuals, the monitoring function of the Council would be undermined."

Mr Walkate (Netherlands), E/1981/SR.15, para.92 (1981).

<sup>113</sup> *See e.g.* Dormenval, *supra*, note 10, at 32.

<sup>114</sup> *See above*, text accompanying note 77. One commentator has pointed out that with the exception of Norway and USSR, States were represented by members of the permanent missions whose "technical preparation was poor", with the result that the questions asked were generally superficial. Fischer, *supra*, note 22, at 175.



out and evaluate some of the finer issues in the reports and has made a certain amount of progress in further defining the substance of the guarantee.<sup>115</sup> Individual members have occasionally fallen short in their legal analysis,<sup>116</sup> but there is demonstrably a core of expertise within the Committee that maintains a high standard of work.

Nevertheless, it is apparent that the Committee does not possess expertise in all the subject areas encompassed within the Covenant. It was noted by one Committee member that "the Covenant's scope was so broad that the Committee could not hope to find among its members experts in housing, discrimination, nutrition and all the other subjects involved in economic, social and cultural rights".<sup>117</sup> Although it clearly would not be possible for the Committee to have members with expertise in every conceivable area, the fact that the vast majority of current members have a predominantly legal background may be criticised.<sup>118</sup> As a legal entity, the Covenant certainly requires a supervisory body with legal expertise, but it is doubted, given the need for wider knowledge particularly as regards the rights to food, housing, clothing and health, that the current emphasis on legal expertise is appropriate. Indeed, in so far as the strictly "legal" functions of the Committee are limited, there is scope for the inclusion of more non-lawyers within its ranks without prejudicing its ability to function effectively.

It might be concluded that, given the nature of the Covenant, the requirement that the experts be limited to those of recognised competence in human rights is not necessarily suitable.<sup>119</sup> The recent appointment of Mrs Bonoan-Dandan, however, whose expertise lies in the area of art and culture, would seem to suggest that the term "competence in human rights" will be interpreted broadly to cover the needs of the Committee as a supervisory body. To further extend this process, it is submitted that the

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<sup>115</sup> The discussion undertaken on article 11 illustrates both of these points. *See*, E/C.12/1990/SR.22-23.

<sup>116</sup> For example, a curious argument was used by one member who argued that France was in violation of its obligations under the Covenant with respect to article 9 notwithstanding an explicit reservation on the question. Alvarez Vita, E/C.12/1989/SR.12, at 12, para.61.

<sup>117</sup> Alston, E/C.12/1990/SR.22, at 3, para.12.

<sup>118</sup> At least fourteen of the eighteen members have a specifically legal background. Only one member has clear expertise in other fields. *See generally*, UN Docs.E/1990/46 and E/1988/46.

<sup>119</sup> *See generally* the suggestion of Westerveen, *supra*, note 68, at 128.



Committee should undertake to advise ECOSOC of the nature of the experts it wishes to be appointed at the next election in 1992.

Nevertheless, as pointed out, the Committee could not hope to have a membership of experts covering all the subjects involved in the Covenant. It is, and always will be, dependent upon the use of external advice and technical expertise in its consideration of reports. Ideally this would be the type of support provided to the Committee by the Secretariat.<sup>120</sup> In absence of such a role being played by the Secretariat, the Committee will have to look towards greater participation by the specialised agencies,<sup>121</sup> and through the use of consultants on an *ad hoc* basis during the consideration of the reports. Such consultants, if used, would deal with issues of a specific nature that may arise in the occasional report.

#### 5) The Independence of the Committee

ECOSOC resolution 1985/17 stipulates in paragraph (b) that the members should serve "in their personal capacity".<sup>122</sup> Moreover, rule 13 of the Rules of Procedure provide that members of the Committee make a solemn declaration to undertake their duties "impartially and conscientiously".<sup>123</sup> It is clear from the experience of the Working Group that such independence is crucial to the effective functioning of the Committee. It might be argued that since the reporting system is primarily intended not for making judicial determinations of compliance, but rather for assisting States in the implementation of the rights within the Covenant, that an insistence on the independence and impartiality of the Committee members is largely misplaced.<sup>124</sup> However, even if the form of judicial impartiality that is essential to those bodies that operate a petition

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<sup>120</sup> See below, text accompanying notes 456-468.

<sup>121</sup> See below, text accompanying notes 338-363.

<sup>122</sup> ECOSOC Resolution 1985/17, *supra*, note 89, para.(c).

<sup>123</sup> Rules of Procedure as approved by ECOSOC, in UN Doc.E/C.12/1990/4.

<sup>124</sup> Capotorti, speaking solely from a textual analysis of the ICESCR, noted that although in theory an independent committee of experts was most suitable for human rights treaty supervision, "as the States reports on economic, social and cultural questions must also help to promote international cooperation, especially in the field of technical assistance, the Economic and Social Council is still the best qualified organ for this kind of 'implementation' of the Covenant." Capotorti, *supra*, note 15, at 136.



system<sup>125</sup> is not strictly necessary, it is nevertheless debilitating for the Committee to be subjected to the political pressures that attend those organs composed of State representatives.

As the terminology used in the ECOSOC resolution is the same as that in article 28(3) ICCPR, it is to be assumed that the Committee should operate in the same independent manner as the Human Rights Committee, whatever the differences in role. However, the fact that members should act in their personal capacities does not mean in itself that they are entirely free from State control. As noted above, State parties retain significant influence over the election of the members of the Committee both by the fact that they nominate the candidates and by the necessary political "trade-offs" that accompany the distribution of seats. Indeed the decision by the Eastern Bloc countries to withdraw their nominee for the Committee at its first session illustrates the political bargaining that enters into the election process.<sup>126</sup> In addition, an attempt was made, albeit unsuccessful, to enforce an "understanding" made during the election process that the rapporteur for the second session should be an expert from an Eastern European Country.<sup>127</sup>

Moreover it is clear that many members of the Committee have been, and continue to be, government officials and civil servants.<sup>128</sup> Robertson comments in relation to the Human Rights Committee, that such a situation:

"contradicts the intent of the Covenant: it not only makes it difficult for the members to devote the necessary time and attention, but also makes it less likely that they can perform their functions 'impartially'. The task of the Committee is difficult and delicate and is not aided by subjecting any of its members to political pressures that are inevitable if

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<sup>125</sup> For example, members of the ILO Committee of Experts on the Application of Conventions and Recommendations are required to work "in a spirit of complete independence and entire objectivity". Valticos, *supra*, note 102, at 369.

<sup>126</sup> *See*, the comment of Sviridov, E/C.12/1987/SR.2, at 3, para.15.

<sup>127</sup> *See*, Sviridov, E/C.12/1987/SR.25, at 2, para.6.

<sup>128</sup> *See e.g.*, Mr Rattray is the Secretary-General of Jamaica; Mr Alvarez Vita is a Minister in the Diplomatic Staff of Peru; Mr Fofana is the Advocat Général of Guinea; Mrs Ider is the head of the department of Legal Affairs of Mongolia; Mr Konate is a Councillor to the Permanent Mission of Senegal to the UN in Geneva; Mr Marchan Romero is an Ambassador for Ecuador; Mr Mratchkov is the Attorney-General of Bulgaria. Other members hold various government or civil service posts. *See above*, note 118.



Committee members are, or are seen as, representing governments."<sup>129</sup>

Robertson goes on to argue that this should be established as a matter of principle<sup>130</sup> and that the Committee members should be permanent salaried staff of the UN.<sup>131</sup> Although it is certainly necessary that members be free from government control, it is doubtful that such a proposition is realistic, especially given the financial constraints under which the UN is currently operating. Indeed it is arguable that Committee members in fact benefit from the knowledge that derives from links with their State.<sup>132</sup> A more modest proposal would be to prohibit Committee members from being in the direct employment of their State.<sup>133</sup> However, even this would present problems for certain developing states which would clearly have difficulties in providing persons with the necessary technical expertise who are not upon the State payroll.

In fact, members of the Committee have consistently stressed their independence before State representatives<sup>134</sup> and there is little evidence of members allowing political affiliations to compromise their role in examining State reports. There is an unofficial agreement, self-imposed on the whole, that an expert from the State whose report is being considered should not participate in the discussion. Interventions in such cases have occurred only when that expert considered that the Committee

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<sup>129</sup> Robertson, *supra*, note 22, at 338; Galey comments that the fact that members of CEDAW often hold official posts gave rise to "serious questions as to the extent they can or do serve in their personal capacity independent of governments", Galey M., "International Enforcement of Women's Rights", 6 *Hum.Rts.Q.*, 463, at 478 (1984). Such a consideration has also been noted in the Committee itself, *see*, Texier, E/C.12/1988/SR.23, at 7, para.60.

<sup>130</sup> Robertson, *supra*, note 22, at 350.

<sup>131</sup> *Ibid.* at 339.

<sup>132</sup> McGoldrick, *supra*, note 23, at 43.

<sup>133</sup> This would exclude in particular the participation of ambassadors and other civil servants. However, it would raise certain problems of interpretation, for example, where a university professor was employed in a public institution financed directly by the State.

<sup>134</sup> For example, following the Chilean representative's reference to the "Australian representative", it was pointed out that members of the Committee were experts acting in an individual capacity and should be referred to by name or by any other neutral expression. *See*, Alston, E/C.12/1988/SR.16, at 3, para.6.



would benefit from his or her specialist knowledge.<sup>135</sup> More often than not, any conflict within the Committee has related to regional rather than State affiliations, reflecting not so much the interference of States parties, but rather the personal views of the members concerned.

The one area of concern, however, has been the degree of absenteeism experienced by the Committee that may be directly related to the responsibilities of the members. At four of its past five sessions, one member of the Committee has been entirely absent, and at two of those sessions an additional two members attended only part of the session.<sup>136</sup> In addition to the casual absences from particular sessions this represents quite a significant problem. Although average attendance must be about twelve or thirteen members, on a number of occasions attendance falls well below this level. Indeed it was commented at the Committee's third session that much of the Committee's work would have been impossible if it had enforced the quorum rule of 12 members (Rule 32 of the Rules of Procedure).<sup>137</sup> How far such absences are due to official State business is unclear,<sup>138</sup> but it is notable that those members who are clearly independent have good records of attendance.<sup>139</sup> It is clearly of importance to the Committee that it maintains the quality of its work which may well be prejudiced by the continuing shortage of members.<sup>140</sup> This is especially the case

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<sup>135</sup> See *e.g.* the intervention of Rattray in the consideration of the Jamaican report, E/C.12/1990/SR.21, at 5, para.21.

<sup>136</sup> The attendance over the first six sessions is as follows:  
 1987 (First Session): All members attended;  
 1988 (Second Session): Mr Sviridov was absent; Mr Daoudi, Mr Rattray attended only part of the session.  
 1989 (Third Session): Mr Kouznetsov, Mr Marchan Romero, Mr Rattray and Mr Mrachkov attended only part of the session.  
 1990 (Fourth Session): Mr Mrachkov was absent.  
 1990 (Fifth Session): Mr Badawi El Sheikh was absent; Mr Alvarez Vita and Mr Rattray attended only part of the session.  
 1991 (Sixth Session): Mr Texier was absent; Mr Rattray attended only part of the session.

<sup>137</sup> See, Alston, E/C.12/1989/SR.23, at 6, para.41.

<sup>138</sup> The absences of Mrachkov was cited however as being due to State business.

<sup>139</sup> One may cite in particular Mr Alston and Mr Simma.

<sup>140</sup> Dormenval considers that "[o]ne's agreement to serve as an expert entails the moral duty not to undermine the authority of the Committee one serves on." Dormenval, *supra*, note 10, at 34.



if the Committee is forced to take decisions that are technically *ultra vires* for not fulfilling the quorum rule.

## B) THE STATUS OF THE COMMITTEE

On a theoretical level, the sovereign equality of States dictates that the supervision of any treaty obligations should be undertaken exclusively by those States that are party to the agreement. On the other hand the effective supervision of human rights demands that the body mandated with its implementation should be independent of the States parties. The Covenant, by placing ECOSOC as the primary organ responsible for the implementation of the Covenant, appears to reflect the latter position.<sup>141</sup> However, such a decision seems to have been taken on the assumption that the supervisory role should merely be one of providing technical assistance and that the Council would be the most appropriate body for assuming such a function.

The debate over the control of the States parties reemerged in determining the membership of the Working Group. It was argued on the one hand that members of the Group could be elected from any member of ECOSOC whether or not they were Party to the Covenant,<sup>142</sup> on the other hand it was contended that members had to be elected from those members of ECOSOC who were also States Parties.<sup>143</sup> As noted above, the position is no clearer in respect to the Committee itself.<sup>144</sup>

Although States parties are responsible for the nomination of members of the Committee, it is clear that the Committee as a whole is primarily a United Nations organ. The Committee was established as a subsidiary organ of ECOSOC and as such derives all its authority from, and is responsible to that body. The interests of the States parties are represented here only in so far as they are represented by ECOSOC. To this extent the Committee differs quite significantly from other human rights committees.

The obvious benefit of such a position is that the Committee maintains a significant degree of autonomy from the States parties. As such, it is not subject to the financial problems faced by other

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<sup>141</sup> Although a number of States in ECOSOC are parties to the Covenant, there are also a significant number which are not.

<sup>142</sup> Ramcharan, *supra*, note 63, at 157.

<sup>143</sup> Yugoslavia, E/SR.1999, at 5, 60 UN ESCOR, (Ag.Item 4), (1976); USSR, *ibid*, at 6.

<sup>144</sup> See above, text accompanying note 109.



Committees that are sponsored by the States parties.<sup>145</sup> Rather, the Committee is financed exclusively by the United Nations.<sup>146</sup> Additionally the Committee could be said to be more flexible in its operation in that changes merely need the authorisation of ECOSOC rather than the amendment of the text of the Covenant itself. The Committee, whilst operating within the broad parameters of the ECOSOC resolutions that created it, has undergone an unprecedented evolution particularly in its working methods. This can be attributed to a large extent to the absence of formal textual constraints experienced by other Committees.

On the other hand, the mandate of the Committee is essentially an indirect one. It operates "to assist the Council" in the consideration of State reports, rather than being directly responsible itself.<sup>147</sup> There is potential here, for a conflict of competence to arise, similar to that experienced by the Committee of Independent Experts to the European Social Charter *vis a vis* the Governmental Committee.<sup>148</sup> In practice, however, the work of the Committee has drawn little interest from ECOSOC, and only in a few cases has the Committee sought the approval of ECOSOC for the adoption of its working methods.<sup>149</sup>

The Committee is also somewhat more vulnerable than other committees to the extent that it is permanently subject to sea-

<sup>145</sup> For comment on the financial position of CERD *see*, Bernard-Maugiron N., "20 Years After: 38th Session of the Committee on the Elimination of Racial Discrimination", 8 *N.Q.H.R.*, 395 (1990). With respect to CAT *see*, Dormenval, *supra*, note 10, at 28. For arguments in favour of central funding for all human rights committees *see*, Note by the Secretary General, Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights, UN Doc.A/44/668, at 30-40, 44 UN GAOR, (Ag.Item 109), (1989).

<sup>146</sup> Although the Committee on Economic, Social and Cultural Rights developed late in the day, it was somewhat fortunate that the earlier proposals for a Committee submitted by the USA and Italy did not come to fruition. Both of those proposals envisaged the States Parties taking primary responsibility for financing the Committee which would be set up independently of ECOSOC. UN Doc.A/6546, at 10-13, 21 UN GAOR, Annexes, (Ag.Item 62), (1966).

<sup>147</sup> *See*, Alston, *supra*, note 30, at 488-489.

<sup>148</sup> The recent Amending Protocol has sought to address the overlap in roles between the two bodies, *see*, Harris D., "A Fresh Impetus for the European Social Charter", 41 *I.C.L.Q.*, 659, at 662-664 (1992).

<sup>149</sup> These include: the adoption of the Committee's Rules of Procedure E/1989/22, at 74, paras 333-4 (1989); the ability of NGO's to submit information to the Committee, E/1987/28, at 49, paras.312-3 (1987); and the creation of a "blacklist" of non-reporting States, E/1991/23, at 68, para.264 (1991).



changes within ECOSOC upon which the Committee is entirely dependent for its existence. The fragility of the whole implementation system was in fact apparent when it was made clear during the drafting of the Covenant that it was legally impossible for the treaty to impose any obligations on the UN with regard to implementation.<sup>150</sup> However this vulnerability does not seem to have manifest itself in any way as yet. During the recent financial crisis in the United Nations for example, the Committee was one of the few institutions that was left unaffected.

### C) WORKING METHODS OF THE COMMITTEE

#### 1) Rules of Procedure

Draft provisional rules of procedure, prepared by the Secretary-General taking into account the relevant resolutions and decisions of ECOSOC and the practice and procedure of other human rights treaty bodies, and amended by members of the Committee were accepted on a provisional basis at the Committee's third session.<sup>151</sup> An amendment was made to the rules at the Committee's fourth session and they were finally approved by ECOSOC in decision 1990/251 prior to the Committee's fifth session.<sup>152</sup>

Although the Committee is nominally a subsidiary of ECOSOC and therefore subject to the rules of procedure of that body, by adopting its own set of rules of procedure it has asserted some form of independence that is entirely appropriate with its role in the supervision of the Covenant. However, in looking to ECOSOC to endorse the procedures, the Committee effectively tied its own hands as regards effecting future changes to the rules, and has left itself at the mercy of ECOSOC. As Alston concludes, it would be highly desirable for the Committee to regain control over its Rules of Procedure as soon as practicable.<sup>153</sup>

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<sup>150</sup> UN Doc.A/2929, *supra*, note 33, at 119, para.16. This is the reason why the Covenant does not instruct ECOSOC but rather uses the term "may", as in articles 18 and 19.

<sup>151</sup> E/C.12/1989/SR.22, at 5, para.24.

<sup>152</sup> ECOSOC Decn.1990/251, (Oct.10 1990), UN ESCOR, Resns, Supp.(No.) (1990).

<sup>153</sup> Alston, *supra*, note 30, at 489.



## 2) Frequency and duration of sessions.

ECOSOC Resolution 1985/17 paragraph (d) provides that the Committee should meet annually for a period of up to three weeks.<sup>154</sup> That the phrase "up to" might be interpreted as precluding the possibility of longer sessions has been explicitly negated by rule 1 of the Rules of Procedure which includes the phrase "or as may be decided by the Economic and Social Council... taking into account the number of reports to be examined by the Committee".<sup>155</sup> It is specifically open for the Committee, when it has a sufficient backlog of reports, to request either an extra session or longer sessions.

There is no doubt that the Committee is in principle disadvantaged in comparison to the Human Rights Committee which meets for nine weeks per year (three, three-week sessions) and has an additional three weeks for working groups. Even including the one week meeting for its pre-sessional working group, the Committee on Economic, Social and Cultural Rights meets for only a third of that time.<sup>156</sup> However, the Human Rights Committee has additional tasks to undertake with the Optional Protocol and the amount of time spent on considering equivalent reports is almost the same.<sup>157</sup> Generally, the Committee spends about eight days considering 12 reports (or four global reports), which gives it an average of one global report every two days.<sup>158</sup>

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<sup>154</sup> The Sessional Working Group initially only had a two week session per annum. It was clear *ab initio* that this would be inadequate for the effective supervision of the reporting mechanism. See e.g. Mr Pastinen (Finland), UN Doc.E/1979/SR.14, para.61, ESCOR, (Ag.Item 4), (1979).

<sup>155</sup> *Supra*, note 123, at 1.

<sup>156</sup> However it is worth noting that CEDAW, under article 20 of the Discrimination against Women Convention, only has two weeks per annum.

<sup>157</sup> *Contra*, Note by the Secretary-General, *supra*, note , at 41, para.101. However the Secretary-General's report, in comparing the amount of time spent on the consideration of each report by different Committees did not take into consideration the fact that the Committee on Economic, Social and Cultural Rights used to consider three state reports in place of a single "global report".

<sup>158</sup> NUMBER OF REPORTS CONSIDERED/SESSION:  
 First session= 11 reports; 18/28 meetings. 0.6 reports/meeting.  
 Second session=15 reports; 18/24 meetings. 0.8 reports/meeting.  
 Third session= 14 reports; 15/25 meetings. 0.9 reports/meeting.  
 Fourth session= 9 reports; 19/26 meetings. 0.4 reports/meeting.  
 Fifth session= 13 reports; 18/23 meetings. 0.7 reports/meeting.  
 Sixth session= 14 reports; 19/26 meetings. 0.7 reports/meeting.  
 Appx Average = 12 reports; 18/25 meetings. 0.7 reports/meeting.  
 At a rate of 0.7 reports/meeting it will take 4.2 meetings to complete a global



In comparison to CERD or CEDAW this is an inordinate amount of time.<sup>159</sup>

Two competing concerns are apparent here: on the one hand the recent financial crisis within the UN has stressed the need for efficient and productive reporting systems; on the other hand it is necessary for the Committees concerned to maintain a high standard of evaluation that inevitably takes time. Thus, it has been noted that the unduly short examinations of reports undertaken by CERD for example, are "simply pointless".<sup>160</sup> The Committee has in fact taken a number of innovative procedural steps such as the imposition of time limits, in order to expedite the consideration of reports.<sup>161</sup> It is unlikely, given the breadth and sheer volume of information that is presented before the Committee, that it will be able to shorten the time required for each report in any significant manner. It has been correctly noted that the only way forward for the Committee in the long run, is for its sessions to be extended when a significant backlog of reports builds up.<sup>162</sup>

So far, requests by the Committee for extra or longer sessions have met with limited success. At its first session, after a debate when it was considered quite widely that it would need two three-week sessions per annum,<sup>163</sup> it was proposed that its sessions should be extended to four weeks given the financial problems facing the UN.<sup>164</sup> ECOSOC, however, did not respond favourably.

The Committee has managed to gain authorisation to hold a pre-sessional working group meeting prior to its plenary sessions, which has relieved some of the work load. In addition, following

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report.

Under the present time limits it should take 8.5 hours to consider a report: approximately 3 meetings (It is a saving of 30 minutes from the previous schedule, but in terms of meetings it would still be about the same).

<sup>159</sup> CERD for example, considered 26 reports in 14 working days.

<sup>160</sup> Higgins R., "The United Nations: Still a Force for Peace", 52 M.L.R., 1, at 19 (1989).

<sup>161</sup> *See below*, text accompanying note 282.

<sup>162</sup> *See*, Alston, E/C.12/1990/SR.7, at 7, para.31.

<sup>163</sup> *See e.g.* Rattray, E/C.12/1987/SR.23, at 5, para.21.

<sup>164</sup> Report of the Committee's First Session, UN Doc.E/1987/28, at 50, para.314, UN ESCOR, Supp.(No.17), (1987).



the Committee's request at its second session,<sup>165</sup> ECOSOC allowed the Committee to hold an extraordinary session in 1990. The fact that this was merely a temporary expedient that did little to resolve the fundamental problem is evidenced by the Committee's repeated request for another extraordinary session in 1993. In the Committee's draft decision, it spoke of the "long standing backlog" of reports many of which had been pending for over two years,<sup>166</sup> and that the "abnormal situation seriously undermines the effectiveness and threatens the credibility of the system for monitoring the implementation" of the Covenant.<sup>167</sup>

It is clear that if the Committee is granted an extra session, it will temporarily help with the backlog of reports. However, the fact that the States parties have, at present, a poor record on reporting suggests that in future when this situation improves, a three-week session *per annum* will be far from adequate even with the occasional extraordinary session.

### 3) Timing of the Sessions

Problems were encountered, particularly with the participation and attendance of members, State representatives, representatives of the Specialised Agencies<sup>168</sup> and Non-Governmental Organisations<sup>169</sup> by the co-incidence of the Committee's meeting with that of the Commission on Human Rights.<sup>170</sup> It was also noted that the fact that the Committee met at the same time as the Commission on Human Rights not only made participation difficult, but detracted from the publicity given to the Committee.<sup>171</sup> In addition the timing of the session coincided with that of the ILO Committee of Experts which hindered the attendance or the presentation of a report by the ILO.<sup>172</sup>

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<sup>165</sup> Report of the Committee's Second Session, UN Doc.E/1988/14, at 59, para.346 and 61 para.356, UN ESCOR, Supp.(No.4), (1988).

<sup>166</sup> Draft Decision I, Report of the Committee's Sixth Session, UN Doc.E/1992/23, at 1, UN ESCOR, Supp.(No.3), (1992).

<sup>167</sup> *Ibid.*

<sup>168</sup> *See*, Mr Raffray (UNESCO), E/C.12/1987/SR.3, at 6, para.30.

<sup>169</sup> This became apparent at the meeting with NGOs at the Committee's third session. Chairman, E/C.12/1989/SR.19, at 8, para.47.

<sup>170</sup> Report of the Committee's Third Session, UN Doc.E/1989/22, at 77, para.346, UN ESCOR, Supp.(No.4), (1989).

<sup>171</sup> *See*, Konate, E/C.12/1988/SR.22, at 7, para.53.

<sup>172</sup> *See*, Samson (ILO), E/C.12/1987/SR.3, at 4, para.18.



Much as the rescheduling of the Committee's session to early December should have enabled it to avoid the problems of attendance, the experience of the fifth and sixth sessions suggest that this is not the case. Comparatively, the attendance of the Specialised Agencies, NGOs and members of the Committee has been no better at the Committee's later sessions than at its earlier ones. To some degree this is because a number of NGOs attending the Commission would previously have attended the Committee, albeit briefly. On the other hand, there is no doubt that the Committee's work at the earlier sessions was largely overshadowed by that of the Commission. It is unlikely that the Committee will find the "perfect" time to hold its sessions. The Committee has rightly concentrated on the primary concern, that interested parties do not feel that they are prevented from attending the Committee by the timing of the session.

#### 4) Consensus Decision-Making

Rule 46 of the Committee's Rules of Procedure states that: "Decisions of the Committee shall be made by a majority of the members present. However, the Committee shall endeavour to work on the basis of the principle of consensus."<sup>173</sup>

In principle, with its present quorum standing at 12,<sup>174</sup> the Committee may make a decision with the concurring votes of seven members. It is clear from the phrase "of the members present" (as opposed to those voting), that abstentions are not sufficient to endorse a decision.<sup>175</sup> However, as with many other human rights committees the emphasis is on working through consensus. On the one hand, it might be argued that an attempt to work by consensus "is liable to water down the moral principles to a lowest common denominator" and restrict the power to make decisions at all.<sup>176</sup> However, the use of consensus is important in maintaining a cohesiveness and a sense of common purpose within the Committee that will be reflected in its work. Moreover, the use of voting in important decisions, not only deprives them of a

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<sup>173</sup> Rule 46, Rules of Procedure, *supra*, note 123, at 10.

<sup>174</sup> Rule 32, *ibid*, at 7.

<sup>175</sup> This contrasts with the position under CERD, *see*, Das K., "United Nations Institutions and Procedures Founded on Conventions on Human Rights and Fundamental Freedoms", in Vasak K. and Alston P.(eds), The International Dimensions of Human Rights, 303, at 309 (1982).

<sup>176</sup> Robertson, *supra*, note 22, at 340.



certain amount of authority, but might encourage political disagreements within the Committee.

In practice the Committee has not resorted to the vote as yet and has maintained a unified approach to all its problems.<sup>177</sup> It is of course important that the Committee retain the ability to take decisions by majority to ensure its power act in the face of a "veto" power (which is implicit in a consensus decision-making process), and to preserve the freedom of conscience and independence of action for each member.<sup>178</sup>

### 5) Publicity

Publicity is of prime importance to the Committee both in assisting it in its work and in the realisation of the rights in general. From the Committee's point of view, publicity of its work would attract the attention of relevant NGOs and Specialised Agencies and stimulate their participation. In addition, it has a promotional effect in generating more international concern for economic, social and cultural rights, thus raising the status of the Committee from that of a poor relation to the HRC.<sup>179</sup> Raising the status of the Committee might in particular induce ECOSOC to allow the Committee an extra session per annum and stimulate interest in an Optional Protocol.

From the point of view of the realisation of the rights generally, it is clear that one of the aims of the reporting process is to stimulate awareness and debate at a national level. Although it has recognised the importance of this aspect of publicity, the Committee is obviously unable to take much action itself to this end. It has merely requested that States should make their reports to the Committee available on the domestic level.<sup>180</sup>

In order to effectuate greater publicity of its work, the Committee has undertaken a number of initiatives. On its own part it holds its meetings in public,<sup>181</sup> and has held meetings with NGOs and the press. Additionally it has stressed that members of

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<sup>177</sup> Ramcharan notes with regard to the Sessional Working Group that it was the clear understanding of delegates that the Working Group should not vote and that decisions should be taken by consensus. Ramcharan, *supra*, note 63, at 169.

<sup>178</sup> See, Mower, *supra*, note 111, at 124.

<sup>179</sup> See e.g., Alston, E/C.12/1990/SR.3, at 10, para.63.

<sup>180</sup> See, Simma, E/C.12/1988/SR.22, at 8, para.56.

<sup>181</sup> Rule 28, Rules of Procedure, *supra*, note 123, at 5.



the Committee should attempt to give the Covenant greater publicity in their personal capacity, whether through attending conferences or publishing articles.<sup>182</sup>

The Committee has also pushed for greater efforts to be taken by the UN in this regard. In particular, the Committee has asked for both a bibliography of published materials on the Covenant<sup>183</sup> and a brochure on the work of the Committee to be published.<sup>184</sup> It has also recommended that the text of its annual report and summary records, available in English, French and Spanish,<sup>185</sup> be distributed as widely as possible by the UN Information Office. Thus far, the Secretariat has not done as much as it could. In response to the Committee's request for a "brochure", the Secretariat produced a brief "fact sheet" outlining the Committee's work in a very general manner. The Committee criticised this rather mediocre effort, commenting in its annual report that:

"in light of the continuing widespread lack of awareness of the Committee's functions, procedures and preoccupations and of the measures it had taken, there remained a pressing need for a detailed and informative analysis to be made widely available."<sup>186</sup>

It is considered that the production of such a report would require comparatively few resources and could be drafted with ease in light of the Committee's policy of describing its working methods within the annual report. Nevertheless, it would be appropriate for the Committee should make an effort to describe the exact type of report that it is looking for, which would obviously avoid unnecessary misunderstandings.

In absence of effective Secretariat backing, the efforts of the Committee to increase the awareness and status of the Covenant and its work will be fairly limited. It is worth noting, however, that publicity will develop when the Committee shows itself to be an effective and useful supervisory body. In particular, it is arguable that the most effective method of generating publicity would be the institution of an Optional Protocol allowing the Committee to receive and consider individual complaints.

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<sup>182</sup> E/1988/14, *supra*, note 165, at 65, para.372.

<sup>183</sup> *Ibid*, at 65, para.372.

<sup>184</sup> Report of the Committee's Fourth Session, UN Doc.E/1990/23, at 75, paras 301-2, UN ESCOR, Supp.(No.3), (1990).

<sup>185</sup> Rule 27, Rules of Procedure, *supra*, note 123, at 6.

<sup>186</sup> E/1992/23, *supra*, note 166, at 97, para.375.



#### D) THE ROLE OF THE COMMITTEE

Primarily, the Committee is merely required to "assist" ECOSOC in the "consideration" of reports under the reporting system. Whilst being posited as an alternative to a petition system overseen by an expert committee, the precise nature of that "consideration" seems to have been assumed by the drafters of the Covenant as being self-evident. No attempt has been made then or since to establish precisely the role of the supervisory body in considering reports under such a system.

It is arguable that the decision of ECOSOC to create a Committee composed of independent experts signifies its intention that the body should assume some form of quasi-judicial role in the supervisory process. If the role of the supervisory organ was principally to aid States in the implementation of their obligations under the Covenant, particularly by stimulating international co-operation and assistance, it would be most effectively performed by ECOSOC as an inter-governmental body.<sup>187</sup> However, the delegation of its authority to a committee of independent experts can only suggest that some independent form of evaluation is intended in the supervision of State reports.<sup>188</sup>

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<sup>187</sup> Capotorti, speaking solely from a textual analysis of the ICESCR, noted that although in theory an independent committee of experts was most suitable for human rights treaty supervision, "as the States reports on economic, social and cultural questions must also help to promote international cooperation, especially in the field of technical assistance, the Economic and Social Council is still the best qualified organ for this kind of "implementation" of the Covenant": Capotorti, *supra*, note 15, at 136. It has also been suggested that an independent Committee would only be necessary if complaints from individuals or States were contemplated, Mr Dombo (Ghana), UN Doc.A/C.3/SR.1401, at 141, para.15 (1966).

<sup>188</sup> That independence is a crucial factor in the adoption of quasi-judicial functions is confirmed by the rather generalised statement of MacBride:

"UN Committees or Sub-Committees are not the ideal bodies to be charged with implementation. They are subject to the prevailing political and ideological controversion: they do not have a judicial approach to the problems with which they are dealing. They regard themselves as the political spokesmen of their governments and often use Committees as a convenient arena in order to gain kudos for themselves or their governments... (They) are necessary and valuable for the purpose of discussing and preparing new Conventions and proposals but not for the purpose of serving as an implementation authority. They have not the necessary time or attributes for such a function."

MacBride S., "The Strengthening of International Machinery for the Protection of Human Rights", in Eide A. and Schou A.(eds), International Protection of Human Rights, 149, at 162 (1968).



However, the Committee has been rather cautious of taking up a "quasi-judicial" role. The Committee has emphasised that it sees itself as entering into a "constructive dialogue" in the reporting process whereby State representatives are asked to appear before the Committee to undertake a mutually-beneficial discussion regarding the degree to which the State concerned has fulfilled its obligations under the Covenant. Members of the Committee have stressed, almost unanimously in the past, that the Committee is not a "court"<sup>189</sup> and therefore should not sit in judgement over States or condemn them for non-compliance with their obligations.<sup>190</sup> Rather, it is thought that the Committee should play a facilitative role in assisting States in their realisation of the rights,<sup>191</sup> especially through filtering requests for international co-operation<sup>192</sup> and technical assistance<sup>193</sup> and providing States with advice. In particular, it has been felt that the Committee should play the role of a "catalyst" in encouraging States to make it possible for national organisations to participate in the implementation of the rights.<sup>194</sup>

In fact the Committee has done little to characterise itself as a body capable or willing to facilitate or provide technical assistance and advice. Rather it has developed its role in ways that point more towards the assumption of quasi-judicial functions. In particular, it has undertaken to receive information from NGOs, asserted its authority as the central supervisory body to interpret the Covenant, and has adopted the procedure of making "concluding comments" or "observations" of a State-specific nature on each report considered. In more recent cases this has involved making comments as to whether or not the State concerned was acting in conformity with its obligations under the Covenant.<sup>195</sup>

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<sup>189</sup> See *e.g.*, Mrachkov, E/C.12/1987/SR.4, at 7, para.26.

<sup>190</sup> See, Alston, E/C.12/1987/SR.4, at 3, para.8; Rattray, E/C.12/1987/SR.4, at 11, para.43; Badawi El Sheikh, E/C.12/1988/SR.2, at 7, para.35.

<sup>191</sup> See *e.g.*, Mrachkov, E/C.12/1987/SR.4, at 7, para.26.

<sup>192</sup> See *e.g.*, Taya, E/C.12/1988/SR.20, at 4, para.13.

<sup>193</sup> See, Alston, E/C.12/1988/SR.20, at 5, para.20.

<sup>194</sup> See, Alston, E/C.12/1987/SR.4, at 3, para.8.

<sup>195</sup> See *below*, text accompanying note 420.



## E) THE REPORTING PROGRAMME

### 1) The Obligation to Report

Article 16(1) of the Covenant reads:

"The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein."

The submission of reports by the States parties is clearly central to the integrity of the reporting system and that failure to report constitutes a violation of a State's obligations under the Covenant. However it has often been recognised that compliance with reporting obligations is generally poor.<sup>196</sup>

The current experience of the Committee on Economic, Social and Cultural Rights is that 16 States have not submitted a single report in ten years and 137 reports are overdue from 55 States parties.<sup>197</sup> It is recognised that this is one of the worst records of all the human rights committees.<sup>198</sup> Members of the Committee have identified a number of reasons for such a record. First, it is evident that the production of reports requires a certain amount of internal organisation<sup>199</sup> and expertise on the part of States which presents problems for developing countries.<sup>200</sup> Secondly, given the vast quantity and range of information required, in contrast to civil and political rights reporting, developing states may not dispose of sufficient personal and economic resources to provide the necessary data.<sup>201</sup> This is a particularly acute problem for those States that are party to a number of different human rights treaties

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<sup>196</sup> Schoenberg noted with respect to the history of the periodic reporting system that it was one of "limited and shallow participation". Schoenberg, *supra*, note 11, at 25.

<sup>197</sup> E/1992/23, Annex I, *supra*, note 166, at 103-112.

<sup>198</sup> Both CERD and CEDAW have also had particular problems in this regard. One difficulty in establishing the exact position of reporting under the Covenant has been the tendency of the Secretariat to "move the goal-posts". For example in the Committee's Annual Report of its Fifth Session there appear to be 211 overdue reports, *see*, E/1991/23, *supra*, note 98, Annex I, at 74-81, but in the report of its Sixth Session, this number had dropped to 137, *see*, E/1992/23, *supra*, note 166, Annex 1, at 103-112.

<sup>199</sup> *See*, Alvarez Vita, E/C.12/1990/SR.7, at 9, para.52.

<sup>200</sup> *See*, Konate, E/C.12/1987/SR.22/Add.1, at 3, para.5; *see also*, Nowak, *supra*, note 103, at 142.

<sup>201</sup> *See e.g.* Simma, E/C.12/1989/SR.18, at 8, para.45.



in that they may well be overburdened by reporting requirements.<sup>202</sup> Thirdly, the original set of guidelines were complicated, general and difficult to apply.<sup>203</sup>

It might also be argued that the low quality and inefficiency of the Committee's predecessors may well have alienated a number of States which have yet to be convinced of the value of the supervisory mechanism. Additionally, as was noted with respect to the HRC, some of the problems experienced may well be due to the relative newness of the procedures.<sup>204</sup> In that case the Committee is well advised to allow the system time to "settle" and concentrate on providing assistance to those States that experience problems in producing the necessary reports.

The Committee, in response to the poor record of reporting, has approached the matter from two different angles. On the one hand, the Committee has consistently recommended that States that experience problems in drafting reports, should seek the assistance of the Secretary-General and particularly the Centre for Human Rights.<sup>205</sup> In light of the poor response it has also suggested that the Under-Secretary-General for Human Rights should approach each State party that has not submitted such a report, and request that they indicate whether assistance is required.<sup>206</sup>

On the other hand, the Committee has also taken a more adversarial stance. It would be somewhat naïve of the Committee if it were to rely entirely on the good faith of the States parties. As one commentator noted, even Western States are often late in submitting their reports.<sup>207</sup> Indeed Belgium stands out as being a relatively wealthy Western State that has not submitted a single report since its ratification in 1983. Thus the Committee has requested that the Secretary-General send reminders to States from which reports are overdue,<sup>208</sup> and records the state of compliance with the reporting procedure in its annual report to ECOSOC. Since its fifth session, however, the Committee has drafted a decision each year, for adoption by ECOSOC, specifically naming

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<sup>202</sup> Report of Meeting of Chairpersons of Human Rights Treaty Bodies, UN Doc.A/39/484, (1984) and UN Doc.A/44/135, paras 46-100, (1989).

<sup>203</sup> See, Rattray, E/C.12/1987/SR.22/Add.1, at 4, para.9; see also, Sohn, *supra*, note 61, at 39.

<sup>204</sup> Robertson, *supra*, note 22, at 346.

<sup>205</sup> E/1990/23, *supra*, note 98, at 765, para.304.

<sup>206</sup> *Ibid*, at 68, para.265. Cf. Konate, E/C.12/1991/SR.24, at 11, para.82.

<sup>207</sup> See, Higgins, *supra*, note 160, at 18.

<sup>208</sup> E/C.12/1987/SR.23, at 4, para.14.



those States that have failed to submit a single report for over a decade.<sup>209</sup> The endorsement of the decision by ECOSOC is notable not only because it shows a concern that the failure to report "threatened to undermine the foundations of the supervisory arrangements",<sup>210</sup> but also because it specifically names the States concerned.<sup>211</sup>

Although both Iceland and Uruguay quickly submitted their reports before the first draft decision was adopted by ECOSOC, members of the Committee have not considered this mechanism to have been entirely successful.<sup>212</sup> Therefore, at its sixth session, the Committee resolved to take further steps to address the problem of non-reporting. Following the example of CERD,<sup>213</sup> the Committee decided that as from its seventh session it would schedule for consideration the reports of those States whose initial reports are 10 or more years overdue (and subsequently in case of all reports that are five or more years overdue) whether or not the report has been received.<sup>214</sup>

There are problems with this approach. First, without the assistance of a State report, it is clearly going to be extremely difficult for the Committee to consider the position of States as regards the implementation of the rights.<sup>215</sup> Currently the Committee does not receive sufficient alternative information from NGOs or specialised agencies to make such a consideration viable. Secondly, if States perceive that the Committee will continue to undertake its supervisory role without State reports, they might take this as a signal that it is unnecessary to submit reports at all. Thirdly, if the Committee's mandate is read strictly, it is only entitled to assist ECOSOC in the consideration of State reports. This does not give the Committee the right to consider the situation of States in absence of a report any more than it can consider the situation of a State not party to the Covenant. Finally, given the problems that States face in the drafting of reports, the Committee might be considered to be unnecessarily confrontational in its stance.

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<sup>209</sup> See, Draft Decision I, E/1991/23, *supra*, note 98, at 1, and Draft Decision II, E/1992/23, *supra*, note 166, at 1.

<sup>210</sup> *Ibid*, Draft Decision II.

<sup>211</sup> It has to be noted that there is nothing in the terms of the Covenant itself that specifically allows the Council to make State-specific recommendations of this kind. The fact that many States parties to the Covenant are also members of ECOSOC, however, gives considerable force to such an interpretation of its powers.

<sup>212</sup> See *e.g.*, Mratchkov, E/C.12/1991/SR.24, at 11, para.86.

<sup>213</sup> *Cf.* Houshmand, E/C.12/1991/SR.24, at 10, para.80.

<sup>214</sup> E/1992/23, *supra*, note 166, at 99, para.382(b).

<sup>215</sup> See, Simma, E/C.12/1991/SR.24, at 12, para.89.



It is considered that notwithstanding such difficulties, the Committee is correct in interpreting its powers in a teleological manner so as to ensure the integrity and effectiveness of the supervision system as a whole. It is quite apparent that there is a positive correlation between the effectiveness of the reporting system and the extent to which States parties take their reporting obligations seriously. Thus alternative measures such as considering three or four periodic reports together,<sup>216</sup> or altering the cycle of submission according to the actual date of submission are effectively counter-productive.<sup>217</sup> The Committee has to take a strong stance on State reporting which, as is clear, is central to the system as a whole. It should be careful, however, to make clear that notwithstanding its consideration of the situations, the States parties remain in violation of their reporting obligations.

## 2) Periodicity of Reports

Article 17(1) reads:

"The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialised agencies concerned."

During the drafting of the Covenant a proposal was made that the periodicity of reports should be set in the text itself.<sup>218</sup> It was fortuitous that the amendment, which provided for the submission of reports every two years, was not adopted, as it is unlikely that such a schedule would have been realistic either for the States concerned or the supervisory body. Such was the position of CERD which, despite the textual requirement of bi-annual reports, has adopted a four-yearly cycle. It is clear that the solution adopted for the Covenant was appreciated for its flexibility and the amount of discretion given to ECOSOC.<sup>219</sup>

Following the requirements of article 17(1) the Secretary General carried out consultations with the States parties and the Specialized Agencies and prepared a note on the implementation of the Covenant. After consultations with the Specialised Agencies and the States Parties, the Secretary General arrived at the proposal that the States Parties would report in the following stages: first year, articles 6-7; second year,

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<sup>216</sup> Bernard-Maugiron, *supra*, note 145, at 396.

<sup>217</sup> Higgins, *supra*, note 160, at 19.

<sup>218</sup> Proposed Amendment of Italy, UN Doc.A/C.3/L.1358, para.3.

<sup>219</sup> UN Doc.A/6546, at 14, para.44, 21 UN GAOR, C.3, Annexes, (Ag.Item 62), (1966).



article 11; third year, articles 13-15; fourth year, article 12; fifth year, articles 9-10; and sixth year, article 8.<sup>220</sup> No specific recommendations, however, were made as to article 1 or the provisions in part II (articles 2-5).<sup>221</sup>

The initial three-part reporting system was justified on the basis of the interest of the specialised agencies in the area. However, the agencies were never able to perform the role which was initially envisaged for them and there was a growing appreciation of the interrelationships between rights such that it was no longer suitable for the rights to be separated into discrete categories.

The change to a new five-yearly periodicity for the submission of reports had a number of objectives at its heart:

1) To reduce the burden imposed on States parties with respect to reporting.

2) To facilitate the task of both the reporting State and the Committee by working on the basis of a global unified report.<sup>222</sup>

3) To be more consistent with reporting obligations under other international human rights instruments.<sup>223</sup>

4) To make the nature and periodicity of the reporting process more readily understood by all concerned.<sup>224</sup>

5) To enhance the effectiveness of the overall monitoring system.<sup>225</sup>

It was also noted that a single report would be consistent with the indivisibility of the various rights contained in the Covenant (although the single report should nevertheless be organised into chapters reflecting different clusters of rights).<sup>226</sup> Accordingly, in its resolution 1988/4, ECOSOC approved the recommendation of the Committee that States parties be requested to submit a single report within two years of

<sup>220</sup> UN Doc.E/5764, at 5 para.24, 60 UN ESCOR, Annexes, (Ag.Item 4), (1976).

<sup>221</sup> *Ibid*, at 10, paras 25-6. No such provision for reporting for articles 2-5 was proposed as it was considered that such provisions apply to the exercise of all the rights in part III and therefore could be taken into account in those reports.

<sup>222</sup> *See e.g.*, Rattray, E/C.12/1988/SR.21, at 3, para.10.

<sup>223</sup> *See e.g.*, Simma, E/C.12/1988/SR.21, at 5, para.21.

<sup>224</sup> *See e.g.*, Konate, E/C.12/1988/SR.21, at 4, para.14.

<sup>225</sup> E/1990/23, *supra*, note 184, at 94, para.1.

<sup>226</sup> E/1988/14, *supra*, note 165, at 58, para.339; *See e.g.* Alston, E/C.12/1988/SR.21, at 3, para.7, where it was argued that the right to an adequate standard of living could be linked with the right to social security or with the right to work.



the entry into force of the Covenant and thereafter at five-yearly intervals.<sup>227</sup>

The possibility of the reporting period being seven years was discussed at the Committee's second session<sup>228</sup> particularly as it was felt that the situation would not change sufficiently over the five-year interval,<sup>229</sup> but it was considered that the latter was preferable to bring the Committee into line with other supervisory committees.<sup>230</sup> The five-yearly reporting cycle will certainly entail an increase in the work load of the Committee, which considering its existing situation may not be advisable.<sup>231</sup> However the benefits of having a system that involves more consistent monitoring on the part of the Committee should outweigh any such problems.

It was considered that a single report still conformed with article 17(1) of the Covenant despite the reference to "stages". Members considered that the term "stages" referred to the periodicity rather than the articles themselves, a matter that seems to have been accepted by States parties.<sup>232</sup> Indeed the Committee invited ECOSOC to seek legal advice on the issue. The fact that it has not done so attests to its general acceptability.<sup>233</sup>

### 3) The Content of Reports

As indicated above, it is clear from the travaux préparatoires that the term "programme" was to signify a programme for the timing, form and substance of the reports submitted to ECOSOC.<sup>234</sup> Indeed, in the Third Committee, this view prevailed over the idea that the States parties themselves should determine the content of the reports. The latter proposal was rejected, quite rightly, on the basis that wide divergencies in the form and contents of the reports would arise and that the reports would soon "degenerate into vehicles of propaganda".<sup>235</sup>

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<sup>227</sup> ECOSOC Resn.1988/4, (May 24 1988), *in*, E/C.12/1989/4, at 30 (1988).

<sup>228</sup> See the proposal of Taya, E/C.12/1988/SR.21, at 5, para.20.

<sup>229</sup> *See*, Taya, E/C.12/1988/SR.21, at 3, para.9.

<sup>230</sup> E/1988/14, *supra*, note 165, at 58, para.340.

<sup>231</sup> *See*, Taya, E/C.12/1988/SR.21, at 3, para.9.

<sup>232</sup> *See e.g.*, Konate, E/C.12/1988/SR.21, at 4, para.14.

<sup>233</sup> E/1988/14, *supra*, note 165, at 59, para.341.

<sup>234</sup> UN Doc.A/2929, *supra*, note 33, at 118, para.12.

<sup>235</sup> UN Doc.A/6546, *supra*, note , at 14, para.45. *In particular see*, Mr Richardson (Jamaica), UN Doc.A/C.3/SR.1401, at 143, para.46 (1966).



States are required to report, under article 16 on the "measures which they have adopted and the progress made in achieving the observance of the rights recognised".<sup>236</sup> As in article 2(1) there is an implicit question-mark over how, and to what extent, the reporting obligation extends to those rights that are not "recognised" in the Covenant. Although this question was raised by the Secretary-General in 1956,<sup>237</sup> no explanation was given in the drafting process that followed. The practice of the Committee, reinforced by the acquiescence of the States Parties, indicates that it is understood that reports are required on all the rights in the Covenant on the same basis.

It is also possible to argue here that in so far as those rights not "recognised" are capable of immediate implementation there will be less emphasis on the "progress made" (although as the ICCPR illustrates, this is not entirely out of place with the immediate realisation of rights). It would then suggest that the current interpretation of the provision requires that States report on the "measures they have adopted" with regard to all of the rights; in addition, they will have to show the "progress made" with regard to those rights expressly recognised in the Covenant.

However, there is no indication that the Committee has taken such a stance, indeed it has leaned towards interpreting its powers in accordance with the object or purpose of the implementation system as a whole, in which debate on the minutiae in the wording of Part IV is generally absent. Thus the reporting guidelines (and the debate in the Committee during their drafting) show no signs that the Committee wishes to confine the information contained in the reports to that indicating the "measures adopted" or the "progress made". Rather, the Committee has taken the view that all States Parties are obliged to submit all information necessary for the Committee to make an evaluation of the extent to which they comply with their obligations under the Covenant. Capotorti finds this to be an inevitable conclusion given the power to request submission of reports, which "includes the power to request supplementary information, and this is tantamount to determine the questions to which the States are asked to answer."<sup>238</sup>

It is clear nevertheless that with respect to the second periodic reports the Committee, like the HRC, will lay greater emphasis on the "progress made" in the realisation of the rights. As such, it will attempt

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<sup>236</sup> The ICCPR contains a substantially similar format in article 40 where States Parties "undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights".

<sup>237</sup> UN Doc.A/2929, *supra*, note 33, at 117 para.5.

<sup>238</sup> Capotorti, *supra*, note 15, at 135.



to avoid the repetition of questions asked in the first stage of reporting and concentrate on the changes that have occurred in the intervening period. Nevertheless, the Committee has at the present stage, had no experience of considering a second periodic report in which it considered the first report itself. The many questions of continuity relating to what issues to raise, and how to follow up on issues considered previously, will have to be dealt with when the Committee comes to consider such periodic reports.

Under article 17 States parties should indicate the "factors and difficulties" affecting the degree of fulfilment of the rights.<sup>239</sup> Alston has described the problem facing the Committee in persuading States to be open about the difficulties encountered in implementing the Covenant as the "principle dilemma".<sup>240</sup> In one case, a State objected to the requirement that States should indicate the difficulties experienced in the realisation of the rights. In particular it argued that the Covenant used the term "may" which indicated that reporting on the difficulties experienced was optional.<sup>241</sup> It was quickly responded that

"it would make a mockery of the Covenant and distort its very spirit to suppose that it only obliged States to report on the positive aspects of developments; that would also mean disregarding the preparatory work and the international follow-up of the Covenant".<sup>242</sup>

This conclusion appears to have been accepted by the State concerned. That it is important for States to report on the problems encountered is conditioned by the assumption that no State will consistently apply the Covenant without problems,<sup>243</sup> and that the Committee has a role to play in facilitating technical assistance.

In general the Committee has received reports that are brief,

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<sup>239</sup> Nowak, in noting that the Torture Convention does not explicitly ask for information on the progress made or the factors and difficulties experienced in implementation, comments that "...it is implicit in any efficient reporting procedure that States parties shall submit all information relevant to the implementation of its international obligations, including both positive and negative developments."

Nowak, *supra*, note 103, at 498.

<sup>240</sup> Alston P., "Implementing Economic, Social and Cultural Rights: The Functions of the Reporting Obligations", *Bull.H.R.*, 5 (1989).

<sup>241</sup> Walkate (Netherlands), E/C.12/1989/SR.15, at 9, para.56.

<sup>242</sup> Alston, E/C.12/1989/SR.15, at 15, para.87.

<sup>243</sup> Alston (Abyss), *supra*, note 30, at 360.



generalised and incomplete.<sup>244</sup> They have often impeded the process of considering pertinent issues by the fact that the representative has had to fill out the written report orally before the Committee. To some extent the unsatisfactory nature of the reports has been a result of the poor quality of the original reporting guidelines and the difficulties experienced by States parties in drafting the reports. More evidently, however, the reports show a lack of commitment or concern with economic, social and cultural rights generally.

The Committee, for its part, has been extremely active in trying to improve the general methodology and content of the reporting process. In its first General Comment, the Committee stressed that reporting was not merely a "procedural matter designed solely to satisfy each State Party's formal obligation to report to the appropriate international monitoring body".<sup>245</sup> It thereafter outlined a number of different objectives that the reporting process was intended to promote. It is perhaps correct to say that even if the Committee only manages to induce States to report in a full and timely manner, that in itself will be a considerable achievement. Whether or not the Committee should set its sights so low, it is clear that poor reporting is a matter that will not be overcome in a short space of time. Accordingly, the Committee has also taken a number of steps towards improving the quality of State reports.

In line with its right to control the content of State reports, the Committee has adopted a set of reporting guidelines to ensure that the principal issues are dealt with in a "methodical and informative manner".<sup>246</sup> These "general guidelines" were adopted at the Committee's fifth session to replace the existing guidelines drafted by the Secretary General following an ECOSOC resolution in 1976.<sup>247</sup>

The old guidelines were considered too general<sup>248</sup> and

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<sup>244</sup> See e.g. Concluding observation on the report of Luxembourg, Neneman, E/C.12/1990/SR.36, at 8, para.31.

<sup>245</sup> General Comment No.1, *supra*, note 27, at 87, para.1.

<sup>246</sup> E/1992/23, *supra*, note 166, at 7, para.22.

<sup>247</sup> ECOSOC Resn.1988(LX), (11 May, 1976), in UN Doc.E/C.12/1989/4, at 3 (1988). A compilation of these guidelines is to be found in E/1991/23, Annex IV, *supra*, note 98, at 88-110.

<sup>248</sup> E/1987/28, *supra*, note 164, at 49, para.308.



rendered out of date by the new reporting periodicity.<sup>249</sup> In addition to reflecting the developments in the substantive content of the rights, the Committee hoped to ease the reporting burden on States by simplifying the guidelines and providing a consolidated general section to be used in all human rights reporting systems.<sup>250</sup>

During the drafting of the guidelines, two points of view presented themselves: on the one hand it was felt that the guidelines should be shorter rather than longer, taking into account States' ability to provide detailed reports in the light of their being at present overburdened by reporting obligations<sup>251</sup> and the ability of the Committee to cope with the voluminous reports that might result.<sup>252</sup> On the other hand it was argued that detailed reporting guidelines would help, rather than impede States that have problems with the reporting requirements. Advocates of the latter position correctly pointed out that the reporting guidelines would enable States to have a clearer idea of what was required,<sup>253</sup> would avoid the inclusion of information that was not necessary and would help the domestic authorities responsible for the drafting of the State report, to distribute the various parts of the report to the relevant authority. In addition it might have been argued that although the concerns of developing States have to be considered when drafting such guidelines,<sup>254</sup> the fact that many Western States are also party to the Covenant should not be forgotten. To "pitch" the guidelines at a very general level would

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<sup>249</sup> E/1990/23, *supra*, note 184, at 73, para.288.

<sup>250</sup> The meeting of Chairpersons recommended that an agreement should be made as to a consolidated introductory section for all human rights reports covering matters such as the size and organization of the country and its legal and judicial system. Alston, E/C.12/1989/SR.1, at 10, para.47.

<sup>251</sup> *See e.g.*, Neneman, E/C.12/1990/SR.15, at 11, para.56. One member noted that if the guidelines were made too complicated, States whose statistical services were not sufficiently developed might be deterred from reporting at all. Neneman, E/C.12/1987/SR.23, at 3, para.11.

<sup>252</sup> *See e.g.*, Neneman, E/C.12/1989/SR.23, at 11, para.90; Mrachkov, E/C.12/1989/SR.3, at 5, para.14.

<sup>253</sup> *See e.g.*, Sparsis, E/C.12/1990/SR.47, at 6, para.20.

<sup>254</sup> Note could be made, however, that the guidelines of the African Commission under the African Charter on Human and Peoples' Rights are said to be "far more lengthy than those available for other international human rights instruments". Gaer, *supra*, note 26, at 31.



not encourage the presentation of sufficiently detailed reports by the more developed States.<sup>255</sup>

It was stressed, however, that if detailed guidelines were adopted, emphasis should be placed on the provision of technical assistance to those States that lack the requisite bureaucratic organisation.<sup>256</sup> In this respect it was noted that the "Country Profile" section in the guidelines could be prepared by the Secretariat if the State party so wished.<sup>257</sup>

In the end the guidelines as finally adopted at the Committee's fifth session, generally reflect the latter point of view. On the whole the guidelines represent a considerable improvement. They reflect a greater understanding, on the part of the Committee, of the central issues pertaining to each rights, and avoid the necessity of duplicating reports submitted to other human rights bodies and specialised agencies. Not only will they save a great deal of the Committee's precious time by avoiding the necessity of asking for basic factual information, they will enable it to pinpoint the crucial issues more effectively.

Although lengthy, it is clear from statements made during the adoption of the guidelines, they are not definitive. Thus at the Committee's sixth session, following a study undertaken by a Committee member on the rights of the elderly, a list of additional questions was drafted for insertion into the reporting guidelines.<sup>258</sup> Although the questions were not adopted at that session, the Committee was clearly willing to revise the reporting guidelines at appropriate times. It will be essential for the Committee to use this ability to make appropriate changes to the content of the guidelines as it develops a greater understanding of the normative content of the rights.

## F) CONSIDERATION OF STATE REPORTS

The technique adopted by the Committee in the consideration of State reports is one of conducting a "constructive and mutually rewarding dialogue"<sup>259</sup> with State representatives.

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<sup>255</sup> Higgins comments that:

"While wordiness is no guarantee of worth, a serious report must necessarily be of a certain length; as must a serious examination."

Higgins, *supra*, note 160, at 19.

<sup>256</sup> See e.g., Konate, E/C.12/1990/SR.47, at 8, para.29.

<sup>257</sup> See, Alston, E/C.12/1989/SR.23, at 12, para.93.

<sup>258</sup> E/1992/23, *supra*, note 166, at 132-134.

<sup>259</sup> E/1992/23, *supra*, note 166, at 10, para.33.



Representatives of the reporting States "are entitled, and indeed are strongly encouraged, to be present at the meetings of the Committee when their reports are examined".<sup>260</sup> The Committee describes the procedure undertaken in its report:

"31... The representative of the State party was invited to introduce the report by making brief introductory comments and responding to the list of issues drawn up by the pre-sessional working group. A period of time was then allocated to enable the representatives of the specialised agencies to provide the Committee with any observations relevant to the report under consideration. During the same period, members of the Committee were invited to put questions and observations to the representative of the State party. As a matter of practice, the members who had participated in the pre-sessional working group were expected to limit their additional questions and the Committee accorded priority to those members who were not present at the pre-sessional working group. A further period of time, usually not on the same day, was then allocated to enable the representative to respond, as precisely as possible, to the questions asked. It was generally understood that questions that could not adequately be dealt with in this manner could be the subject of additional information provided to the Committee in writing.

"32. The final phase of the Committee's examination of the report consisted of a period during which members were invited to offer any concluding observations they wished to make on the basis of all the information available to them. Rather than taking place on the same day as the final set of replies by the representative of the State party, it was agreed that this final phase would be held at least one day later in order to provide adequate time for members to reflect on the information provided and to reach a balanced evaluation. To facilitate the process it was agreed that

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<sup>260</sup> *Ibid*, at 9, para.31. Rule 62 of the Rules of Procedure provide:

"Representatives of the reporting States are entitled to be present at the meetings of the committee when their reports are examined. Such representatives should be able to make statements on the reports submitted by their States and reply to questions which may be put to them by the members of the Committee."

*Supra*, note 118, at 14.



the Chairman would request a particular member, ideally not from the same region as the reporting State, to take initial responsibility for drafting a text which would reflect the views of the Committee as a whole. The Committee would then discuss the draft with a view to adopting it by consensus. The final phase of the consideration of the report did not involve the representative of the State party although the latter was entitled to observe the work of the Committee in this regard. Once the concluding observations were adopted, they were forwarded to the State party concerned and included in the Committee's report. If it so wished, the State party might address any of the Committee's concluding observations in the context of any additional information that it provided to the Committee."<sup>261</sup>

#### 1) Theoretical Underpinnings of the Constructive Dialogue

The constructive dialogue is primarily intended to allow the Committee to enter into a mutually beneficial dialogue regarding the degree to which the State concerned has fulfilled its obligations under the Covenant, without the necessity of formal declarations of compliance or non-compliance.<sup>262</sup> There are a number of benefits of such an approach. First, in so far as representatives provide answers to the issues of concern it allows the Committee to make a more precise analysis of the problems and intricacies of the situation.<sup>263</sup> Secondly, it gives the Committee an opportunity to offer informal suggestions and recommendations based on their wide experience in the field.<sup>264</sup> Thirdly, it avoids the type of confrontation that may occur with governments following formal declarations of non-compliance.<sup>265</sup>

#### 2) Effectiveness of the Approach

As Nowak commented, "the efficiency of the procedure depends however primarily on the willingness of States representatives to get down to the problems and engage in a

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<sup>261</sup> E/1992/23, *supra*, note 166, at 9, paras.31-2.

<sup>262</sup> *See e.g.*, Robertson, *supra*, note 22, at 344.

<sup>263</sup> Das, *supra*, note 175, at 258.

<sup>264</sup> *Ibid.*

<sup>265</sup> Fischer, *supra*, note 22, at 168.



constructive dialogue with the Committee".<sup>266</sup> Despite the problem of postponements,<sup>267</sup> the constructive dialogue approach has been a relatively successful experience for the Committee. It has not suffered for example the problems of the HRC with the refusal of certain States to participate in the process.<sup>268</sup> Indeed, in general the participation of States has been good and a number of the discussions detailed and informative.

However the unwillingness of certain States to participate in good faith has presented the Committee with a number of problems. Despite the fact that the approach is supposedly one of mutual benefit, the Committee is often faced by representatives that are either inept, consummately evasive or disarmingly open.

The Committee has consistently emphasised the desirability of States parties' reports to be presented by experts in the fields concerned.<sup>269</sup> Unfortunately, a certain number of States continue to dispatch representatives who do not possess sufficient experience or knowledge to be able to answer the questions of the Committee in a proficient manner.<sup>270</sup> The Committee has adopted the policy of naming the representatives of the States concerned in Annex V of its annual reports presumably with a view to indicating which States take the reporting process seriously. In addition, it was suggested at the Committee's sixth session, that the Committee should make clear that delegations composed solely of a single Ambassador would in most cases be inadequate.<sup>271</sup>

Although this remains a problem, to a large extent States have provided more than one person in their delegations and have displayed a considerable amount of expertise.<sup>272</sup> It is considered that the Committee should look towards the presence of larger delegations with broad expertise. Inevitably, questions generally cover a large range of subjects that are not necessarily the

<sup>266</sup> Nowak, *supra*, note 103, at 201.

<sup>267</sup> See *below*, text accompanying notes 324-332.

<sup>268</sup> See, "Human Rights Committee: Commentary", 20 *I.C.J.Rev.*, 25 (1978). This has not, however, been an enduring problem for the HRC, see, McGoldrick, *supra*, note 23, at 82.

<sup>269</sup> See *e.g.*, Mratchkov, E/C.12/1991/SR.10, at 9, para.46; Cf.E/1988/14, *supra*, note 165, at 62, para.362.

<sup>270</sup> See *e.g.* concluding observation on the report of Mexico, Alston, E/C.12/1990/SR.11, at 7, para.40.

<sup>271</sup> See, Alston, E/C.12/1991/SR.10, at 9, para.48.

<sup>272</sup> See *e.g.* the list of State delegates which participated in the Committee's sixth session. E/1992/23, Annex V, at 139-141.



responsibility of any single person in the government administration. Thus unlike bodies dealing with civil and political rights, the presence of the Minister of Justice, for example, would not be adequate.<sup>273</sup> A good indication of the ability of the representatives to answer questions is the number of advisors present, and the range of expertise that they bear.<sup>274</sup>

It is apparent that the Committee, as indeed with many other human rights committees, is often faced by the evasive diplomat who circuitously avoids the questions.<sup>275</sup> It is clear that a certain amount of persistence is warranted in such situations and indeed is sometimes enough to elicit adequate responses.<sup>276</sup> In addition it is open for the Committee to respond that its questions have not been answered in an adequate manner and request additional information be supplied at a later date.

The fact that the Committee has only a single three-week session per annum also places a certain pressure on the constructive dialogue in terms of time.<sup>277</sup> The tendency of State representatives to present their reports at great length<sup>278</sup> and of members of the Committee to duplicate their questions<sup>279</sup> has stimulated the Committee to place time limits on the various sections of the Constructive dialogue.<sup>280</sup> In part this was the response to paragraph 7 of ECOSOC resolution 1987/5<sup>281</sup> in

<sup>273</sup> Cf. Gaer, *supra*, note 26, at 38.

<sup>274</sup> A good example is that of Spain, which was represented for its report on articles 13 to 15 by a delegation of four, including the Deputy Director-General for Legal Affairs for the Ministry of Education and Science, Technical Advisors to the Ministry of Culture and the Ministry of Education and Science, and a Counsellor to the Permanent Mission of Spain at the UN Office in Geneva. See, E/1992/23, Annex V, *supra*, note 166, at 140.

<sup>275</sup> See e.g., Representative of Colombia, E/C.12/1990/SR.13-14.

<sup>276</sup> See, Dormenval, *supra*, note 10, at 33.

<sup>277</sup> It has been noted that lack of time has also seriously affected the operation of CEDAW, see, Burnes A., "CEDAW's Tenth Session", 3 *N.Q.H.R.*, 340 (1991).

<sup>278</sup> Cf., Higgins, *supra*, note 160, at 19.

<sup>279</sup> Cf., Dormenval, *supra*, note 10, at 32.

<sup>280</sup> The suggestion was first made at the Committee's first session that, in order to expedite the Committee's procedure, it might adopt the practice of the specialised agencies and set time-limits on statements. Sparsis, E/C.12/1987/SR.23, at 5, para.23.

<sup>281</sup> ECOSOC Resn.1987/5, (May 26 1987), in, UN Doc.E/C.12/1989/4, at 27 (1988).



which the Committee was requested, *inter alia* to explore ways of expediting consideration of reports. It was thus decided at the Committee's fourth session that, in line with the practice of the HRC, up to three meetings would be used to consider a report. Accordingly it allocated the following "indicative" times for each "global" report:

- 1) Up to 30 minutes of general introductory comments by the representative of the State party;
- 2) Up to two hours for the representative to respond to the list of written questions.
- 3) Up to three hours for observations from representatives of the Specialised Agencies and questions from members of the Committee.
- 4) Up to two hours for further replies by the State Party.
- 5) Finally, up to one hour, on a subsequent day, for concluding observations by members of the Committee.<sup>282</sup>

It is clear from the Committee's practice that these time limits are primarily "indicative", relating more to the need to fulfil its schedule than to engender more accurate and concise responses from the State representative. At its fifth and sixth sessions for example, there is little evidence that these limits were strictly imposed.

Although there is certainly a need for the Committee to maintain a degree of flexibility in the process to allow for real dialogue to take place,<sup>283</sup> State representatives still spend an excessive amount of time discussing irrelevant issues. It is submitted that a greater emphasis should be placed upon the use of time limits to enforce more concise responses. In that respect the Committee might consider take up the proposal made in its second session of imposing time limits on individual answers.<sup>284</sup>

Certain members of the Committee have also looked towards eliminating duplicitous questioning to expedite the consideration of reports. Although an immoderate amount of duplication in the questioning would not be propitious, not only do State representatives show consummate ability in assimilating various questions on a single issue in giving their response, but the repetition of certain questions gives an indication of the relative

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<sup>282</sup> Cf. E/1992/23, *supra*, note 166, at 10, para.24.

<sup>283</sup> See e.g., Simma, E/C.12/1991/SR.10, at 11, para.54.

<sup>284</sup> See, Sparsis, E/C.12/1988/SR.2, at 2, para.5.



importance of the matter raised.<sup>285</sup> The practice seems to be that members repeat questions that they consider to be of considerable importance. It would be unfortunate if this mechanism for assessing the degree of consensus within the Committee over a particular issue was lost.

Several other possibilities for expediting the questioning process have been discussed, such as limiting the Committee to a single set of questions,<sup>286</sup> and limiting the oral questions to those members not members of the pre-sessional working group.<sup>287</sup> It is considered that in accordance with the idea of setting up a dialogue, the Committee should maintain its ability to ask further questions on issues that have not been adequately responded to. Despite the limits of time and the necessity of allowing all the members of the Committee to ask questions at some stage, it should not be necessary that the members of the Committee generally, or of the pre-sessional working group in particular, be restricted from asking further questions when required.

One of the major problems with the questioning process is that the questions tend to be general and unfocussed.<sup>288</sup> Little attention is paid to the actual text of the Covenant and quite often questions are asked as to matters that appear to have only indirect relevance to the rights concerned. It has been noted that this is partially due to the fact that the Committee is still adjusting to the "global" report system.<sup>289</sup> Accordingly, it has been suggested that the Committee should deal with each right in turn followed by the

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<sup>285</sup> The Committee commented in the report of its second session: "It was noted, however, that some duplication was both inevitable and desirable and that it would not be appropriate to seek to limit the type of issues which Committee members might wish to raise."

E/1988/14, *supra*, note 165, at 59, para.345.

<sup>286</sup> *See*, Jimenez Butragueno, E/C.12/1989/SR.8, at 11, para.63.

<sup>287</sup> *See*, Simma, E/C.12/1989/SR.8, at 11, para.62.

<sup>288</sup> As Alston noted:

"Regarding the process of questioning... the only way to elicit detailed and focused responses from the Governments concerned was to begin by asking very specific questions. A general question inevitably gave rise to a standard response whereas a specific one, requesting facts and figures which were generally available to the Government, led to targetted and meaningful dialogue. Similarly, a precise question based on information in the Committee's possession would yeild an explicit confirmation or denial, as the case may be. In any case the question and the Government's recorded answer would constitute a tangible contribution to the international debate."

Alston, E/C.12/1991/SR.10, at 5, para.25.

<sup>289</sup> *See*, Alston, E/C.12/1991/SR.10, at 5, para.26.



government response.<sup>290</sup> It is considered that this might go some way towards focussing the attention of the Committee members upon specific issues, but the principal initiative will have to be taken by the individual Committee members themselves.

Committee members should attempt to relate each question to the specific rights in the Covenant and to demonstrate more clearly their understanding of the guarantee.

One method of ensuring more specific and informed questions would be to introduce a form of division of labour within the Committee, under which members of the Committee would be assigned responsibility for questions in certain areas.<sup>291</sup> This is a mechanism that has been instituted in other fora.<sup>292</sup> Although this might discourage members from asking questions on issues outside their area of responsibility,<sup>293</sup> it would encourage individual members to become specialists in their designated areas and thus engender a greater specificity in questioning. An additional benefit would be to enable the Committee to identify those areas in which it requires further specialist input in future years. It is submitted that the Committee should reconsider the benefits of such an approach with a view to instituting it at some point in the future.

### 3) The Pre-Sessional Working Group

In response to a request by the Committee,<sup>294</sup> ECOSOC in resolution 1988/4 authorised the creation of a pre-sessional working group<sup>295</sup> whose principal task (although it had no fixed mandate and could undertake a variety of tasks<sup>296</sup>) would be "to identify in advance the questions which might most usefully be discussed with the representatives of the reporting States."<sup>297</sup> By doing so, it was thought that it would improve the efficiency of the system and facilitate the task of States parties by providing advance

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<sup>290</sup> *Ibid.*

<sup>291</sup> *Cf.* Alston, E/C.12/1988/SR.2, at 3, para.8.

<sup>292</sup> For example within the Committee of Independent Experts to the European Social Charter.

<sup>293</sup> *See e.g.*, Rattray, E/C.12/1988/SR.22, at 4, para.24.

<sup>294</sup> E/1988/14, *supra*, note 165, at 60, para.348; recommendation: at 62, para.361.

<sup>295</sup> ECOSOC Resn.1988/4, *supra*, note 247, at 31, para.10.

<sup>296</sup> *See*, Alston, E/C.12/1989/SR.1, at 7, para.36.

<sup>297</sup> E/1992/23, *supra*, note 166, at 7, para.24.



notice of the issues that might arise in the examination of reports.<sup>298</sup> The establishment of the pre-sessional working group was a logical step in the work of the Committee<sup>299</sup> given the diverse range of issues covered, their complexity, and the need for precise and detailed information. It has also been noted that by removing the element of surprise, the chances of an altercation between the State concerned and the Committee has been reduced.<sup>300</sup>

Accordingly a pre-sessional working group composed of five members, appointed by the Chairman, with due regard for a balanced geographical distribution, met for five days prior to the Committee's third, fourth, fifth and sixth sessions. Following a request by the Committee at its fourth session, ECOSOC approved the holding of the working group's session at a time one to three months prior to the Committee's session,<sup>301</sup> despite the additional (if only marginal) cost. The change in schedule was aimed at allowing sufficient time for the list of questions to be translated into the appropriate language, the transmission of the list to the capital concerned and the preparation of adequate responses by the relevant State Party. It would also allow greater time for the translation and dissemination of the list of issues to Committee members.<sup>302</sup> Although the pre-sessional working group met some three months before the Committee's sixth session,<sup>303</sup> there was considerable agreement within the Committee that additional time had to be given to the States concerned.<sup>304</sup> It therefore requested that the arrangements be made for holding the meetings of the working group in May, June or July as from 1992.<sup>305</sup>

Each member of the working group is assigned a particular report, or reports, taking into consideration the preferred areas of expertise.<sup>306</sup> He or she is then required to make a particularly

<sup>298</sup> E/1988/14, *supra*, note 165, at 62, para.361.

<sup>299</sup> E/1992/23, *supra*, note 166, at 8, para.25.

<sup>300</sup> *See*, Rattray, E/C.12/1987/SR.4, at 11, para.4.

<sup>301</sup> ECOSOC Decn.1990/252, (May 25 1990).

<sup>302</sup> E/1989/22, *supra*, note 170, at 75, para. 338.

<sup>303</sup> It met from 16-20 September 1991, *see*, E/1992/23, *supra*, note 166, at 3, para.11.

<sup>304</sup> *See e.g.*, Rattray, E/C.12/1991/SR.10, at 9, para.44.

<sup>305</sup> E/1992/23, *supra*, note 166, at 5, para.17.

<sup>306</sup> *Ibid*, at 8, para.26.



detailed study of the report and draw up, with the assistance of a file of information provided by the Secretariat,<sup>307</sup> a draft list of the issues which appear to be important for consideration by the working group as a whole. The final lists of issues are then sent to the States concerned and made available to members of the Committee. They are intended to highlight the issues that the working group thought to be important and in no way preclude members of the Committee from raising other issues during the consideration of the report in plenary.<sup>308</sup>

A list of such questions is transmitted to the permanent delegations of the relevant States together with a copy of the Committee's most recent report and a note which reads:

"The list is not intended to be exhaustive and it should not be interpreted as limiting or in any other way prejudging the type and range of questions which members of the Committee might wish to ask. However, the working group believes that the constructive dialogue which the Committee wishes to have with the representatives of the State party can be facilitated by making the list available in advance of the Committee's session."<sup>309</sup>

Certain operating problems have been identified with regard to the pre-sessional working group. It was noted by one member of the Committee at its fourth session that, following the experience with the Mexican report, there was a need to streamline the questions prepared by the pre-sessional Working Group.<sup>310</sup> This was partially evident from the reaction of Luxembourg at the Committee's fourth session to the lengthy list of issues presented to it by the working group, when it asked for a postponement in the consideration of its report.<sup>311</sup> It was noted, however, that the length of the list of issues was partially a reflection of the poor quality of the report.<sup>312</sup>

Similarly, during the fifth session a certain amount of inconsistency was apparent in the work of the pre-sessional working group. The members of the group did not place emphasis

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<sup>307</sup> *Ibid.*

<sup>308</sup> *See*, Alston, E/C.12/1989/SR.1, at 7, para.36.

<sup>309</sup> E/1992/23, *supra*, note 166, at 8, para.28.

<sup>310</sup> *See*, Alston, E/C.12/1990/SR.7, at 5, para.21.

<sup>311</sup> *See*, Alston, E/C.12/1990/SR.12, at 1, para.2.

<sup>312</sup> *See*, Simma, E/C.12/1990/SR.12, at 1, para.4.



on the same problems and often the questions reflected the personal interests of the drafter.<sup>313</sup> It was noted however that this was somewhat inevitable, given that the questions were to an extent, a reflection of the adequacy of the report itself. As one member commented:

"each list of issues related to a particular case; it was to some extent the reverse reflection of the report with which it dealt and of which it sought to fill the gaps concerning the nature and the amount of information given."<sup>314</sup>

It should be assumed, however, that some of the unnecessary inconsistencies will be ironed out in future with the operation of the revised reporting guidelines and the aid of the Secretariat.

Nowak considers that the consequences of the use of the pre-sessional working group by the HRC has been "to protract rather than streamline the procedure, and the hope for more controlled exchange of views and information between States representatives and members of the Committee has not materialised yet." He goes on to assert that it is only the oral questions that really stimulate "a spontaneous and critical discussion".<sup>315</sup> However, it must be stressed that for the CESCR the work of the pre-sessional working group is an important element in extending what would otherwise be a brief and unsatisfactory dialogue. The fact that the process is more protracted is really of concern only in so far as it is a drain on the financial resources of the UN which, in the case of the pre-sessional working group, is marginal.

From the point of view of supervising State compliance with the obligations, a sustained dialogue will enable greater specificity and more accurate evaluation. In addition it would be inaccurate to maintain that the Committee does not, by use of the working group, exercise more control over the exchange of views. The pre-sessional working group in theory enables the Committee to direct the oral presentation primarily at those issues of concern to the Committee.

It has to be said that the Committee's consideration of reports has not improved dramatically since the operation of the pre-sessional working group. The questions asked in plenary sessions appear to be equally general, and it is still rare for the Committee to enter into a detailed debate about the issues that have

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<sup>313</sup> See, Sparsis, E/C.12/1990/SR.33, at 2, para.2.

<sup>314</sup> Simma, E/C.12/1990/SR.33, at 2, para.3.

<sup>315</sup> Nowak, *supra*, note 103, at 201.



arisen. The main function of the working group, as indicated above,<sup>316</sup> has been as a means of ensuring that the Committee is provided with all the information requested by the reporting guidelines.

It is considered that the full potential of the pre-sessional working group will only be realised once States have undertaken to report in a full and accurate manner, and when the Committee has access to sufficient alternative sources of information such that problem areas may be identified at an early stage in the constructive dialogue process. Until that time the working group will function in its present limited manner.

Outside the operation of the constructive dialogue, the Committee has also been able to use the pre-sessional working group to undertake a number of tasks that would otherwise consume the Committee's own precious working time.<sup>317</sup> In particular, the working group has been mandated with:

- i) the allocation of time limits for the consideration of State reports;<sup>318</sup>
- ii) the transitional arrangements for the extension of the periodicity of reporting to five years.<sup>319</sup>
- iii) making a preliminary study of the draft general guidelines.<sup>320</sup>
- iv) considering the issue of how to deal with supplementary reports containing additional information and formulating comments and recommendations on them.<sup>321</sup>
- v) examining draft general comments.<sup>322</sup>
- vi) considering the structure of the general discussion.<sup>323</sup>

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<sup>316</sup> *See above*, text accompanying note 314.

<sup>317</sup> For the work of the pre-sessional working group at the Committee's sixth session, *see*, Texier, E/C.12/1991/SR.1, at 7-8, paras.36-8.

<sup>318</sup> E/1989/22, *supra*, note 170, at 2, para.13. *See*, Alston, E/C.12/1989/SR.1, at 8, para.38

<sup>319</sup> E/1989/22, *ibid*, at 2, para.13; *See also*, Alston, E/C.12/1989/SR.1, at 8, para.39.

<sup>320</sup> *See*, Simma, E/C.12/1990/SR.1, at 6, para.37

<sup>321</sup> UN Doc.E/1990/23, *supra*, note 184, at 3, para.11. Prior to the fourth session the pre-sessional working group considered the additional reports received from the Netherlands, France and Zaire.

<sup>322</sup> E/1992/23, *supra*, note 166, at 9, para.30.

<sup>323</sup> *Ibid*.



#### 4) Non-Appearance Before the Committee

A recurring problem for the Committee has been the continual deferral by States Parties of the consideration of their reports after they have been scheduled in the Committee's work. Thus at the Committee's fifth session, six States<sup>324</sup> asked to postpone the consideration of their reports until the following Committee session. At the Committee's sixth session, two States made similar requests.<sup>325</sup> For a State to postpone at the last moment seriously disrupts the Committee's procedures. Not only is the Committee forced to re-schedule its consideration of other reports but it is also unable to request new States to appear before it at such short notice.

It was decided at the Committee's fifth session, following the procedure of the HRC,<sup>326</sup> that "on the third occasion that a State party's report is scheduled for consideration, it will, except in truly exceptional circumstances, proceed with the consideration of the report whether or not a representative of the State party concerned is able to be present."<sup>327</sup> It was also decided that this should be reflected in the Committee's rules of procedure.<sup>328</sup> The adoption of this working practice at the Committee's fifth session appeared to have immediate results. Iran eventually appeared before the Committee and two other States (Afghanistan and Panama) made official pledges to submit their reports in time for the Committee's next session, which in fact they did.

The Committee is prepared, however, to accept that States may have a valid reason for their non-appearance.<sup>329</sup> Panama, for example, in asking for a postponement of the consideration of its

<sup>324</sup> Afghanistan, E/C.12/1990/SR.27, at 3, para.16; the Islamic Republic of Iran, *ibid*; the Democratic People's Republic of Korea, *ibid*; Yemen, *ibid*; Syria, E/C.12/1990/SR.29, at 2, para.1; and Panama, E/C.12/1990/SR.35, at 12, para.48. Of these States, the Iranian report had been scheduled for consideration at the Committee's third session and that of Afghanistan at the Committee's first session. Tikhonov, E/C.12/1990/SR.27, at 4, para.18.

<sup>325</sup> Czech and Slovak Federal Republic, E/1992/23, *supra*, note 166, at 14, para.5; and Belarus, *ibid*.

<sup>326</sup> The HRC has actually gone as far as considering a state report without the representative being present (It first did this in 1983 at its 20th session with the report of Guinea). "Human Rights Committee: Commentary", 33 *I.C.J.Rev.*, 39 (1984). Nowak M., "UN Human Rights Committee: Survey of Decisions given up till 1984", 5 *H.R.L.J.*, 199, at 200 (1984).

<sup>327</sup> E/1991/23, *supra*, note 98, at 9, para.35.

<sup>328</sup> E/C.12/1990/SR.28, at 2.

<sup>329</sup> *See*, Sparsis, E/C.12/1990/SR.23, at 12, para.55.



report referred to the fact that it did not have the necessary technical expertise to answer the questions presented to it.<sup>330</sup> The Committee agreed to the postponement of consideration on the basis of the political upheavals experienced in that country since the report was drafted. In such cases however the Committee hoped that the State concerned would notify the Committee as far in advance as possible to avoid last minute withdrawals that may disrupt the work of the Committee.<sup>331</sup> Ideally, the Committee should be left enough time to call upon another State to present its report.<sup>332</sup>

It is considered that in the majority of cases, States could quite easily predict, at the time of the meeting of the pre-sessional working group, whether or not they will be able to present the report in the following months. The Committee should seek to gain an undertaking from the States at that time, to the effect that they consider themselves capable of presenting the report at the next session of the Committee. Only in cases where the State has experienced some upheaval in the intervening period should the Committee agree to postpone the consideration of the reports.

#### 5) Sources of Information

Perhaps the most crucial factor in the success of any reporting procedure is the extent to which the supervisory body has access to information other than that provided by the State concerned.<sup>333</sup> If reliance is placed merely upon the information provided by the State, it is the State that controls the terms of discussion by raising or avoiding issues at will. "Alternative" sources of information provide the Committee concerned with a necessary foil to evaluate the State reports and contribute towards a more balanced assessment of the actual situation in a given country. Additionally, in so far as such information may contain allegations regarding violations of the Covenant upon which the Committee may rely in making its evaluation of the report, the

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<sup>330</sup> See, Klein, E/C.12/1990/SR.35, at 12, para.48.

<sup>331</sup> E/1990/23, *supra*, note 166, at 76, para.306.

<sup>332</sup> See, Neneman, E/C.12/1990/SR.35, at 13, para.53.

<sup>333</sup> The Committee makes the following comment in its annual report: "The Committee has consistently noted that access to all relevant sources of information pertaining to economic, social and cultural rights was essential in order to enable it to discharge its monitoring functions effectively". E/1992/23, *supra*, note 166, at 100, para.384.



provision of alternative information can operate in a manner similar to that of a petition.<sup>334</sup>

In reality, however, States never have a complete monopoly over the information available to a Committee: Committee members will inevitably bring with them information they have gathered generally as experts in their fields. Nevertheless, in a number of Committees this is the extent to which reference may be made to alternative sources of information. As has been noted, there has been a reluctance, on the part of monitoring bodies, to institutionalise the receipt of information from other sources upon the false premise that it is necessarily less accurate.<sup>335</sup>

There are a number of benefits to be gained by allowing a supervisory committee open access to alternative sources of information. First, it removes from individual members the burden of seeking relevant information informally and allows for more consistent and greater amounts of information to be available. Secondly, it allows the Committee as a whole to assess the relevance and accuracy of the information provided. Thirdly, it provides Non-Governmental Organisations (NGO's) with a permanent and formal mechanism through which they might present their concerns which might encourage greater participation. Finally, it allows for the involvement of the Secretariat which might actively seek information on the Committee's behalf.

The text of the Covenant itself makes scant reference to the use of alternative sources of information. Although the specialised agencies may submit reports to ECOSOC "on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities",<sup>336</sup> nothing is said about the possibility of their participating in the consideration of the reports or of any other bodies submitting information to ECOSOC. The Committee, however, in stressing the importance of alternative information in enabling it to discharge its monitoring functions effectively, has taken the unprecedented step of officially inviting "all concerned bodies and individuals to submit relevant and appropriate documentation to it."<sup>337</sup> The basis for this step and the various forms of information received will be addressed below.

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<sup>334</sup> See, in relation to CERD, Buergenthal, *supra*, note 10, at 202.

<sup>335</sup> Alston, *supra*, note 30, at 496.

<sup>336</sup> Article 18 ICESCR.

<sup>337</sup> E/1992/23, *supra*, note 166, at 100, para.386.



### a) The Specialised Agencies

As noted above, the Covenant makes specific reference to the possibility of the Specialised Agencies reporting to ECOSOC in the supervisory process. Indeed, that all but two articles in Part IV of the Covenant refer in some manner to the Specialised Agencies, emphasises the important role envisaged for them during the drafting of the Covenant.<sup>338</sup>

Although there was considerable textual support for the participation of the Specialised Agencies in the consideration of State reports, following the entry into force of the Covenant, attempts were made to minimise their input. A number of States (particularly the USSR) opposed the consideration of the Agencies' reports and attempted to prevent the Agencies from commenting on State reports, or speaking within the Working Group.<sup>339</sup> The result was that the ILO at least, ceased to prepare special reports for the Working Group.

Although it is clearly unfortunate that the Agencies were actively discouraged from participating in the supervision of the reports, two important points were raised about the of the form of their participation. First, it is apparent that the Agencies may receive copies of the relevant parts of State reports,<sup>340</sup> and may submit reports "on the progress made",<sup>341</sup> but it is open to question whether they are entitled to comment specifically upon the reports of States parties. Ramcharan argues that whereas the travaux préparatoires were "inconclusive" on the point, at the end of the Council discussion "there was a clear agreement among all representatives that the specialised agencies could not comment on the reports of States Parties."<sup>342</sup>

It is considered that this is not the most obvious inference to be made from the text of the Covenant. It leaves the Specialised Agencies in the curious position of being able to utilise the information in the States reports to draw up their own reports under Article 18, but not being able to refer to the State reports *per se*. The Committee has not actively sought to clarify this issue.

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<sup>338</sup> See above, text accompanying notes 38-40, and 50-60.

<sup>339</sup> See generally, Samson, *supra*, note 38, at 635-637. For an overview of the ILO experience see, "Impact of ILO Policies on the UN", ILO Doc. GB.225/IO/3/3, 16-22 (1984).

<sup>340</sup> Article 16(2)(b).

<sup>341</sup> Article 18.

<sup>342</sup> Ramcharan, *supra*, note 63, at 159.



In practice the ILO has undertaken to submit reports "on the results of the operation of various ILO supervisory procedures in the fields covered by the Covenant".<sup>343</sup> The reports do not make specific reference to the State reports, nor do they attempt to make a separate evaluation of the implementation of the Covenant.<sup>344</sup> On the other hand, the most recent report of UNESCO, despite being less comprehensive and more general than the ILO reports, does make reference to the State reports indicating matters that have not been dealt with and discrepancies in data.<sup>345</sup> As no mention has been made of this development it is assumed that it is satisfactory to all concerned.

The second issue that was raised in the Working Group concerned the active participation of the Agencies in the oral discussion of the reports. Although the Covenant does not refer to the possibility of the Specialised Agencies assisting ECOSOC in the consideration of reports, the Council expressly authorised representatives of the agencies to "take part in the proceedings of the Working Group".<sup>346</sup> Samson argues that the attempt to prevent the representatives from speaking "would have been contrary not only to the terms of the Council Resolution establishing the Working Group and to the Rules of Procedure of the Council, which were expressly applicable, but to the relationship agreements between the UN and the specialised agencies".<sup>347</sup>

The Committee has specifically endorsed in its Rules of Procedure, the right of Specialised Agencies to participate in the debate on State reports within the Committee. Rule 68 in particular states:

"The specialised agencies concerned shall be invited to designate representatives to participate at the meetings of the Committee. Such representatives may make statements on matters falling within the scope of the activities of their respective organisations in the

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<sup>343</sup> UN Doc.E/1992/4, at 1 (1991). The reports of the ILO to the Committee are to be found in documents: E/1987/59 (1986); E/1988/6 (1987); E/1989/6 (1988); E/1990/9 (1989); E/1991/4 (1990); E/1992/4 (1991).

<sup>344</sup> *See*, Dao (ILO), E/C.12/1988/SR.2, at 5, para.21.

<sup>345</sup> *See e.g.*, Comments of UNESCO on the reports of Argentina, the Philippines and Ecuador, UN Doc.E/1990/8, (1989).

<sup>346</sup> ECOSOC Resn.1988 (LX), *supra*, note 247, at 5.

<sup>347</sup> Samson, *supra*, note 38, at 637.



course of the discussion by the Committee of the report of each State party to the Covenant."<sup>348</sup>

Amendments made at the fourth session of the Committee in light of its established practice, make it clear that this rule does not impede the representatives of the Specialised Agencies from making specific comments as appropriate.<sup>349</sup> Nor are the representatives limited to making those comments at the end of the discussion.<sup>350</sup> In fact, the representatives of the Specialised Agencies are generally requested to be the first to make comments upon the report following its oral presentation by the State representative concerned. They have not, however, taken it upon themselves to become involved in the debate at later stages.

It is clear that not all specialised agencies are directly involved in the matters covered by the Covenant. Only a limited number participated in the drafting of the Covenant, and an inter-agency consultation in 1976 elicited interest only from the ILO, WHO, UNESCO and the FAO.<sup>351</sup> Although the provisions of the Covenant certainly do not limit the participation to these specialised agencies, there is no correlative power for the Committee to demand co-operation. The Committee has recently noted the importance of economic, social and cultural rights in the work of the international financial institutions of the UN.<sup>352</sup> As such it has read the reference in article 22 to specialised agencies as including, in addition to the above four agencies, the World Bank (IBRD) and the IMF.<sup>353</sup>

A differentiation might be made between co-operation with the ILO for example and co-operation with the financial institutions such as the IMF. Whereas the former can contribute directly to the elucidation of standards within the Covenant, the latter is relevant only in so far as aid given by the institution may effect the economic, social and cultural rights of the population concerned.<sup>354</sup> Accordingly it might be concluded that the financial

<sup>348</sup> Rules of Procedure, *supra*, note 123, at 16.

<sup>349</sup> E/1990/23, *supra*, note 184, at 74, para.293.

<sup>350</sup> *Ibid.*

<sup>351</sup> Sohn, *supra* note 61, at 32-33.

<sup>352</sup> E/1990/23, Annex III, *supra*, note 184, at 86-89.

<sup>353</sup> *Ibid.*, at 86, para.2.

<sup>354</sup> See, Harris D., "Commentary by the Rapporteur on the Consideration of States Parties' Reports and International Co-operation", 9 *Hum.Rts Q.*, 147, at 153 (1987).



institutions have little part to play in the supervisory role of the Covenant.<sup>355</sup> However, given the possible utility of statistical indicators in the Committee's supervision of the implementation of the Covenant,<sup>356</sup> the financial institutions and other UN organs might have a significant role to play in providing the Committee with an idea of the current level at which certain rights are enjoyed and the progress made over time.<sup>357</sup> It is considered that the cooperation of such agencies as the IMF and the IBRD, although not foreseeable in the near future,<sup>358</sup> would contribute enormously to the general effectiveness of the Committee's supervision.<sup>359</sup>

As the Committee noted in its General Comment No.2, "the attendance by representatives of the appropriate United Nations bodies at its first four sessions has, with the notable exceptions of ILO, UNESCO and WHO, been very low. Similarly, pertinent materials and written information had been received from only a very limited number of agencies."<sup>360</sup> Even given the fact that the Committee's experience is better than that of its pre-decessor, it is submitted that this is something of an overstatement. The Specialised Agencies have great potential for assisting and developing the work of the Committee and have, as yet, done very little.

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<sup>355</sup> The term supervision here is intended to exclude the provision of technical assistance (article 22), to which the Committee's General Comment No.2 was directed.

<sup>356</sup> See, The General Discussion at the Committee's sixth session, E/1992/23, Chap.VII, *supra*, note 166, at 81-86, paras.332-351.

<sup>357</sup> For the potential role of the World Bank in the implementation of the right to food, see, Van Hoof G. and Tahzib B., "Supervision with Respect to the Right to Food and the Role of the World Bank", in de Waart P., Peters P., and Denters E.(eds), International Law and Development, 317 (1988). Alston comments:

"...the position with respect to the right to food or the right to education in a given country would be described in infinitely more detail and in a far more informative way in internal reports regularly prepared by the World Bank, the FAO, UNICEF, and other agencies than in the reports submitted to the Committee by the States themselves."

Alston, *supra*, note 30, at 500.

<sup>358</sup> Although such agencies are becoming more involved in the question of human rights generally, their reports are still confidential.

<sup>359</sup> Cf. Limburg Principle 96, 9 Hum.Rts Q., 122, at 134-5 (1987).

<sup>360</sup> General Comment No.2, UN Doc.E/1990/23, Annex III, at 86-7, para.4, UN ESCOR, Supp.(No.3), (1990).



At the Committee's first six sessions, only the ILO and UNESCO have attended every session. The WHO has attended four sessions and the FAO only two. Similarly, whereas the ILO has submitted written information every session, UNESCO has submitted only two reports and the FAO and WHO have as yet submitted no written information to the Committee. Even the ILO, which has by far the best record, has limited itself to providing the Committee with the relevant extracts of ILO supervisory procedures.

The possible reasons for the poor record of participation are diverse. One may surmise that it is a result, in part at least, of the hostility shown by the Working Group to the Specialised Agencies. Other reasons include the more general inability of the UN and the Agencies to co-operate successfully<sup>361</sup> and the traditional concern that involvement in human rights would politicise the work of the Agencies and prejudice their future effectiveness.

It is curious that the Committee has not made a concerted effort to encourage the Agencies concerned to resume the form of participation that they were willing to undertake in 1976. At that stage the ILO, for example, resolved to entrust the Committee of Experts on the Application of Conventions and Recommendations with the task of examining the State reports and other available information on the implementation of the Covenant.<sup>362</sup> It is considered that ideally this is the level of co-operation that the Committee should look towards.

The attitude of members of the Committee, however, has been that the best way to use the experience of the Specialised Agencies was not necessarily through asking them for information or requesting them to attend the Committee meetings. Rather, members of the Committee should be authorised to make their own inter-disciplinary studies and obtain the necessary information themselves for presentation to the Committee at a later stage.<sup>363</sup> Although this would certainly allow the Committee to tailor the substance and form of the information received from such sources to suit its own needs and would help develop the personal expertise of the Committee members, it is a rather poor substitute for the full participation by the Agencies themselves.

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<sup>361</sup> See, Samson, *supra*, note 38, at 669-670.

<sup>362</sup> *Ibid*, at 636.

<sup>363</sup> See, Alston, E/C.12/1989/SR.2, at 7, para.32.



b) Non-Governmental Organisations

The Covenant makes no reference to the participation of Non-Governmental Organisations in the supervisory process. However, by mandating ECOSOC with the responsibility for considering State reports, it is implicit that the supervision would take place in accordance with the Council's normal rules of procedure. According to ECOSOC Resolution 1296 (XLIV),<sup>364</sup> Non-Governmental Organisations are, according to their consultative category, entitled to submit written statements and make oral presentations to the Council.<sup>365</sup> It would appear to be open to the Council to allow for the provision of NGO information in the consideration of State reports under the Covenant.

However, at the Committee's first session, the question of NGO participation sparked a heated debate.<sup>366</sup> It was argued by those who opposed the provision of NGO material, that the Council decisions governing the work of the Committee provided only for the attendance of NGOs.<sup>367</sup> Further, the later, more specific, Council resolutions took legal precedence over the earlier general resolution allowing for the participation of NGOs in the work of the Council.<sup>368</sup> On the other hand, it was argued that NGO material was essential to the work of the Committee and that there was nothing in the Council's later resolutions that excluded the possibility of the submission of that material.<sup>369</sup> The question was eventually referred to ECOSOC which, in Resolution 1987/5,<sup>370</sup> resolved the issue by formally invited NGOs to submit

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<sup>364</sup> ECOSOC Resn.1296 (XLIV), (1968).

<sup>365</sup> *See generally*, Chiang P., Non-Governmental Organisations at the United Nations, (1981).

<sup>366</sup> *See*, Alston P. and Simma B., "First Session of the UN Committee on Economic, Social and Cultural Rights", 81 A.J.I.L., 747, at 752 (1987).

<sup>367</sup> ECOSOC Resn.1984/9, (May 24 1984), *in* UN Doc.E/C.12/1989/4, at 16 (1988).

<sup>368</sup> *See*, Sviridov, E/C.12/1987/SR.24, at 9, para.64; Mratchkov, *ibid*, at 10, para.67.

<sup>369</sup> *See e.g.*, Simma, E/C.12/1987/SR.24, at 10, para.66; Rattray, *Ibid*, at 10, para.69.

<sup>370</sup> ECOSOC Resn.1987/5 (May 26 1987), *in* UN Doc.E/C.12/1989/4, at 27 (1988).



to it "written statements that might contribute to full and universal recognition and realisation of the rights in the Covenant".<sup>371</sup>

In adopting this policy, the Committee was breaking new ground as far as human rights treaty monitoring bodies were concerned. Oddly enough, even though the Committee has taken its mandate to receive such information from ECOSOC rules of procedure, it has not undertaken to allow NGOs to participate in debates on State reports. One exception to this rule has been that individual NGO representatives may participate in their capacity as experts in the Committee's general discussions.<sup>372</sup>

As suggested above, the institutionalisation of a mechanism for the submission of information has a number of benefits over the informal process undertaken by other Committees<sup>373</sup> not least because it should encourage greater involvement by NGOs in the Committee's work.<sup>374</sup> However, the experience of the Committee thus far has not been promising.<sup>375</sup> The only NGOs to attend consistently have been Habitat International Coalition and Rights and Humanity, and in all the Committees sessions there have been only a handful of written statements received from NGOs.

This poor response has not been due to any lack of enthusiasm on the part of the Committee. Indeed in the one case where the Committee was in receipt of detailed information from an NGO it responded by finding the State concerned (the Dominican Republic) to be in violation of its obligations under the Covenant.<sup>376</sup> Similarly, NGO information has been used to good effect in the cases of Iran and Panama. The fact that the Committee

<sup>371</sup> *Ibid*, para.6.

<sup>372</sup> *See below*, text accompanying notes 447-8.

<sup>373</sup> Members of CERD and HRC for example, have access to non-governmental information only in their positions as experts, *see* Del Prado J., "United Nations Conventions on Human Rights: The Practice of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination in Dealing with Reporting Obligations of States Parties", 7 *Hum.Rts.Q.*, 492, at 500 (1985). However, under rules 62(1) and (2) of its Rules of Procedure, CAT may receive NGO material. *See*, Zoller A-C., "UN Committee Against Torture" 7 *N.Q.H.R.*, 210 at 251 (1989).

<sup>374</sup> Informal mechanisms also prevent the Committee members from using the information other than in asking questions of representatives. *See*, Buergenthal, *supra*, note 10, at 205.

<sup>375</sup> There was a certain amount of disappointment, at the Committee's fourth session, that only two NGOs attended. Alvarez Vita, E/C.12/1990/SR.3, at 11, para.69.

<sup>376</sup> *See*, E/1991/23, *supra*, note 98, at 64, para.249.



is prepared to rely upon NGO information is extremely encouraging. It suggests that if developed in a more systematic manner, the receipt of NGO information might at some time in the future become assimilated to a form of informal petition system.

The major obstacles to creative NGO participation with regard to the ICESCR seem to relate to the lack of sufficient publicity, and geographical and structural constraints relating to the nature of the organisations working within the sphere of economic, social and cultural rights. The relevant NGOs can be classified as either international "development" NGOs which direct and promote technical and material aid to "underdeveloped" countries, or national "voluntary organisations" which deal with concerns such as welfare rights and housing and which operate purely in the domestic field. Neither category of organisation naturally draws upon the work of human rights bodies, nor would necessarily have consultative status in ECOSOC. Conversely, the existing human rights NGOs have shown a distinct reluctance to become involved with the promotion of economic, social and cultural rights.<sup>377</sup>

That there is little homogeneity in the types of organisations that might successfully contribute to the Committee's work suggests that is no single method to encourage greater participation. Outside the ever important question of publicity, the most crucial factor will be the degree to which the Committee "is capable of yeilding satisfactory returns" to the input of time and effort by the NGO concerned.<sup>378</sup> It should be noted, however, that if NGO participation is premised upon these grounds, the Committee is forced into the position of taking up a more adversarial stance with respect to States, with an emphasis on finding "violations" of the Covenant.

### c) Institutional Mechanisms

In order to institutionalise the receipt of information the Committee has requested the Secretariat to establish a separate file containing "all available information" on each of the States Parties whose reports are "currently pending consideration". The

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<sup>377</sup> See, Tomasevski K., Development Aid and Human Rights, 113-116 (1989). It has also been suggested that NGOs are uncertain about what information they should collect and how to obtain it, see, Steiner H., Diverse Partners: Non-Governmental Organisations in the Human Rights Movement, (1991).

<sup>378</sup> Alston, *supra*, note 30, at 502.



Committee has stipulated in addition, that the following information, at least, should be included in the file:

- a) Information on the country contained in any recent reports of the Commission on Human Rights and its Sub-Commission.
- b) Information taken from the two most recent reports of the HRC, CERD, or CEDAW.
- c) Relevant information on the country concerned in the recent reports of the ILO Committee on the Application of Conventions and Recommendations.
- d) Any relevant information on the situation in the country concerned from the WHO.
- e) The relevant statistical information on the country concerned contained in the statistical tables of the UNDP's "World Development Report" and UNICEF's "State of the World's Children Report".
- f) Any UN or Specialised Agency report referred to by a State Party in its report.
- g) Any other relevant documentation submitted to the Secretariat for inclusion in the file.<sup>379</sup>

Although the files are to be created for States Parties whose reports are "currently pending consideration", it is stated that the files are to be maintained "on a continuing basis".<sup>380</sup> It is clear that relevant information may be submitted to the Secretariat at any time, but that a Secretariat "file" will only be created when that State's report is "pending consideration" by the Committee and thus will only be available to the Committee at that time.

The files will arm the Committee with extensive information with which it may more readily assess the level at which rights are enjoyed in the country concerned. However, at the Committee's sixth session, members complained, of the lack of information in the files.<sup>381</sup> It was noted, in particular, that the file on Syria was merely four pages long.<sup>382</sup> Undoubtedly it will take a few years before the files are built up in the manner requested by the Committee. However, that only a few pages of information have been provided at this stage is indicative of the general lack of support provided to the Committee by the Secretariat.

The high priority placed upon independent sources of information by the Committee is also reflected in its decision to

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<sup>379</sup> E/1992/23, *supra*, note 166, at 100-1, para.386.

<sup>380</sup> *Ibid*, at 101, para.387.

<sup>381</sup> *See*, Alston, E/C.12/1991/SR.10, at 4, para.23.

<sup>382</sup> *See*, Simma, E/C.12/1991/SR.10, at 8, para.39.



appoint "liason-officers" from the Committee to follow any pertinent work of other human rights bodies (in particular CEDAW, CERD, CAT and HRC) and report to the Committee at the beginning of each session.<sup>383</sup> This decision appears to be a response to the increasing regularity in which other Committees are dealing with matters that fall within the scope of economic, social and cultural rights.<sup>384</sup>

In addition the Committee has persisted in its demand for the creation of a "Human Rights Resource Room" for use by members of all of the human rights committees, equipped with documents and statistical information from the UN bodies, regional human rights organisations and non-governmental organisations.<sup>385</sup> Although this proposal has been reiterated by members of the Committee since its third session and endorsed by the Meeting of Chairpersons of the Human Rights Treaty Bodies, the Secretariat has yet to take any action. In fact the Secretariat has merely provided a number of wholly unsatisfactory proposals<sup>386</sup> which have done nothing but further deteriorate the relations between the Committee and the Centre for Human Rights. In response, the Committee included the following statement in its annual report:

"The Committee observed that it made little sense for the Secretary-General to be offering various forms of technical assistance to States Parties in relation to the Covenant and other instruments, while failing to take a major step specifically requested by the meeting of persons chairing the human rights treaty bodies in 1988 and reiterated by the Committee in 1989, twice in 1990 and in 1991. It therefore expressed the hope that the matter would finally be treated with the urgency it deserved."<sup>387</sup>

The lack of action by the Secretariat is probably partially due to the overall level of resources made available by the General

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<sup>383</sup> E/1990/23, *supra*, note 184, at 75, para.298. Cf. Alston, E/C.12/1991/SR.24, at 6, para.53.

<sup>384</sup> For example, the decisions taken by the HRC under article 26 ICCPR concerning social security.

<sup>385</sup> Alston, E/C.12/1989/SR.1, at 10, para.48; Simma, E/C.12/1990/SR.29, at 7, para.28.

<sup>386</sup> One proposal was for the use of a reading room in the UN library, *see*, Martensen, E/C.12/1991/SR.1, at 4, para.7.

<sup>387</sup> E/1992/23, *supra*, note 166, at 98, para.377.



Assembly. However, members of the Committee have made clear their view that notwithstanding resource scarcity, the Centre for Human Rights has been primarily responsible for the failure to provide a resource room.<sup>388</sup> It is difficult to understand, given the negligible level of secretariat back-up to the Committee, that this request should present such problems. It appears that the Committee is faced with the task not only of convincing States that it is a serious monitoring body, but also of persuading the Centre for Human Rights that it deserves more attention.

#### 6) Additional Information

It was decided early on in the Committee's work, that "it would not be fair to reject a report presented by a State party on the grounds that it did not comply with the general guidelines."<sup>389</sup> It was therefore considered that States should be given the opportunity to provide additional information at a later stage. Similarly, following the procedure of CEDAW, it has also been established that additional information could also be requested by the Committee on questions that were left unanswered following the consideration of the report.

The question of how to deal with the additional information has been addressed by the Committee at its most recent sessions. The possibility of adopting the procedure of the HRC was discussed. There, State reports are assessed for their adequacy by a working group and the Committee is entitled to postpone consideration of a report which is insufficient. It was pointed out that such a procedure was not suitable for the CESCRR which met only once a year, as it could seriously disrupt the scheduling for the consideration of the reports.<sup>390</sup> Accordingly the Committee will consider all reports scheduled. If, following that consideration, the Committee is in any way dissatisfied with either the written or oral reports, it will request the submission of additional information.

Although the use of written material was intended to expedite the Committee's working methods, it is becoming clear that this is not the case. It is perhaps a reflection of the poor quality of reports submitted to the Committee, which may be improved with the new general guidelines, but at its fifth session, for example, every State that appeared before the Committee was

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<sup>388</sup> See, Alston, E/C.12/1991/SR.10, at 4, para.24.

<sup>389</sup> E/1988/14, *supra*, note 165, at 62, para.360.

<sup>390</sup> See, Simma, E/C.12/1988/SR.22, at 9, para.71.



requested to provide additional information. If this trend continues it will place an even heavier burden on the Committee which is already overloaded with reports.

At its sixth session, the Committee was in receipt of a number of pieces of additional information submitted by France,<sup>391</sup> the Netherlands,<sup>392</sup> Zaire,<sup>393</sup> Colombia<sup>394</sup> and Jamaica.<sup>395</sup> It had been noted at the Committee's fifth session, that the procedure of the HRC was to consider additional information during the examination of that State Party's following report.<sup>396</sup> This was considered to be unsuitable as it might mean an unnecessary delay of some four years before the issue was considered again.<sup>397</sup> Accordingly, the Committee decided upon the following arrangement. Additional information will be considered by the pre-sessional working group prior to the Committee's following session.<sup>398</sup> The member of the Committee who presented the Committee's concluding comments on the State Party's report will make a preliminary evaluation of the additional information.<sup>399</sup> Following that, the pre-sessional working group will assess whether the information supplied provided answers to the questions asked by the Committee, and whether it does so in an adequate fashion.<sup>400</sup> The Committee will then have 45 minutes designated to consider the additional information in plenary session at which a State representative may be present.<sup>401</sup> If any further questions are raised at this point, depending on when the next report is due, the State concerned will be requested to deal with such issues either before or in its next report.<sup>402</sup> Finally the

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<sup>391</sup> E/1989/5/Add.1

<sup>392</sup> E/1989/5/Add.2

<sup>393</sup> E/1989/5

<sup>394</sup> E/1989/5/Add.3.

<sup>395</sup> E/1989/5/Add.4.

<sup>396</sup> *See*, Texier, E/C.12/1990/SR.46, at 2, para.3.

<sup>397</sup> *Ibid.*

<sup>398</sup> E/C.12/1990/SR.45, at 12, paras.83-85.

<sup>399</sup> *See*, Marchan Romero, E/C.12/1990/SR.46, at 3, para.7.

<sup>400</sup> *See*, Mratchkov, E/C.12/1990/SR.46, at 2, para.5.

<sup>401</sup> *See*, Kouznetsov, E/C.12/1990/SR.46, at 4, para.15.

<sup>402</sup> *See*, Alston, E/C.12/1991/SR.15, at 5, para.18, and E/C.12/1991/SR.18, at 2, para.1.



conclusions of the Committee following its consideration of the additional information will be contained in a separate chapter in its final report.<sup>403</sup>

These procedures were operated at the Committee's sixth sessions where the additional information provided by Zaire and Colombia were considered.<sup>404</sup> Unfortunately three States, whose additional information was due to be considered, requested that the discussion should be postponed until the next report. This was agreed to by the Committee. It is considered that although it is often preferable that the State representatives appear before the Committee during the consideration of reports, at this stage in proceedings the Committee should not compromise its schedule merely on that basis. It is unlikely that the representative concerned will be able to respond any more directly to the questions posed. In some cases the State will already have had the opportunity to respond three times. Thus, the Committee should place importance upon reviewing the additional information according to its schedule whether or not the State is able to send a representative.

Notwithstanding these considerations, the review of additional information appears to be a useful mechanism for the Committee. The conclusions drafted on the information supplied by Zaire, in particular, are detailed and well considered, take into account the arguments presented by the State and make a useful evaluation of areas of concern to the Committee. It is considered that the Committee should endeavour to continue adopting conclusions of that quality which are a credit to its perseverance.

Much as the additional information process has been a success for the Committee, consideration will have to be given to the non-submission of such information. A number of States such as the United Kingdom and Mexico have been requested to provide the Committee with such information and as yet have failed to do so. The Committee will have to establish a procedure to deal with such a situation. It would be appropriate as a start, if the Secretariat were to provide the Committee with an outline of which States have been requested to provide additional information and which have not yet done so and send the appropriate

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<sup>403</sup> See, Kouznetsov, E/C.12/1990/SR.46, at 5, para.23. See, E/1992/23, Chapter VI, *supra*, note 166, at 76-80.

<sup>404</sup> E/1992/23, *supra*, note 166, at 76-80, paras.323-331.



reminders.<sup>405</sup> The Committee may also consider taking action along the lines of the ILO Committee of Experts. There if a request for additional information is not complied with, the question may become one of "public observation".<sup>406</sup>

Additionally, as an incentive to States parties it could adopt the procedure of the HRC where, if the additional information is submitted promptly and fully, the Committee will, if appropriate, defer the date for the submission of the State party's next report.

An interesting development at the Committee's sixth session, which could have considerable impact upon its future working methods, was its approach to the Dominican Republic. It made the following statement in its report:

"The Committee notes that its request for an additional report... has not yet evoked a response from the Government. It notes that in the meantime it has received additional information from several sources, including that contained in document E/C.12/1991/NGO/1, which, if accurate, would give rise to serious concern on the part of the Committee. The Committee thus requests the State party to suspend any actions which are not clearly in conformity with the provisions of the Covenant, and requests the Government to provide additional information to it as a matter of urgency."

The overt implication of this statement is that the Committee expects additional information to be provided as to the new situation over and above that already requested at its previous session. The statement is somewhat ambiguous, however, and does not clearly indicate the Committee's intention. It might be argued, for example, that the Committee is not in fact requesting information as to the new situation, but merely taking note of it. Additionally, it is possible that the Committee does not consider that its initial consideration of the report is "closed" and therefore the receipt of new information is still appropriate.<sup>407</sup>

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<sup>405</sup> This is a procedure adopted by CAT. UN Doc.CAT/C/SR.38, paras 10-11.

<sup>406</sup> Valticos, *supra*, note 102, at 370.

<sup>407</sup> The suggestion was made at the Committee's sixth session that there were two kinds of requests for additional information. First, those which merely required the submission of figures, following the completion of the consideration of the report, that would not give rise to further discussion. Secondly, those which required the submission of substantive information such that the provision of the information had to be considered as another stage in the consideration of



Another possibility, which has considerable import, is that the Committee is asserting its authority to request information or reports *ad hoc*, upon receipt of a "complaint" by an NGO or other interested party. Certainly, in so far as the Committee, through ECOSOC, has authority to establish a system for the submission of reports, it may undertake to create a mechanism of reporting in such situations. If this is the case then the Committee will be in a position to operate what might be seen as an "unofficial petition system".

### 7) The Concluding Comments.

As from its second session, the Committee has adopted the practice of making "concluding observations" or "comments" on the State reports at the end of the constructive dialogue. The precise nature and purpose of the concluding comments, however, has been the subject of a certain amount of confusion on the part of the Committee members. It would appear that they evolved as part of the "constructive dialogue" and represent a stage in the ongoing process of "consideration". As such they do not represent the "suggestions and recommendations of a general nature" mandated by ECOSOC to assist it in undertaking its responsibilities in articles 21 and 22 of the Covenant.<sup>408</sup>

It was noted at all of the Committee's early sessions that the concluding observations were often inconsistent,<sup>409</sup> imprecise<sup>410</sup> and an "unsatisfactory reflection of the Committee's proceedings."<sup>411</sup> This was partially due to the political climate in which the Committee was working, which made it difficult for the Committee to agree upon a stronger formulation.<sup>412</sup> A decision to delay the formulation of concluding comments for at least a day

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the report. Here the Committee's consideration could be said to be incomplete and should be resumed at the Committee's next session. Alston, E/C.12/1991/SR.15, at 4, para.13. Although having considerable merit, these proposals were not acted upon by the Committee.

<sup>408</sup> ECOSOC Resolution 1985/17 para.(f), *supra*, note 89, at 21.

<sup>409</sup> *See*, Alston, E/C.12/1988/SR.23, at 6, para.57.

<sup>410</sup> *See*, Neneman, E/C.12/1988/SR.23, at 7, para.58.

<sup>411</sup> Alston, E/C.12/1989/SR.24, at 5, para.38.

<sup>412</sup> *See*, Alston, E/C.12/1991/SR.10, at 5, para.27. CEDAW for example, briefly introduced the procedure of adopting concluding comments but discontinued it after failing to come to agreement about the statement. *See*, Byrnes A., "The 'Other' Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women", 14 Yale J.I.L. 1, at 21 (1989).



following the consideration of the report concerned, has only partially tackled the problem. A debate on the role of the "discussion leader" in the presentation of the Committee's concluding observations at its fifth session underlined the fact that no coherent conception of the nature of the observations was apparent.<sup>413</sup> It became apparent in that debate, that the "discussion leader" was merely to present a detailed and considered opinion on the quality of the report. This in no way impeded other Committee members from disagreeing with the discussion leader or presenting their own views.<sup>414</sup> The "conclusions" of the Committee would be drawn up by the rapporteur who would reflect the nature of support for a particular view in the Committee's final report.

The matter was further discussed at the Committee's sixth session following an initial proposal that outlined the criteria upon which the concluding comments should be made.<sup>415</sup> After some discussion, the Committee adopted the following criteria for formulating concluding observations:

- "(a) The extent to which the written report was satisfactory according to the Committee's guidelines;
- (b) The extent to which the responses to written questions were satisfactory, including an indication of any major issues with respect to which no satisfactory response had been received;
- (c) The extent to which the oral and written reports, taken together, had enabled the Committee to identify the major obstacles to the realisation of the rights under consideration;
- (d) The extent to which the State party concerned had demonstrated progress in the realisation of the rights concerned since the consideration of its earlier reports;
- (e) Identification of specific issues in relation to which:
  - i) The Committee requires more information, perhaps in the form of a further written submission;
  - ii) The Committee considered further action to be required in order to satisfy the obligations contained in the Covenant;

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<sup>413</sup> See generally, E/C.12/1990/SR.31, at 6-13.

<sup>414</sup> See e.g., Rattray, E/C.12/1990/SR.31, at 11, para.50.

<sup>415</sup> See, Alston, E/C.12/1991/SR.14, at 11, para.50.



iii) The Committee considered that follow-up action, in terms of technical co-operation or international assistance, might be appropriate."<sup>416</sup>

What is clear from these criteria is that the Committee is prepared to declare whether or not it views the reports as being "satisfactory" or otherwise.<sup>417</sup> This is something of a new departure for the Committee, which had previously rejected proposals that the concluding comments should either indicate whether the reports were satisfactory,<sup>418</sup> or which questions had not been answered satisfactorily.<sup>419</sup> In addition, the Committee appears willing to indicate the degree to which States are acting in conformity with the provisions of the Covenant.<sup>420</sup> In adopting the criteria, however, members of the Committee stressed that they should not be applied in an excessively formalistic manner,<sup>421</sup> and

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<sup>416</sup> E/1992/23, *supra*, note 166, at 99-100, para.383.

<sup>417</sup> This differs from Rule 66(3)(A) adopted by CERD in so far as it is the quality of reports, not the degree of compliance that is to be considered "satisfactory" or "unsatisfactory". With regard to the operation of this rule in CERD *see*, Buergenthal, *supra*, note 10, at 198.

<sup>418</sup> A proposal was made to include a provision in the Rules of Procedure which read:  
 "The consideration of reports by States parties shall conclude with an opinion (statement) whereby the Committee shall inform the Council whether it deems that they way in which the State party fulfils its obligations under the Covenant is, in the main, satisfactory or unsatisfactory. In the absence of consensus among the members of the Committee on this opinion (statement), the matter shall be put to the vote in accordance with the terms of rules 45, 46, 48 and 49 of these rules."

Wimer Zambrano, E/C.12/1989/SR.22, at 9, para.65.

<sup>419</sup> One member proposed that the Committee's report to ECOSOC should include "those questions which, in the opinion of the experts, have not been adequately dealt with." Alvarez Vita, E/C.12/1989/SR.22, at 5, para.33. It was argued in response to this suggestion that it would require the Committee to arrive at conclusions as to which of its questions had not been adequately dealt with which at that time was not possible. Simma, E/C.12/1989/SR.22, at 6, para.37. In particular, it was felt that the Committee "must not be turned into a tribunal for judging States parties." Simma, E/C.12/1989/SR.22, at 7, para.52.

<sup>420</sup> Interesting enough CERD did eventually adopt Rule 66(3)A in its Rules of Procedure entitling it to make suggestions and genral recommendations in cases of non-compliance. It has been commented that this gives it a "quasi-judicial" function when dealing with State reports. Buergenthal, *supra*, note 10, at 198.

<sup>421</sup> *See*, Alston, E/C.12/1991/SR.14, at 11, para.53.



that bearing in mind the experience of CERD,<sup>422</sup> there was a need for subtlety and flexibility.<sup>423</sup> Accordingly, the criteria were not intended to require that reference to compliance should be made in every case, but merely that it should remain an option.<sup>424</sup>

That the Committee has declared its willingness to make evaluations as to the degree of compliance of States, although reflecting the recent practice of the Committee,<sup>425</sup> goes some way to clarify the perceived role of the Committee. For some time the Committee was in the paradoxical situation of seeking to avoid the impression that it is passing judgement on the performance of a given State, whilst evidently being forced to move in that direction by the theoretical and practical considerations of efficacy.<sup>426</sup> This point of view had led Committee members to argue, rather curiously, that the Committee's role was to undertake an "assessment" of the State reports which would not mean expressing criticism or making a judgement, but rather "including an observation in the Committee's report."<sup>427</sup> It has never been evident that the Committee could have undertaken a proper assessment without making critical comments in certain cases.

The assumption by the Committee of such a "quasi-judicial" role was somewhat inevitable given the fact that the Committee is a body of independent experts with authority to receive communications from NGOs. That it has undertaken to make substantive evaluations of State reports will undoubtedly contribute considerably to its perceived effectiveness.<sup>428</sup> As has been noted, the willingness of the Committee to question State parties' compliance "serves only to strengthen the value of the body, as

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<sup>422</sup> The rule adopted by CERD has been considered "too rigid and applying the same criteria to every report, which would prevent the Committee from taking into account the special circumstances of each country and not leave the Committee the required flexibility." Das, *supra*, note 175, at 314.

<sup>423</sup> See, Simma, E/C.12/1991/SR.25, at 4, para.23.

<sup>424</sup> See, Alston, E/C.12/1991/SR.25, at 5, para.29.

<sup>425</sup> Witness its concluding comments on the report of the Dominican Republic.

<sup>426</sup> For the open contradictions of the previous situation see, Note by the Secretary-General, *supra*, note , at 48-49, paras 123-125.

<sup>427</sup> Texier, E/C.12/1989/SR.13, at 14, para.71.

<sup>428</sup> Buergenthal correctly notes that the effectiveness of the reporting procedure "depends ultimately upon the willingness of the Committee to... make a formal determination that a State Party has not discharged its obligations under the Convention." Buergenthal, *supra*, note 10, at 201.



well as to convey a clear sense of independence and the desire to carry out its mandate effectively".<sup>429</sup> It is important to note, however, that the Committee will have to exercise this power with considerable discretion. Consideration will have to be given, for example, to the nature and quality of the information before it and the desirability of taking an adversarial rather than a co-operative stance.

The main obstacle before the Committee in making substantive assessments of State compliance seems to be the limits on its fact-finding capabilities. As Capotorti notes:

"...a specific recommendation presumes an accurate verification of the circumstances.... Thus, whenever examination of reports is superficial... the only possible outcome consists in general recommendations: and these have the function of means for political pressure, rather than of true instruments for supervising the observance of agreements."<sup>430</sup>

However the Committee has wisely decided that it is not required to make precise evaluations in every case. It is in a position where it may make either specific or more general observations according to the nature and quality of the material before it. What seems to be required then is a balanced approach that recognises the importance of making concrete assessments yet maintains the co-operative approach already shown by the Committee.

## 8) General Comments

In response to an invitation addressed to it by ECOSOC in paragraph 9 of resolution 1987/5,<sup>431</sup> endorsed by GA Resolution 42/102, the Committee decided at its second session<sup>432</sup> to begin, as from its third session, to prepare general comments on the various articles and provisions of the Covenant "with a view to assisting the States Parties to fulfil their reporting obligations."<sup>433</sup>

Although article 21 of the Covenant refers to the possibility of ECOSOC making recommendations of a general nature to the General Assembly, the Committee's assumed power bears little

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<sup>429</sup> Leckie S., "The Fifth Session of the Committee on Economic, Social and Cultural Rights", 13 Hum.Rts.Q., 539, at 547 (1991).

<sup>430</sup> Capotorti, *supra*, note 15, at 138.

<sup>431</sup> *Supra*, note 281.

<sup>432</sup> E/1988/14, *supra*, note 165, at 63, para.367

<sup>433</sup> E/1992/23, *supra*, note 166, at 12, para.42.



relation to that provision. Rather, the Committee's authority to make such comments derives from its mandate to assist ECOSOC in the consideration of the State reports. Whether or not this could be said to be a power implied by the terms of the Covenant, it is evident that no States have objected to such an interpretation.

As the Committee has stressed, the purpose of the General Comments is to assist the States parties in fulfilling their reporting obligations. More explicitly the Committee aims with its general comments:

"to make the experience gained so far through the examination of these reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures and to stimulate the activities of the States parties, the international organisations and the specialised agencies concerned in achieving progressively and effectively the full realisation of the rights recognised in the Covenant."<sup>434</sup>

The method by which the Committee adopts its general comments was made clear at its second session. Any member of the Committee may propose, at any time, that a general comment on a specific article or articles should be prepared. That member then submits an informal draft general comment for circulation. The Chairman of the Committee may choose either to call for a consideration of the draft in plenary or for its referral to a pre-session working group which considers all relevant proposals and submits a draft text to the Committee. The text of the general comment, as adopted, is included in the Committee's annual report to ECOSOC and is brought to the attention of the General Assembly. Texts are also transmitted to States parties by the Secretary-General. Any comments from States parties or the specialised agencies are to be brought to the attention of the Committee at its following session.<sup>435</sup>

As has been evident in the practice of the HRC, the use of General Comments is an important mechanism for developing the jurisprudence of a Committee in a way that is not possible in individual comments on State reports. Not only does it provide a

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<sup>434</sup> *Ibid.*, at 12, para.44.

<sup>435</sup> E/1988/14, *supra*, note 165, at 64, para.370.



means by which jurisprudence may be generated at a faster rate (which is particularly important for a Committee in the early stages of its development), but it is also a means by which members of the Committee may come to an agreement by consensus as to an interpretation of a specific provision without facing the difficult issue of addressing individual States.

Thus far the Committee has adopted four General Comments at its third, fourth, fifth and sixth sessions.<sup>436</sup> The first three General Comments were directed primarily at outlining the foundations of the reporting system and laying down an analytical framework for the future generation of right-specific jurisprudence. The first, deals with the nature of the reporting system, the second with international measures of technical assistance, and the third with the general obligations embodied in article 2(1). Each one has contributed to a general understanding of the Committee's work and has been warmly received.<sup>437</sup> The most recent, and perhaps most important General Comment thus far, has been on the right to housing in article 11- its first General Comment on a substantive article.

The Committee makes clear that the role of General Comments is to convey a sense of the existing jurisprudence of the Covenant as viewed by the Committee.<sup>438</sup> Overtly, the function of the General Comments is merely descriptive. However, in its fourth General Comment, the Committee has taken a more constructive approach. In outlining the essential qualitative elements of the right to housing in article 11, it could hardly be said that the Committee was merely describing its current practice, nor could it be said to be a reflection of the information collected from State reports.<sup>439</sup> Instead, the Committee appears to be using the General Comment as a means of developing a common understanding of the norms by establishing a prescriptive

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<sup>436</sup> General Comment No.1, (E/1989/22, annex III); General Comment No.2, (E/1990/23, annex III); General Comment No.3, (E/1991/23, annex III) and General Comment No.4, (E/1992/23, annex III). The text of each General Comment may be found in the Appendices.

<sup>437</sup> *See e.g.*, comments by Martenson on General Comment No.2, E/C.12/1990/SR.36, at 2-3, paras 6-7.

<sup>438</sup> E/C.12/190/CRP.4, Chap.III, at 9. It is clear nevertheless that the General Comments will not be confined to the substantive rights in the Covenant, General Comments No.1 and 2 thus reflect the broader terms of the Committee's mandate.

<sup>439</sup> General Comment No.4 was produced as the result of extensive co-operation with NGOs, one of which drafted the initial version.



definition. By doing so, the Committee appears to be asserting its authority to exercise an interpretative function *in abstracto*, rather than confining that function to its particular role in the consideration of State reports. Although such interpretations are not binding *per se*, it is undoubtedly true that they have considerable legal weight.

In absence of an authoritative procedure for settling divergencies of opinion over the interpretation of the Covenant, it is for the State parties to construe the Covenant for themselves. Individual States may put forward their own interpretations of the Covenant's provisions but such interpretations are by no means authoritative and may be rejected by other States. In fact States have rarely made direct statements regarding the meaning of Covenant provisions. The only real indication as to an agreement by States of a particular interpretation of the Covenant is to be found where there is a significant degree of concurrence in State practice. The relevant State practice is to be found not merely in how the States undertake to realise the rights, but also in their participation in the supervisory processes of the Covenant. As Meron commented:

"... the Committee may be competent to interpret the Convention insofar as required for the performance of the Committee's functions. Such an interpretation *per se* is not binding on States parties, but it affects their reporting obligations and their internal and external behaviour. It shapes the practice of States in applying the Convention and may establish and reflect the agreement of the parties regarding its interpretation."<sup>440</sup>

Indeed, the endorsement by ECOSOC and the General Assembly (in which significant numbers of States parties participate) of the Committee's annual report gives considerable weight to the Committee's interpretations.<sup>441</sup>

Given the fact that the terms of the Covenant are particularly vague and the general absence, on the national or international plane, of an understanding of the content of the

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<sup>440</sup> Meron T., Human Rights Law-Making in the United Nations, at 10 (1986). He was speaking specifically about CERD, but his analysis is still pertinent in the context of the Committee.

<sup>441</sup> Tomuschat similarly argues that the HRC, by the fact of its independence and impartiality, is "the best suited meeting point and clearing centre for diverging interpretations" of the ICCPR put forth by States with different ideological standpoints. Tomuschat C., "National Implementation of International Standards on Human Rights", Can.H.R.Y., 31, at 36 (1984/5).



rights, there is a necessity for the Committee to attempt to fill the void. Until it does so, economic, social and cultural rights will remain, in the minds of many, general aspirations which bind States in only the most general manner. The Committee does not benefit by having a petition system in which general principles may be established, and the "constructive dialogue" is a most unsatisfactory means of developing jurisprudence. Considerable importance must be placed, therefore, upon the use of General Comments to develop a general understanding of the norms within the Covenant. Once it has created a qualitative framework outlining the general scope and content of each of the rights, the Committee will be in a far better position to utilise the reporting procedure effectively.

Unfortunately, despite the urgency with which the Committee needs to develop its jurisprudence, it has, as yet, only succeeded in producing one General Comment each session. Ideally, it would be for the Secretariat to produce draft comments for discussion and adoption by the Committee. In absence of sufficient Secretariat resources or motivation to take on such a role, the Committee should look to other means by which the production of General Comments may be increased. In the near future, consideration could be given to sacrificing the constructive, but less productive, general discussion in favour of adopting additional General Comments.

#### 9) The General Discussion

At the Committee's second session it was felt that a general discussion would be useful to its work. One member commented in presenting the idea to the Committee that:

"the reporting process was designed to encourage States parties to reflect on their general policies with respect to economic, social and cultural rights and on the issues raised by the members of the Committee. However, at no time did the Committee try to synthesize all the information put before it and to understand all the implications of specific rights. It could do so by earmarking one day in each session, perhaps in the third week, for such a discussion. That discussion would be based on the reports of States parties over the previous 10 years and focus on interesting practices and experiences in different countries and economic and social systems with regard to the right under consideration. It would be facilitated by inputs from relevant specialised



agencies, but would not focus upon or criticise specific reports by States parties... No elaborate conclusions need be drafted..."<sup>442</sup>

It was commented, in addition, that the Committee would establish a "common assessment of the criteria relating to the observance of the Covenant" and would "lay the foundations of its future work" by providing for the "concrete expression of the Covenant on an increasingly uniform basis."<sup>443</sup> In addition it would facilitate the exchange of experience among States and to develop a better understanding of the content and implications of different rights.<sup>444</sup>

It has become the practice of the Committee to devote one day at each session to a general discussion of one specific right or a particular aspect of the Covenant "in order to develop in greater depth its understanding of the relevant issues." At the third session the principal emphasis was on the right to adequate food,<sup>445</sup> at the fourth the right to housing,<sup>446</sup> and at the sixth, the focus was on the use of economic and statistical indicators pertaining to the work of the Committee.<sup>447</sup>

In the discussion the Committee has sought to draw widely on the available expertise which may assist its work. In particular it has invited special rapporteurs from the Sub-Commission on Prevention of Discrimination and the Protection of Minorities, experts from relevant Non-Governmental Organisations and representatives of the Specialised Agencies (ILO, FAO, WHO, UNESCO) and other UN organs (UNDP, UNRISD and the UN Centre for Human Settlements).

The discussions have highlighted issues of importance, allowed the Committee to address broader issues that are not directly related to its examination of State reports and has served to develop the relationship between the Committee and other interested bodies. It is particularly notable that the participation of NGOs has been considerably greater at such discussions than in other stages of its work.

<sup>442</sup> Alston, E/C.12/1988/SR.22, at 5, para.30.

<sup>443</sup> Rattray, E/C.12/1988/SR.22, at 5, para.31.

<sup>444</sup> E/1988/14, *supra*, note 165, at 60, para.349.

<sup>445</sup> UN Docs.E/C.12/1989/SR.20-21.

<sup>446</sup> UN Docs.E/C.12/1990/SR.22-23.

<sup>447</sup> UN Docs.E/C.12/1991/SR.20-21.



It was considered by several members at the Committee's third session that the general discussion (on the right to food), might be expected to provide the basis of a draft general comment in future.<sup>448</sup> However, only in the case of the right to housing has the general discussion actually born fruit. The general criticism may be made that although the general discussions are undoubtedly useful, they are not entirely productive. The Committee has adopted the practice of summarising the outline of the general discussions in its annual report, but such outlines give little indication of any common agreement.

It is considered that given the lack of time available to the Committee, emphasis should be placed upon using its time in a productive manner. In particular it could look to the establishment, at the end of the debate, of a number of general principles that demonstrate common agreement. It would also be appropriate for the Committee to make it a policy that a general comment be drafted following all of its general discussions. If agreement on such a draft is not possible, that might signify the need to discuss the matter further.

#### 10) Technical Assistance

The Covenant specifically envisages the use of technical assistance in the implementation of the rights within the Covenant. Article 22 reads:

"The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant."

Moreover, it is clear that under article 23, the possible international measures for the implementation of the rights was not strictly limited to technical assistance, but included "a range of possible international action". The idea behind the inclusion of these articles was that the promotion of economic, social and cultural rights depended to a considerable extent on the extent economic conditions and therefore the provision of technical assistance was of considerable relevance.

Essentially, with the wide definition of technical assistance, these provisions throw open the concern of the Committee through ECOSOC,

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<sup>448</sup> E/1989/22, *supra*, note 170, at 73, para.330.



to all action taken within the United Nations that may affect the economic, social and cultural rights of a given population. The Committee has emphasised this point by identifying a large number of bodies to which it feels itself capable of directing its recommendations including *inter alia* the UNDP, UNICEF, IMF, IBRD, ILO UNESCO, FAO and the WHO.<sup>449</sup>

The Committee has directed itself in two main directions in its recommendations regarding technical assistance. First, it has made certain recommendations to institutions concerned with development activities to the effect that consideration should be given at all times to the impact of economic policies on the economic, social and cultural rights of the population.<sup>450</sup> The concern of the Committee is primarily upon the need to ensure that assistance programmes do not negatively affect the enjoyment of economic, social and cultural rights. It must be recognised however that by the terms of article 22, this is a somewhat limited goal. Essentially what is required is the specific direction of technical assistance towards the realisation of the rights.

Secondly, the Committee has recommended action to be taken by the Secretariat to assist developing States in complying with their reporting requirements through, for example, the establishment of training courses.<sup>451</sup> As the provision of advisory services is technically outside the competence and capabilities of the Committee itself, the Committee's interest has been to make recommendations to the Secretariat. Accordingly, following the invitation of the Under-Secretary General, the Committee outlined its suggestions for the development of the Advisory Services programme<sup>452</sup> with regard to the Covenant. In particular it suggested the provision of:

- a) technical assistance in reviewing national legislation, or drafting appropriate legislative or other instruments as necessary as preparation for the possible ratification of the Covenant.
- b) technical assistance in the preparation of an initial report, including monitoring of the situation with respect to the enjoyment of the rights.
- c) assistance to enable a State parties to send an expert to present the

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<sup>449</sup> General Comment No.2 (1990), *supra*, note 360, at 86, para.2.

<sup>450</sup> *Ibid*, at 86-89.

<sup>451</sup> *See below*, text accompanying note 463.

<sup>452</sup> The Advisory Services programme was created by GA Resn.926 (X), (1955). It has four basic functions: the provision of advisory services by experts; the awarding of fellowships and sholarships; the holding of international seminars; and the organisation of regional or national training courses.



report to the Committee, where it would otherwise be unable to do so.<sup>453</sup>

The Committee has also stressed that note should be made of article 23 of the Covenant which provides for the holding of regional meetings and technical meetings for the purpose of consultation and study organised in conjunction with the Governments concerned. It concluded that "every effort should be made to ensure that economic, social and cultural rights are, wherever possible, on the agenda of all regional and other training courses, workshops and seminars."<sup>454</sup>

It is clear that the UN programme of technical assistance compares rather poorly with that undertaken by the ILO.<sup>455</sup> The principal problem facing the Committee is that it has no authority to provide, or require that technical assistance be provided. All it is capable of doing, is to pass on requests for technical assistance to the Secretariat or other bodies concerned and hope that they might be taken up. It has not been helped in this regard by the failure of States to indicate themselves what assistance they require.

## G) THE ROLE OF OTHER BODIES IN THE COMMITTEE'S WORK

### 1) The Secretariat

Given the range and complexity of issues confronting the Committee the need for strong secretariat assistance is paramount.<sup>456</sup> In contrast to the rather ambiguous relationship that the HRC has with the Secretariat (as it is not a United Nations Body *per se*) the Committee has no such problems. As an expert group of a UN organ, the Secretariat is automatically responsible for its servicing. The general functions of the Secretariat can be described *inter alia* as:

1) Providing the Committee with summary records of its proceedings "with the necessary staff and facilities for the effective performance of its functions bearing in mind the need to give adequate publicity to its work."<sup>457</sup>

2) Ensuring that the UN press service issues press releases on the

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<sup>454</sup> *Ibid.*

<sup>455</sup> See, Leary V., "Lessons from the Experience of the International Labour Organisation", in Alston P.(ed), The United Nations and Human Rights: A Critical Assessment, 580, at 589-60 (1992).

<sup>456</sup> Sohn, *supra*, note 61, at 35.

<sup>457</sup> ECOSOC Resn.1985/17, para.(g), *supra*, note 89, at 21. For the Working Group see ECOSOC Decision 1979/43, para.15, (11 May 1979), *in*, UN Doc.E/C.12/1989/4, at 8. ECOSOC Resn.1982/33, para.(e), (6 May 1982), *ibid*, at 13.



- 2) Ensuring that the UN press service issues press releases on the Committee's proceedings.<sup>458</sup>
- 3) Bringing the suggestions and recommendations of the Committee to the attention of States Parties.<sup>459</sup>
- 4) Giving publicity to the proceedings of the Committee.<sup>460</sup>
- 5) Sending reminders to States Parties from which reports have not been received.<sup>461</sup>
- 6) Bringing the report of the Committee to the attention of the Commission on Human Rights, the Sub-Commission, CERD, CEDAW, HRC and other UN organs, specialised agencies concerned with providing technical assistance and regional commissions.<sup>462</sup>
- 7) Providing Advisory Services to assist States Parties in discharging their reporting obligations, including holding training courses on the preparation of reports.<sup>463</sup>
- 8) Providing a compilation from official UN sources of statistics relevant to the Committee's work.<sup>464</sup>
- 9) The establishment and maintenance of files of information on the

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<sup>458</sup> ECOSOC Resn.1983/41, para.8, (27 May 1983), *in*, UN Doc.E/C.12/1989/4, at 15 (1988); ECOSOC Resn.1984/9, para.6, (24 May 1984), *ibid*, at 17.

<sup>459</sup> ECOSOC Resn.1984/9, *ibid*, para.8.

<sup>460</sup> ECOSOC Resn.1987/5, *supra*, note 281, at para.12.

<sup>461</sup> ECOSOC Decision 1979/43, para.14, 11 May 1979.

<sup>462</sup> ECOSOC Resn.1987/5, *supra*, note 281, at para.10.

<sup>463</sup> ECOSOC Resn.1987/5, *supra*, note 281, at para.11. Following the invitation of the Under-Secretary General, the Committee outlined its suggestions for the development of the Advisory Services programme with regard to the Covenant. In particular it suggested:

a) technical assistance in reviewing national legislation, or drafting appropriate legislative or other instruments as necessary as preparation for the possible ratification of the Covenant.

b) technical assistance in the preparation of an initial report, including monitoring of the situation with respect to the enjoyment of the rights.

c) assistance to enable a State parties to send an expert to present the report to the Committee, where it would otherwise be unable to do so.

In addition the Committee has stressed that note should be made of article 23 of the Covenant which provides for the holding of regional meetings and technical meetings for the purpose of consultation and study organised in conjunction with the Governments concerned. It concluded that "every effort should be made to ensure that economic, social and cultural rights are, wherever possible, on the agenda of all regional and other training courses, workshops and seminars." E/1989/22, *supra*, note 165, at 76, paras 343-345.

<sup>464</sup> ECOSOC Resn.1987/5, para.13, 26 May 1987.



States Parties to the Covenant.<sup>465</sup>

10) Providing a table of issues for the Pre-Sessional Working Group identifying those issues that a State Party has not addressed in its report that is required by the reporting guidelines.<sup>466</sup>

11) Providing for the Rapporteur or other member, a dossier of information on the current developments of relevance to the Committee.<sup>467</sup>

The relationship between the Committee and the Secretariat has not been a happy one. Members of the Committee have repeatedly expressed, with due cause, their great dissatisfaction with the general lack of support provided by the Secretariat. The Committee is serviced by a single member of the Centre of Human Rights, who also has duties with respect to other human rights committees. The assistance provided to the Committee on a steady basis includes merely the provision of basic secretarial services and the drafting of routine parts of the report. Thus far, outside the production of a very limited bibliography, virtually no research or other analytical work has been undertaken by the Secretariat on behalf of the Committee. Indeed it has been noted that "once the annual session was finished, members received no more than one or two perfunctory administrative communications until the following session began".<sup>468</sup>

Although the Committee would clearly appreciate the Secretariat playing a greater role in its work, its main cause for complaint has been the almost total lack of cooperation. It is perceived that the problem is not merely one of financial hardship on the part of the Centre for Human Rights but mismanagement and lack of concern. Even the fairly limited requests for assistance, such as the compilation of files of information on States and the creation of a human rights treaty resource room, have not received satisfactory attention.

As has been noted elsewhere, the Committees effectiveness would be greatly enhanced by proper Secretariat support. Ideally, the Secretariat would undertake functions, in addition to those outlined above, such as the production of draft General Comments and other analytical reports, the collection and compilation of information both from official and unofficial sources (such as NGOs) on the situation in each of the State parties, the identification of inadequacies in State reports and issues that deserve further consideration, and the provision of advice and assistance to States parties as to how they might further the

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<sup>465</sup> E/1990/23, *supra*, note 184, at 75, para.298.

<sup>466</sup> *Ibid.*

<sup>467</sup> *Ibid.*

<sup>468</sup> Alston, *supra*, note 30, at 502.



enjoyment of the rights. It is patently unrealistic to expect the Committee, which meets for a limited time each year, to undertake all of these functions itself. If the operation of the Covenant is to have any long-term success, there is a pressing need for the Secretariat to begin undertaking a more active role in the work of the Committee.

## 2) The Economic and Social Council

On the basis that the Committee is mandated with assisting ECOSOC in the consideration of State reports, it might be assumed that ECOSOC itself would take some part in the evaluation process much like the ILO Conference Committee on the Application of Conventions and Recommendations.<sup>469</sup> To that end, the Committee is asked to include in the report on its activities, a summary of its consideration of the reports submitted by States parties to the Covenant.<sup>470</sup>

In practice ECOSOC does little more than make note of the Committee's report. Indeed, it was decided after the Committee's third session that in future the reports of the Committee would be discussed not by ECOSOC in plenary, but by its Social Council<sup>471</sup> which has no provision for summary records.<sup>472</sup> In justifying such action, it was noted that even if ECOSOC did not consider the report in plenary, it was referred to the General Assembly Third Committee where the report was given substantive consideration.<sup>473</sup>

Although it was noted with disappointment that ECOSOC took little interest in the report of the Committee,<sup>474</sup> it was stressed that ECOSOC should not be encouraged to pronounce on any substantive matters which were rightly in the exclusive domain of the Committee.<sup>475</sup> To the extent that the Council should not take over those functions adopted by the Committee this decision is undoubtedly correct. However, it cannot be maintained on the other hand that ECOSOC has no essential

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<sup>469</sup> The report of the ILO Committee of Experts is considered by the Conference Committee on the Application of Conventions and Recommendations. It chooses the most important cases that arise and asks the government for explanations. The replies form the basis of a discussion within the Conference Committee and in particularly serious disputes a procedure for "direct contact" exists whereby a representative of the Director General undertakes a discussion, in the country concerned, with the governmental authorities.

<sup>470</sup> ECOSOC Resn.1985/17, *supra*, note 89.

<sup>471</sup> *See*, Houshmand, E/C.12/1990/SR.1, at 10, para.70.

<sup>472</sup> *See*, Badawi El Sheikh, E/C.12/1990/SR.3, at 7, para.45.

<sup>473</sup> *See*, Houshmand, E/C.12/1990/SR.3, at 9, para.59.

<sup>474</sup> *See*, Simma, E/C.12/1990/SR.3, at 9, para.55.

<sup>475</sup> *See*, Alston, E/C.12/1990/SR.3, at 9, para.56.



role in the implementation process. It is, after all, the Council that is empowered with making general recommendations to be submitted to the General Assembly.

Any conclusions drawn by the Committee following the consideration of State reports become the responsibility of ECOSOC when the report is adopted. This would suggest that the Council has a direct interest in considering the report in some depth. From the point of view of the Committee, it is clearly better if the Council, which has direct control over its resources, is aware of all its issues and concerns.

#### H) THE FUTURE: AN OPTIONAL PROTOCOL?

Despite the fact that proposals for a petition procedure relating to economic, social and cultural rights were specifically rejected during the drafting of the Covenant, at the Committee's most recent sessions the debate has been revived. The Committee has undertaken several discussions as to the possibility of drafting an Optional Protocol to the Covenant on Economic, Social and Cultural Rights to provide for some form of individual or group complaints mechanism. Whereas in earlier sessions the debate generally ended with the conclusion that it was "too early" to consider realistically the possibility of such a system,<sup>476</sup> at its sixth session in 1991 it was generally felt that the matter deserved further consideration.

The Committee had before it a useful document produced by Professor Alston outlining a number of arguments in favour of developing an Optional Protocol.<sup>477</sup> Whilst the majority of the Committee agreed that the institution of an Optional Protocol would be a beneficial development both in terms of increasing the status of the Covenant and the Committee,<sup>478</sup> and in terms of improving the degree of protection offered, questions were raised as to the form that the Optional Protocol would take. It was generally considered that an inter-state petition system would not be fully effective,<sup>479</sup> and that individuals and possibly NGOs should have standing to submit complaints,<sup>480</sup> but it was questioned whether a system like that operated by the HRC in which

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<sup>476</sup> See e.g., Rattray, E/C.12/1990/SR.4, at 5, para.17.

<sup>477</sup> See, Discussion Note, E/C.12/1991/WP.2.

<sup>478</sup> See e.g., Konate, E/C.12/1991/SR.13, at 10, para.51; Bonoan-Dandan, E/C.12/1991/SR.14, at 14, para.67.

<sup>479</sup> See e.g., Simma, E/C.12/1991/SR.14, at 13, para.61.

<sup>480</sup> See e.g., Mratchkov, E/C.12/1991/SR.13, at 9, para.43.



decisions were not binding was satisfactory.<sup>481</sup> It was also suggested that there was a need for the Committee to do further work in establishing benchmarks<sup>482</sup> and that the system, if established, should operate only in relation to a limited number of rights. With regard to the latter point it was commented that:

"...it was inconceivable that it should subject the full range of economic, social and cultural rights, particularly those enshrined in the crucial article 11, to the kind of legalistic jurisprudential review undertaken by the Human Rights Committee."<sup>483</sup>

The result of the debate was that the Committee decided to consider the possibility of the Optional Protocol in more detail at its seventh session.

It is considered that the creation of a system of individual or NGO complaints is an attractive proposition on a number of grounds. First and foremost, such a system, if operated effectively, would vastly increase the level of national and international awareness of both the Covenant and the Committee. This in turn may encourage better reporting and more participation by NGOs, stimulate the institution of domestic remedies, and generate greater support for the work of the Committee (including more sessions and Secretariat involvement).

Secondly, the institution of a complaints mechanism would enable the Committee to increase the effectiveness of the supervision system in a way not possible otherwise. Not only would it provide an additional means of supervision bringing extra force to bear on recalcitrant States, it would provide the Committee with the ability to develop the normative content of the rights in a specific and tangible manner. As Alston has noted:

"...the collected 'views' of the Committee based on individual cases are of much greater value in shedding light on the meaning of the various rights formulations than either the Committee's General Comments or the insights generated by its examination of State reports".<sup>484</sup>

Contrary to the general perception of petition systems, their value lies not so much in the degree to which they operate as corrective or remedial mechanisms, but rather in the specificity they provide to the

<sup>481</sup> See, Simma, E/C.12/1991/SR.14, at 13, para.64.

<sup>482</sup> See e.g., Rattray, E/C.12/1991/SR.13, at 7, para.36.

<sup>483</sup> Simma, E/C.12/1991/SR.14, at 13, para.62.

<sup>484</sup> Discussion Paper, *supra*, note 477, at 7, para.18.



norms allowing States to appreciate in advance the precise type of action required of them.<sup>485</sup>

The principal argument against the creation of a petition system relating to economic, social and cultural rights, has been, and remains, the idea that they are essentially non-justiciable. More specifically, it is argued that given the promotional nature of the rights and the generality of their terminology, it would be impossible for a supervisory body to decide whether or not a State is acting in conformity with its obligations under the Covenant. As was suggested during the drafting of the Covenant, complaints "could only refer to insufficient programmes in the attainment of certain goals and it would be impossible for the committee to determine what the rate of progress in any particular case should be".<sup>486</sup>

It is coming to be accepted that it is no longer valid to characterise economic, social and cultural rights as exclusively "promotional" or entirely non-justiciable. There is increasing evidence of economic, social and cultural rights being the subject of international petitions.<sup>487</sup> As far as the Committee is concerned, it has already gone some way to identifying rights and obligations within the Covenant that require immediate implementation and therefore would traditionally be suited to judicial determination. In particular, it has mentioned article 3 (equal rights for men and women), article 7(a)(i) (equal remuneration for work of equal value), article 8 (trade union rights), article 10(3) (protection of children from exploitation), article 13(2)(a) (free and compulsory primary education), article 13(3) (respect for parental choice in education), article 13(4) (right to establish and direct educational institutions), article 15(3) (freedom of scientific research and creative activity).<sup>488</sup> In addition, the Committee has indicated that those aspects of rights that involve State abstention would similarly be capable of immediate implementation. A number of examples could be: freedom

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<sup>485</sup> As Vasak notes, petition systems operate not so much to present a remedy for the individual or group, but to prevent the reoccurrence of that situation. Vasak, *supra*, note 12, at 216.

<sup>486</sup> UN Doc.A/2929, *supra*, note 33, at 124, para.41.

<sup>487</sup> One may cite the recent jurisprudence of the HRC and CERD. It should also be noted that the Migrant Workers Convention and UNESCO operate petition systems in the field of economic, social and cultural rights. Moreover, the Inter-American system has recently adopted a protocol allowing for individual petitions on economic, social and cultural rights, and there is evidence that a system might be established under the European Social Charter, *see*, Harris, *supra*, note 148, at 673-4.

<sup>488</sup> *See*, General Comment No.3, (1990), *in*, UN Doc.E/1990/23, Annex III, at 84, para.5.



from forced labour (article 6(1)), freedom from arbitrary dismissal (article 6), and freedom from arbitrary eviction (article 11).

Such arguments suggest that there is, in fact, a justiciable core to every human right and indeed that it would be theoretically possible to operate a petition system with respect to economic, social and cultural rights. The impression left by the Committee, however, is that it would be better to institute an Optional Protocol with respect to a limited range of rights, leaving in particular, rights such as those relating to food, housing and health to one side. The perceived problem is that those rights that are phrased in excessively general terms and which are, for the main part, to be implemented progressively, might not be suited to judicial determination.

At a theoretical level, it is considered that it is entirely inappropriate for the Committee to divide the rights into those which are suited to a petition procedure and those which are not. Not only would it undermine the indivisibility of the rights, but it would also raise questions as to the relative importance of each group of rights. More importantly, however, it is considered that the problems associated with the operation of a petition system in relation to general or progressive rights are overstated.

First, in theory, whether or not a provision is worded generally or is subject to progressive implementation, there is nothing to prevent a body with the necessary interpretative powers from making a decision as to the compliance of a State with its obligations. The decision might be a difficult one to make, but that is a different question. The justiciability of a particular issue depends, not upon the quality of the decision, but rather upon the authority of the body to make the decision. *Prima facie* then, in so far as the Committee is given the authority to assume a quasi-judicial role over the rights in the Covenant those rights will be justiciable.

The Committee, however, in order to maintain its credibility, would have to concern itself with the quality of the decisions made. Given the difficulty of establishing either the precise conditions of deprivation or the direct responsibility of States, the Committee will have to allow the States a margin of appreciation. Although this will mean concentrating upon overt or manifest violations of the Covenant, it does not entirely deprive the procedure of merit.

It is clear that the precise terms and conditions under which a complaints mechanism might operate will have to be established and agreed upon by the States parties. It will be for the Committee, however, to act as the spur to encourage any such action to be taken. For the Committee to effectively push through the institution of such a mechanism itself, it will have to demonstrate the necessity and advisability of such a development. The primary means by which it



might do so is through developing its existing supervisory role in a way that shows the potential of a complaints mechanism.

#### **IV CONCLUSION**

It is undoubtedly the case that in the relatively short period of time that the Committee on Economic, Social and Cultural Rights has been charged with monitoring the implementation of the Covenant, it has transformed the supervision system beyond recognition. The Committee's work has been marked by a series of procedural reforms, undertaken swiftly and with relative ease, that places it in the position of having one of the most developed and potentially effective reporting mechanisms of all the human rights supervisory bodies. Notably, the Committee has undertaken to receive information from Non-Governmental Organisations, has adopted the procedure of making State-specific comments following its consideration of State reports, conducts General Discussions with experts from other fields and organisations, and drafts General Comments to further an understanding of the normative content of the rights in the Covenant and the reporting obligations.

That the Committee has been able to undertake such far-reaching procedural reforms is partially a reflection of the nature of its mandate. Essentially the Committee is charged with assisting the Economic and Social Council with the consideration of State reports. Unlike other human rights Committees, the CESCR is not constrained by specific textual provisions in the treaty, it receives its authority from, and is primarily responsible to ECOSOC. ECOSOC itself is authorised merely to "consider" State reports. Its approach has been to interpret this mandate in a wide sense, allowing the Committee considerable leeway in its development of procedural initiatives.

The success of the Committee in its reform process is more significantly a reflection of the friendly and co-operative relations between its members. On no occasion has it been necessary to take decisions other than by consensus, nor has there been any serious disagreement between Committee members. Effectively, much work is conducted informally with compromises and agreements being made out of session. The formal cohesiveness of the Committee is, to a large extent, a reflection of the amount of informal work that takes place. Having said that, the development of the Committee's work has been pushed forward by a small number of members. Others, while not being opposed to the direction in which the Committee is moving, have not tended to contribute as fully as they might. This is fortuitous in the sense that it allows a greater unity of purpose, but it also means that the work load becomes disproportionately spread. One might also speculate on the possibly disastrous scenario in which certain of the more active members are not re-elected to the Committee in future.



Notwithstanding the success of its reforms, the Committee still faces a number of problems in developing the effectiveness of the supervision process. In particular one might note the continuing inadequacy of the State reports, the failure on the part of a large number of States to report in a timely manner and the disruption of the process of supervision by States failing to appear before the Committee. In addition, the Committee itself is subject to considerable pressure by the fact that it has only a single three-week session per annum. Quite appropriately, the Committee has sought to ease the reporting burden and expedite the process of considering reports, but has not resorted to taking measures that might compromise the quality of supervision.

The largest problem facing the Committee, however, is posed by the substance of the Covenant itself. The breadth of subjects covered by the Covenant, combined with the lack of jurisprudence (whether national or international) in certain vital areas such as health and nutrition, mean that significant importance has to be placed upon the Committee's "creative" or "interpretative" functions. That it has undertaken to draft General Comments to develop an understanding of the normative content of the rights is a useful development in this respect. However, there is no doubt that the Committee lacks the support of a skilled and committed Secretariat prepared to produce analytical reports and provide other necessary assistance. Thus far, the Secretariat not only has failed to provide the form of support that ideally would be expected of it, but it has done little to assist the Committee in taking up those tasks itself. The failure to provide a resource room for the human rights treaty bodies stands out in this respect.

Although the Committee's procedural reforms have been directed at increasing its effectiveness as a supervisory body, they have also lent its work a certain duplicity. Whilst the reforms themselves, have placed the Committee in the position whereby it is theoretically capable of making substantive evaluations of the degree of State compliance with the obligations under the Covenant, it has shown itself, until recently, unwilling to do so. The Committee itself, has preferred to characterise its role as one of monitoring, and facilitating the provision of technical advice and assistance. The inherent tension in its position is evident from the fact that monitoring itself does not exclude the possibility of making quasi-judicial determinations of compliance, and that the Committee is not really in a position to undertake a significant role in the provision of technical assistance.

There are indications, nevertheless, that the Committee is willing, on occasion, to take a more adversarial stance. Certainly, in so far as the Committee is capable of receiving information from NGOs and has undertaken to make concluding observations of a substantive nature on the State reports, it is likely to develop its role in making quasi-judicial



determinations of compliance. Indeed, if it adopts the authority to request ad hoc reports, the procedure might evolve at some stage into an unofficial complaints mechanism. At present, however, in light of the present lack of established standards, minimal NGO participation, and insufficient information, it is considered that the Committee should act with a certain amount of discretion.

Similar considerations have to be born in mind with respect to the proposed institution of an official complaints mechanism in the form of an Optional Protocol. Undoubtedly, a complaints system would be a useful and beneficial development, not merely in terms of increasing the level of supervision, but in so far as it would assist in the normative development of the Covenant and would elevate the status of the Covenant as a human rights instrument. That there might be certain difficulties in establishing criteria to guide decision-making as regards the more generally-stated and progressive rights, should not be overstated. Indeed, in so far as a complaints systems would be the most effective mechanism for defining State obligations in a specific and concrete manner, suggests that the generality of the norms should not stand in the way of such a development.



## **CHAPTER TEN: CONCLUSIONS**

It is something of a paradox that the Covenant on Economic, Social and Cultural Rights, which was intended to form part of the new world order following the Second World War, is now, forty seven years later, only in the early stages of its development. An unduly lengthy and complex drafting process followed by a slow process of ratification meant that the Covenant only entered into force in 1976. It suffered a false start with the abortive supervision process operated by the Working Group such that the beginning of its development as an effective human rights treaty essentially began in 1987 with the creation of the Committee on Economic, Social and Cultural Rights.

That the emergence and development of the Covenant has been a painfully slow process may be put down, to a large extent, to the political and ideological forces that have used human rights as a battleground. Economic, Social and Cultural Rights were long championed by the Socialist States who, whilst ensuring their inclusion in a human rights treaty, were not prepared to accept strong implementation (or rather supervision) procedures. Western States, on the other hand, in making unsubstantiated and categorical claims about the nature of economic, social and cultural rights, ensured that they were separated from their civil and political counterparts in a different instrument. The resulting Covenant on Economic, Social and Cultural Rights was a poor counterpart to the Covenant on Civil and Political Rights, suffering in particular from a weaker implementation procedure.

The political or ideological conflict continued into the mid-1980s and effectively ensured that the already weak supervision system created for the Covenant on Economic, Social and Cultural Rights would have little real force. The revitalisation of the Covenant, under the auspices of the Committee, may be indirectly attributed to the end of the ideological confrontation between East and West, the democratisation process in former Socialist States and the strengthening of international co-operation.

The emergence of the Committee may also be appreciated as a response to the increasing interest in, and concern with economic, social and cultural welfare which accompanied the political "enlightenment" of the 1980s. Despite the resolutely "monetarist" philosophies of the UK and the USA, it had become evident in the context of development at least, that attention needed to be paid to the economic and socially vulnerable, and that sustainable development was not to be achieved merely by reliance upon economic growth and the "trickle down" effect as advocated in the early 1970s. More recently, development organisations such as the World Bank and UNDP have begun to place



emphasis upon the notion of "good governance" (broadly speaking the range of civil, political, social, economic, and cultural rights) and have noted the importance of basic needs in the development process.

Whilst there is increasing awareness and concern as to the economic, social and cultural welfare of populations, this has not, as yet, been entirely transposed into the context of human rights. On the one hand, there remains considerable resistance on the part of legal commentators to the acceptance of economic, social and cultural rights on the same basis as civil and political rights. The rights in the Covenant continue to be characterised as "non-justiciable" or "programmatic". On the other hand, development organisations have been wary of adopting a rights-based stance, which is seen as being too inflexible and confrontational. In the long run, the effectiveness with which the Committee develops the Covenant will be measured by the extent to which it disposes of such arguments in a conclusive manner.

That the Covenant has considerable potential as an international instrument for the protection of economic, social and cultural rights is evidenced by the material scope of protection offered. Although a number of the economic rights are already the subject of international procedures under the auspices of the ILO, the Covenant does offer unparalleled protection as regards social and cultural rights. In particular, it is the only universal instrument that seeks to guarantee in general the rights to food, clothing, housing, health and cultural life.

The unique nature of the rights to which the Covenant is addressed is, however, not without its problems. Perhaps most significant is the fact that the rights are stated in an excessively broad and general manner. This has not necessarily posed a problem for supervisory bodies in the field of civil and political rights, as they have been in the privileged position of being able to draw upon vast array of both national and international jurisprudence generated by other human rights supervisory bodies and the various national constitutional courts that had traditionally dealt with the same, or similar, rights. However, in the case of economic, social and cultural rights, even where they are found in the Constitutions of States, they have rarely given legal effect by the courts concerned. Moreover, international organisations working in the field of economic, social and cultural rights (with the exception of the ILO and, to a lesser extent UNESCO) have resolutely refused to deal with the issues in terms of rights. This inevitably means that a considerable burden is placed upon the Covenant's supervisory body to attempt to breath some life into the provisions.

Further problems evidenced in the text of the Covenant are its confused and inconsistent structure. First, it is not clear whether the obligations clause in article 2(1) relates to all of the substantive rights in



Part III, or only to those that are specifically recognised. Secondly, the substantive articles themselves often contain a confused mixture of rights, objectives and implementation procedures. Thirdly, it is unclear to what extent the rights are intended to be covered by the general or specific limitations clauses to be found in the Covenant or whether indeed it is possible to derogate from the rights at all. Finally, and perhaps most crucially, the general State obligations are so obscure that it appears, on the face of it, to be virtually impossible to establish the extent to which a State is in compliance with its obligations under the Covenant.

Similarly, Part IV of the Covenant which outlines the supervision system is marked more by what it leaves out than by what it includes. Broadly speaking it is a reporting system to be operated under the auspices of ECOSOC. Provision is made for the participation of the Specialised Agencies and the Commission on Human Rights and for general reports to be submitted to the General Assembly. The text, however, does not make clear the degree to which each of the bodies mentioned should involve themselves. Although ECOSOC is mandated with the "consideration" of the reports, the Commission on Human Rights may similarly "study" the reports and make general recommendations. It is unclear which body has the primary responsibility for undertaking supervision. Moreover, although many assumptions could be made about the object and purpose of reporting systems in general, the Covenant only provides for the submission of reports and their consideration. The periodicity, form and content of the reports is left open, as is the nature of the consideration that should be given to them. As a whole, the the raw text of the Covenant could be said to offer considerable potential but little promise.

As of December 1991, there are 104 States parties to the Covenant which, given the date on which it entered into force, is not unreasonable. Apart from their poor record of reporting under the Covenant, which is by no means unusual for the universal human rights treaties, their participation has been consistent if disinterested. To a large extent the unenthusiastic response of States may be put down to the unsatisfactory experience of the Working Group in which there was very little call for States to take their reporting responsibilities seriously. In the experience of the Committee, however, States have participated in a co-operative manner and have not found it necessary to challenge either the procedural or substantive developments in the Committee's work. In fact the Committee has largely been allowed to develop its role and practices without obstruction.

It is primarily the manner in which the Committee has transformed the supervision system that marks its work thus far. In contrast to the superficial and wholly unsatisfactory working methods



of the Working Group, the Committee has adopted a number of useful and innovative procedural initiatives to further the efficacy of its supervisory role. In particular, one could mention the receipt of information from NGOs, the adoption of State-specific concluding comments, the allocation of days to undertake general discussions, and the adoption of General Comments. Whilst the quality of State reports still leaves a certain amount to be desired, the rewards of the reform process are beginning to show. The Committee has adopted four influential General Comments, the most recent of which was on a substantive article, and has come to the point where it was able, with reasonable certainty, to find a State in violation of its obligations under the Covenant.

Having said that, there remain a number of problems that have impeded the full development of the supervisory process in the manner desired by the Committee. First, as noted above, there is need for a considerable improvement in both the quality and timeliness of State reports. The measures taken thus far by the Committee, such as the establishment of new reporting guidelines and the creation of a "black list" of States whose reporting has been particularly bad, have yet to reap rewards. Additionally the most recent decision of the Committee to consider situations where the State has failed to submit a report in ten years, poses problems both of a logistical and legal nature.

Secondly, despite the existence of mechanisms for the receipt of information from NGOs and Specialised Agencies, the response has been particularly poor. There is something of a vicious circle here. Until the Committee demonstrates itself to be an effective supervisory mechanism, giving considered and detailed analyses of State reports and making determinations as to non-compliance in appropriate cases, it will not be deemed worthy of attention by such bodies. Equally, the Committee is essentially hamstrung without adequate access to alternative sources of information. As there is a limited amount that the Committee itself may do in such circumstances, the need for greater Secretariat support and more publicity become of central importance.

The lack of proper Secretariat support has been one of the most unsatisfactory aspects of the Committee's work which, if it continues, could easily stultify the future development of the Covenant. The Secretariat has undertaken no analytical studies and has provided only a minimal amount of assistance in terms of collecting information, undertaking an initial consideration of State reports and publicising the work of the Committee. This is particularly unfortunate in the context of the Committee's work, given its dependence upon large quantities of detailed information on the situation prevailing in the countries concerned and the urgent need for a greater understanding of the content of the norms within the Covenant.



The headway made by the Committee in terms of its procedural reforms have not been matched by its development of the substantive guarantee. It has produced useful General Comments on article 2(1) and on the right to housing in article 11, which have done much to clarify the issues involved, but it continues to be overwhelmed by the range and detail of the subjects with which it is dealing. The reporting guidelines indicate quite clearly that, whereas the Committee has formulated its general approach, it has considerable work to do before it will be able to focus effectively upon the salient issues.

In terms of its general approach, the Committee has made a number of important points about the nature of State obligations under the Covenant. In particular, it has pointed out that despite the broad terms of article 2(1), a number of the rights and articles are capable of immediate implementation. Further, it has suggested that there is a "core obligation" under which States are required to ensure, at least, the enjoyment of a minimum core content of each right. Failure to comply with the core obligation will amount to a *prima facie* violation of the Covenant. However, in so far as the Committee has not spelt out what it understands to be the minimum core content, or even whether it is a national or international standard, suggests that it has considerable more work to do in this area. Other significant aspects of the Committee's general approach have been its use of the "margin of appreciation" doctrine in evaluating whether or not the course of action taken by the State was "appropriate", and its requirement that certain rights be ensured on an inter-individual level.

As regards the specific rights themselves, however, the Committee has only undertaken an in-depth analysis of the right to housing in article 11. Otherwise, it has tended to interpret the articles in a broad manner without excessive analysis of terminology. On the one hand this has enabled the Committee to view the provisions in a dynamic manner, giving them a relevance and validity in current circumstances that they might not otherwise gain. For example, the Committee has extended the range of grounds upon which distinctions might be considered discriminatory far beyond those actually specified in article 2(2). However, on the other hand, the Committee may be criticised for being too general in its approach and for failing to address the precise terms of the articles with sufficient rigour. A particular example is article 8, which is not only considerably more detailed than other articles and encompasses issues that have been dealt with at length by other bodies, but also contains a number of questions that require clarification. Specifically, there is a need for consideration to be given to the relative scope and operation of the limitations clauses in articles 8(1)(a) and 8(2).



Notwithstanding the generality of its approach, the Committee has made a certain amount of headway with articles 6 to 8 in terms of outlining the scope of the provisions and occasionally addressing important points of concern. For example, the Committee has interpreted the right to work in article 6 as including a right not to be arbitrarily dismissed from employment and a right not to be forced to work. Similarly with respect to article 8 it has made important, if controversial, decisions such as viewing pre-entry closed shop agreements as being in violation of the right to join the trade union of one's choice.

In developing the substance of the rights in articles 6 to 9, it is clear that the Committee will have to make reference to the work of the ILO in the area. Not only is it necessary that there should not be any conflict in standards, but it is also apparent that excessive duplication of the supervisory process would be a waste of time and resources for all parties concerned. The main function of the Committee in the area should be to supplement the protection already offered by the ILO. This means concentrating upon the position of those States that are not party to the relevant ILO Convention or who have persistently failed to take the necessary remedial action.

Even for the Committee to undertake such a limited function, it is necessary for it to develop the necessary expertise. It is somewhat unfortunate in this respect, that the participation of the ILO remains at a minimal level, despite the reformed nature of the Committee. In the absence of adequate assistance from the ILO itself, the Committee will have to adopt alternative strategies for developing the necessary expertise. It has been suggested, for example, that the Committee have greater control over the appointment of its members and that individual members should take on the responsibility for developing expertise in particular subject areas.

As suggested, some of the failings of the Committee as regards its approach to the substance of the articles may be put down to the dynamics of its operation as a supervisory body. In particular one might note the lack of technical expertise within, and available to, the Committee, the inadequate amount of time allowed to the Committee to exercise its functions in an effective manner, the lack of strong Secretariat support and the relatively unfocused nature of the reporting procedure. It appears to be extremely difficult, under present conditions, for the Committee to concentrate upon specific issues of relevance during its consideration of a State report. What is required, is some form of assistance whether in terms of secretariat support or time, even of a temporary nature, that might in effect generate some momentum in the implementation process as a whole.



Notwithstanding the various problems faced by the Committee, the prospects for the future are positive. The Committee has operated for a number of sessions without significant conflict, has adopted a number of important general comments and has begun to make headway in developing the normative content of the rights. In addition, it has one of the most well-developed reporting systems to be found at the universal level and has begun to receive useful assistance from NGOs. The level of confidence within the Committee is perhaps reflected in its recent discussions on the possibility of drafting an Optional Protocol providing for a system of individual complaints. Although the establishment of a complaints system is as yet a distant prospect, it is undoubtedly true that the operation of such a system would have a beneficial effect, not only in terms of improving the protection offered by the Covenant, but also in raising the level of international awareness of the work of the Committee.



## APPENDIX I

### INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

#### PREAMBLE

The States Parties to the present Covenant,

*Considering* that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

*Recognising* that these rights derive from the inherent dignity of the human person,

*Recognising* that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

*Considering* the obligation of States under the Charter of the United Nations to promote universal respect for and observance of, human rights and freedoms,

*Realising* that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant,

*Agree* upon the following articles:

#### PART I

##### *Article 1*

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust



Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

## PART II

### *Article 2*

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

### *Article 3*

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

### *Article 4*

The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of those rights and solely for the purpose of promoting the general welfare in a democratic society.

### *Article 5*

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised herein, or at their limitation to a greater extent than is provided for in the present Covenant.



2. No restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.

### PART III

#### *Article 6*

1. The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

#### *Article 7*

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers as a minimum with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

#### *Article 8*

1. The States Parties to the present Covenant undertake to ensure:
  - (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned,



for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

### *Article 9*

The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.

### *Article 10*

The States Parties to the present Covenant recognise that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to



life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

### *Article 11*

1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

### *Article 12*

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.



### *Article 13*

1. The States Parties to the present Covenant recognise the right of everyon to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right:
  - (a) Primary education shall be compulsory and available free to all;
  - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
  - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
  - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
  - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

### *Article 14*

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education,



free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

### *Article 15*

1. The States Parties to the present Covenant recognise the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

## PART IV

### *Article 16*

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observances of the rights recognised herein.

2. (a) All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;

(b) The Secretary-General of the United Nations shall also transmit to the specialised agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialised agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.



*Article 17*

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialised agencies concerned.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.
3. Where relevant information has previously been furnished to the United Nations or to any specialised agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

*Article 18*

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialised agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

*Article 19*

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialised agencies in accordance with article 18.

*Article 20*

The States Parties to the present Covenant and the specialised agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

*Article 21*

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialised agencies on the measures taken



and the progress made in achieving general observance of the rights recognised in the present Covenant.

#### *Article 22*

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialised agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

#### *Article 23*

The States Parties to the present Covenant agree that international action for the achievement of the rights recognised in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organised in conjunction with the Governments concerned.

#### *Article 24*

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialised agencies which define the respective responsibilities of the various organs of the United Nations and of the specialised agencies in regard to the matters dealt with in the present Covenant.

#### *Article 25*

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources.

### **PART V**

#### *Article 26*

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialised agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of



ratification shall be deposited with the Secretary-General of the United Nations.

3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.

4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

#### *Article 27*

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.

2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

#### *Article 28*

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

#### *Article 29*

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendments adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.

3. When amendments come into force they shall be binding on those



bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

*Article 30*

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph 1 of the same article of the following particulars:

- (a) Signatures, ratifications and accessions under article 26;
- (b) The date of entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

*Article 31*

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.



## APPENDIX II

### STATES PARTIES TO THE COVENANT ON ECONOMIC SOCIAL AND CULTURAL RIGHTS

<u>Participant</u>	<u>Signature</u>	<u>Ratification</u> <u>Accession (a)</u> <u>Succession (d)</u>
Afghanistan		24 Jan. 1983(a)
Albania		4 Oct. 1991(a)
Algeria	10 Dec. 1968	12 Sep. 1989
Argentina	19 Feb. 1968	8 Aug. 1986
Australia	18 Dec. 1972	10 Dec. 1975
Austria	10 Dec. 1973	10 Dec. 1973
Barbados		5 Jan. 1973(a)
Belarus	19 Mar. 1968	12 Nov. 1973
Belgium	10 Dec. 1968	21 Apr. 1983
Bolivia		12 Aug. 1982(a)
Bulgaria	8 Oct. 1968	21 Sep. 1970
Burundi		9 May 1990
Cameroon		27 Jun. 1984(a)
Canada		19 May 1976(a)
Central African Republic		8 May 1976(a)
Chile	16 Sep. 1969	10 Feb. 1972
Colombia	21 Dec. 1966	29 Oct. 1969
Congo		5 Oct. 1983(a)
Costa Rica	19 Dec. 1966	29 Nov. 1968
Cyprus	9 Jan. 1967	2 Apr. 1969
Czech and Slovak Republic	7 Oct. 1968	23 Dec. 1975
Democratic People's Republic of Korea		14 Sep. 1981(a)
Denmark	20 Mar. 1968	6 Jan. 1972
Dominican Republic		4 Jan. 1978(a)
Ecuador	29 Sep. 1967	6 Mar. 1969
Egypt	4 Aug. 1967	14 Jan. 1982
El Salvador	21 Sep. 1967	30 Nov. 1979
Equatorial Guinea		25 Sep. 1987(a)
Estonia		21 Oct. 1991(a)
Finland	11 Oct. 1967	19 Aug. 1975



<u>Participant</u>	<u>Signature</u>	<u>Ratification</u> <u>Accession (a)</u> <u>Sucession (d)</u>
France		4 Nov. 1980(a)
Gabon		21 Jan. 1983(a)
Gambia		29 Dec. 1978(a)
Germany	9 Oct. 1968	17 Dec. 1973
Greece		16 May 1985(a)
Grenada		6 Sep. 1991(a)
Guatemala		19 May 1988(a)
Guinea	28 Feb. 1967	24 Jan. 1978
Guyana	22 Aug. 1968	15 Feb. 1977
Honduras	19 Dec. 1966	17 Feb. 1981
Hungary	25 Mar. 1969	17 Jan. 1974
Iceland	30 Dec. 1968	22 Aug. 1979
India		10 Apr. 1979(a)
Iran (Islamic Republic of)	4 Apr. 1968	24 Jun. 1975
Iraq	18 Feb. 1969	25 Jan. 1971
Ireland	1 Oct. 1973	8 Dec. 1989
Israel	19 Dec. 1966	3 Oct. 1991
Italy	18 Jan. 1967	15 Sep. 1978
Jamaica	19 Dec. 1966	3 Oct. 1975
Japan	30 May 1978	21 Jun. 1979
Jordan	30 Jun. 1972	28 May 1975
Kenya		1 May 1972(a)
Lebanon		3 Nov. 1972(a)
Libyan Arab Republic		15 May 1970(a)
Lithuania		20 Nov. 1991(a)
Luxembourg	26 Nov. 1974	18 Aug. 1983
Madagascar	14 Apr. 1970	22 Sep. 1971
Mali		16 Jul. 1974(a)
Malta	22 Oct. 1968	13 Sep. 1990
Mauritius		12 Dec. 1973(a)
Mexico		23 Mar. 1981(a)
Mongolia	5 Jun. 1968	18 Nov. 1974
Morocco	19 Jan. 1977	3 May 1979
Nepal		14 May 1991(a)
Netherlands	25 Jun. 1969	11 Dec. 1978
New Zealand	12 Nov. 1968	28 Dec 1978
Nicaragua		12 Mar. 1980(a)
Niger		7 Mar. 1986(a)



<u>Participant</u>	<u>Signature</u>	<u>Ratification</u> <u>Accession (a)</u> <u>Succession (d)</u>
Norway	20 Mar. 1968	13 Sep. 1972
Panama	27 Jul. 1976	8 Mar. 1977
Peru	11 Aug. 1977	28 Apr. 1978
Philippines	19 Dec. 1966	7 Jun. 1974
Poland	2 Mar. 1967	18 Mar. 1977
Portugal	7 Oct. 1976	31 Jul. 1978
Republic of Korea		10 Apr. 1990(a)
Romania	27 Jun. 1968	9 Dec. 1974
Rwanda		16 Apr. 1975(a)
St Vincent and the Grenadines		9 Nov. 1981(a)
San Marino		18 Oct. 1985(a)
Senegal	6 Jul 1970	13 Feb. 1978
Solomon Islands		17 Mar. 1982(d)
Somalia		24 Jan. 1990(a)
Spain	28 Sep. 1976	27 Apr. 1977
Sri Lanka		11 Jun. 1980(a)
Sudan		18 Mar. 1986(a)
Suriname		28 Dec. 1976(a)
Sweden	29 Sep 1967	6 Dec. 1971
Syrian Arab Republic		21 Apr. 1969(a)
Togo		24 May 1984(a)
Trinidad and Tobago		8 Dec. 1978(a)
Tunisia	30 Apr. 1968	18 Mar. 1969
Uganda		21 Jan. 1987(a)
Ukraine	20 Mar. 1968	12 Nov. 1973
U.S.S.R.	18 Mar. 1968	16 Oct. 1973
United Kingdom	16 Sep. 1968	20 May 1976
United Republic of Tanzania		11 Jun. 1976(a)
Uruguay	21 Feb. 1967	1 Apr. 1970
Venezuela	24 Jun. 1969	10 May 1978
Viet Nam		24 Sep. 1982(a)
Yemen		9 Feb. 1987(a)
Yugoslavia	8 Aug. 1967	2 Jun. 1971
Zaire		1 Nov. 1976(a)
Zambia		10 Apr. 1984(a)
Zimbabwe		13 May 1991(a)



The following States have signed but not ratified:

Cambodia	17 Oct. 1980
Liberia	18 Apr. 1967
U.S.A.	5 Oct. 1977



## APPENDIX III

### MEMBERSHIP OF THE COMMITTEE

#### CURRENT MEMBERS

Mr P.ALSTON (Australia):	1987- (re-elected 1990).
Mr J.ALVAREZ VITA (Peru):	1987- (re-elected 1988)
Mr A.H.BADAWI(Egypt):	1991-
Mrs V.BONOAN-DANDAM(Philippines):	1991-
Mr M.L.FOFANA (Guinea):	1987- (re-elected 1988)
Mrs L.IDER (Mongolia):	1991-
Mrs M.JIMENEZ BUTRAGUENO(Spain):	1987- (re-elected 1988)
Mr S.C.KONATE (Senegal):	1987- (re-elected 1988)
Mr V.KOUZNETSOV (U.S.S.R.):	1989- (re-elected 1990)
Mr J.A.MARCHAN ROMERO (Ecuador):	1987- (re-elected 1990)
Mr V.MRACHKOV (Bulgaria):	1987- (re-elected 1988)
Mr A.MUTERAHEJURU (Rwanda):	1987- (re-elected 1990)
Mr W.NENEMAN (Poland):	1987- (re-elected 1988)
Mr K.O.RATTRAY (Jamaica):	1987- (re-elected 1988)
Mr B.SIMMA (F.R.G.):	1987- (re-elected 1990)
Mr M.D.SPARSIS (Cyprus):	1987- (re-elected 1988)
Mr P.TEXIER (France):	1987- (re-elected 1988)
Mr J.WIMER ZAMBRANO (Mexico):	1987- (re-elected 1990)

#### PREVIOUS MEMBERS

Mr I.BADAWI EL SHEIKH (Egypt):	1987-1990.
Mr A.DAOUDI (Syrian Arab Republic):	1987-1988.(resigned)
Mr S.GLAIEL (Syrian Arab Republic):	1989-1990.
Mr E.P.SVIRIDOV (U.S.S.R.):	1987-1988.(resigned)
Ms C.TAYA (Japan):	1987-1990.



## APPENDIX IV

### GENERAL COMMENT No.1 (1989)

#### Reporting by States Parties

1. The reporting obligations which are contained in part IV of the Covenant are designed principally to assist each State party in fulfilling its obligations under the Covenant and, in addition, to provide a basis on which the Council, assisted by the Committee, can discharge its responsibilities for monitoring States parties' compliance with their obligations and for facilitating the realisation of economic, social and cultural rights in accordance with the provisions of the Covenant. The Committee considers that it would be incorrect to assume that reporting is essentially only a procedural matter designed solely to satisfy each State party's formal obligation to report to the appropriate international monitoring body. On the contrary, in accordance with the letter and spirit of the Covenant, the processes of preparation and submission of reports by States can, and indeed should, serve to achieve a variety of objectives.

2. A first objective, which is of particular relevance to the initial report required to be submitted within two years of the Covenant's entry into force for the State party concerned, is to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant. Such a review might, for example, be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy-making and implementation in the different fields covered by the Covenant.

3. A second objective, is to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within the territory or under its jurisdiction. From the Committee's experience to date, it is clear that the fulfilment of this objective cannot be achieved only by the preparation of aggregate national statistics or estimates, but also requires that special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged. Thus, the essential first step towards promoting the realisation of economic, social and cultural rights is diagnosis and knowledge of the existing situation. The



Committee is aware that this process of monitoring and gathering information is a potentially time-consuming and costly one and that international assistance and co-operation, as provided for in article 2, paragraph 1 and articles 22 and 23 of the Covenant, may well be an integral part of any process designed to promote accepted goals of public policy and is indispensable to the effective implementation of the Covenant, it may note that this fact in its report to the Committee and indicate the nature and extent of any international assistance that it may need.

4. While monitoring is designed to give a detailed overview of the existing situation, the principal value of such an overview is to provide the basis of the elaboration of clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant. Therefore, a third objective of the reporting process is to enable the Government to demonstrate that such principled policy-making has in fact been undertaken. While the Covenant makes this obligation explicit only in article 14 in cases where "compulsory primary education, free of charge" has not yet been secured for all, a comparable obligation "to work out and adopt a detailed plan of action for the progressive implementation" of each of the rights contained in the Covenant is clearly implied by the obligation in article 2, paragraph 1 "to take steps... by all appropriate means..."

5. A fourth objective of the reporting process is to facilitate public scrutiny of government policies with respect to economic, social and cultural rights and to encourage the involvement of the various economic, social and cultural sectors of society in the formulation, implementation and review of the relevant policies. In examining reports submitted to it to date, the Committee has welcomed the fact that a number of States parties, reflecting different political and economic systems, have encouraged inputs by such non-governmental groups into the preparation of their reports under the Covenant. Other States have ensured the widespread dissemination of their reports with a view to enabling comments to be made by the public at large. In these ways, the preparation of the report, and its consideration at the national level can come to be of at least as much value as the constructive dialogue conducted at the international level between the Committee and representative of the reporting State.

6. A fifth objective is to provide a basis on which the State party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realisation of the obligations contained in the Covenant. For this purpose, it may be useful for States



to identify specific bench-marks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health care provider, etc. In many of these areas, global bench-marks are of limited use, whereas national or other more specific bench-marks can provide and extremely valuable indication of progress.

7. In this regard, the Committee wishes to note that the Covenant attaches particular importance to the concept of "progressive realisation" of the relevant rights and, for that reason, the Committee urges States parties to include in their periodic reports information which shows the progress over time, with respect to the effective realisation of the relevant rights. By the same token, it is clear that qualitative, as well as quantitative, data are required in order for an adequate assessment of the situation to be made.

8. A sixth objective is to enable the State party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realise progressively the full range of economic, social and cultural rights. For this reason, it is essential that States parties report in detail on the "factors and difficulties" inhibiting such realisation. This process of identification and recognition of the relevant difficulties then provides the framework within which more appropriate policies can be devised.

9. A seventh objective is to enable the Committee, and the States parties as a whole, to facilitate the exchange of information among States and to develop a better understanding of the common problems faced by States and a fuller appreciation of the type of measures which might be taken to promote effective realisation of each of the rights contained in the Covenant. This part of the process also enables the Committee to identify the most appropriate means by which the international community might assist States, in accordance with articles 22 and 23 of the Covenant. In order to underline the importance which the Committee attaches to this objective, a separate general comment on those articles will be discussed by the Committee at its fourth session.



## GENERAL COMMENT No.2 (1990)

### International Technical Assistance Measures (Article 22 of the Covenant)

1. Article 22 of the Covenant establishes a mechanism by which the Economic and Social Council may bring to the attention of relevant United Nations bodies any matters arising out of reports submitted under the Covenant "which may assist such bodies in deciding, each within the field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the... Covenant". While the primary responsibility under Article 22 is vested in the Council, it is clearly appropriate for the Committee on Economic, Social and Cultural Rights to play an active role in advising and assisting the Council in this regard.
  
2. Recommendations in accordance with Article 22 may be made to any "organs of the United Nations, their subsidiary organs and specialised agencies concerned with furnishing technical assistance". The Committee considers that this provision should be interpreted so as to include virtually all United Nations organs and agencies involved in any aspect of international development co-operation. It would therefore be appropriate for recommendations in accordance with Article 22 to be addressed, *inter alia*, to the Secretary-General, subsidiary organs of the Council such as the Commission on the Status of Women, other bodies such as UNDP, UNICEF and CDP, agencies such as the World Bank and IMF, and any of the other specialised agencies such as ILO, FAO, UNESCO and WHO.
  
3. Article 22 could lead either to recommendations of a general policy nature or to more narrowly focused recommendations relating to a specific situation. In the former context, the principal role of the Committee would seem to be to encourage greater attention to efforts to promote economic, social and cultural rights within the framework of international development co-operation activities undertaken by, or with the assistance of, the United Nations and its agencies. In this regard the Committee notes that the Commission on Human Rights, in its resolution 1989/13 of 2 March 1989, invited it "to give consideration to means by which the various United Nations agencies working in the field of development could best integrate measures designed to promote full respect for economic, social and cultural rights in their activities".
  
4. As a preliminary practical matter, the Committee notes that its own endeavours would be assisted, and the relevant agencies would also be



better informed, if they were to take a greater interest in the work of the Committee. While recognising that such an interest can be demonstrated in a variety of ways, the Committee observes that attendance by representatives of the appropriate United Nations bodies at its first four sessions has, with the notable exceptions of ILO, UNESCO and WHO, been very low. Similarly, pertinent materials and written information had been received from only a very limited number of agencies. The Committee considers that a deeper understanding of the relevance of economic, social and cultural rights in the context of international development co-operation activities would be considerably facilitated through greater interaction between the Committee and the appropriate agencies. At the very least, the day of general discussion on a specific issue, which the Committee undertakes at each of its sessions, provides an ideal context in which a potentially productive exchange of views can be undertaken.

5. On the broader issues of the promotion of respect for human rights in the context of development activities, the Committee has so far seen only rather limited evidence of specific efforts by United Nations bodies. It notes with satisfaction in this regard the initiative taken jointly by the Centre for Human Rights and UNDP in writing to United Nations Resident Representatives and other field-based officials, inviting their "suggestions and advice, in particular with respect to possible forms of co-operation in on-going projects [identified] as having a human-rights dimension or in new ones in response to a specific Government's request". The Committee has also been informed of longstanding efforts undertaken by ILO to link its own human rights and other international labour standards to its technical co-operation activities.

6. With respect to such activities, two general principles are important. The first is that the two sets of human rights are indivisible and interdependent. This means that efforts to promote one set of rights should also take full account of the other. United Nations agencies involved in the promotion of economic, social and cultural rights should do their utmost to ensure that their activities are fully consistent with the enjoyment of civil and political rights. In negative terms this means that the international agencies should scrupulously avoid involvement in projects which, for example, involve the use of forced labour in contravention of international standards, or promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant, or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. In positive terms, it means that, wherever possible, the



agencies should act as advocates of projects and approaches which contribute not only to economic growth or other broadly-defined objectives, but also to enhanced enjoyment of the full range of human rights.

7. The second principle of general relevance is that development co-operation activities do not automatically contribute to the promotion of respect for economic, social and cultural rights. Many activities undertaken in the name of "development" have subsequently been recognised as ill-conceived and even counter-productive in human rights terms. In order to reduce the incidence of such problems, the whole range of issues dealt with in the Covenant should, wherever possible and appropriate, be given specific and careful consideration.

8. Despite the importance of seeking to integrate human rights concerns into development activities, it is true that proposals for such integration can too easily remain at a level of generality. Thus, in an effort to encourage the operationalisation of the principle contained in article 22 of the Covenant, the Committee wishes to draw attention to the following specific measures which merit consideration by the relevant bodies:

(a) As a matter of principle, the appropriate United Nations organs and agencies should specifically recognise the intimate relationship which should be established between development activities and efforts to promote respect for human rights in general, and economic, social and cultural rights in particular. The Committee notes in this regard the failure of each of the first three United Nations Development Decade Strategies to recognise that relationship and urges that the fourth such strategy, to be adopted in 1990, should rectify that omission;

(b) Consideration should be given by United Nations agencies to the proposal, made by the Secretary-General in a report of 1979,<sup>1</sup> that a "human rights impact statement" be required to be prepared in connection with all major development co-operation activities;

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<sup>1</sup> "The international dimensions of the right to development as a human right in relation to other human rights based on international co-operation, including the right to peace, taking into account the requirements of the new international economic order and the fundamental human needs" (E/CN.4/1334, para.314).



(c) The training of briefing given to project and other personnel employed by United Nations agencies should include a component dealing with human rights standards and principles.

(d) Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenants are duly taken into account. This would apply, for example, in the initial assessment of the priority needs of a particular country, in the identification of particular projects, in project design, in the implementation of the project, and in its final evaluation.

9. A matter which has been of particular concern to the Committee in the examination of the reports of States parties is the adverse impact of the debt burden and of the relevant adjustment measures on the enjoyment of economic, social and cultural rights in many countries. The Committee recognises that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as "adjustment with a human face" or as promoting "the human dimension of development" requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, *inter alia*, international co-operation. In many situations, this might point to the need for major debt relief initiatives.

10. Finally, the Committee wishes to draw attention to the important opportunity provided to States parties, in accordance with article 22 of the Covenant, to identify in their reports any particular needs they might have for technical assistance or development co-operation.



### GENERAL COMMENT No.3 (1990)

#### The Nature of States Parties Obligations (art.2, para.1 of the Covenant)

1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general legal obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result. While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the International Covenant on Civil and Political Rights, it is not always recognised that there are also significant similarities. In particular, while the Covenant provides for progressive realisation and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect. Of these, two are of particular importance in understanding the precise nature of States parties obligations. One of these, which is dealt with in a separate General Comment, and which is to be considered by the Committee at its sixth session, is the "undertaking to guarantee" that relevant rights "will be exercised without discrimination...".

2. The other is the undertaking in article 2(1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps", in French it is "to act" ("s'engage à agir") and in Spanish it is "to adopt measures" ("a adoptar medidas"). Thus while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant.

3. The means which should be used in order to satisfy the obligation to take steps are stated in article 2(1) to be "all appropriate means, including particularly the adoption of legislative measures". The Committee recognises that in many instances legislation is highly desirable and in some cases may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. In fields such as health, the protection of children and mothers, and education, as well



as in respect of the matters dealt with in articles 6 to 9, legislation may also be an indispensable element for many purposes.

4. The Committee notes that States parties have generally been conscientious in detailing at least some of the legislative measures that they have taken in this regard. It wishes to emphasise, however, that the adoption of legislative measures, as specifically foreseen by the Covenant, is by no means exhaustive of the obligations of States parties. Rather, the phrase "by all appropriate means" must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the "appropriateness" of the means chosen will not always be self-evident. It is therefore desirable that States parties reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most "appropriate" under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make.

5. Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognised, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3) 3 and 26 of that Covenant) to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognised in that Covenant are violated, "shall have an effective remedy" (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7(a)(i), 8, 10(3), 13(2)(a), (3) and (4) and 15(3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.

6. Where specific policies aimed directly at the realisation of the rights recognised in the Covenant have been adopted in legislative form, the Committee would wish to be informed, *inter alia*, as to whether such laws create any right of action on behalf of individuals or groups who feel that their rights are not being fully realised. In cases where



constitutional recognition has been accorded to specific economic, social and cultural rights, or where the provisions of the Covenant have been incorporated directly into national law, the Committee would wish to receive information as to the extent to which these rights are considered to be justiciable (i.e. able to be invoked before the courts). The Committee would also wish to receive specific information as to any instances in which existing constitutional provisions relating to economic, social and cultural rights have been weakened or significantly changed.

7. Other measures which may also be considered "appropriate" for the purposes of article 2(1) include, but are not limited to, administrative, financial, educational and social measures.

8. The Committee notes that the undertaking "to take steps... by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a, socialist or a capitalist system, or a mixed, centrally planned, or *laissez-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognised in the Covenant are susceptible of realisation within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognised and reflected in the system in question. The Committee also notes the relevance in this regard of other human rights and in particular the right to development.

9. The principal obligation of result reflected in article 2(1) is to take steps "with a view to achieving progressively the full realisation of the rights recognised" in the Covenant. The term "progressive realisation" is often used to describe the intent of this phrase. The concept of progressive realisation constitutes a recognition of the fact that full realisation of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realisation over time, or in other words



progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties reports the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

11. The Committee wishes to emphasise, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. Moreover, the obligations to monitor the extent of the realisation, or more especially of the non-realisation, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any



way eliminated as a result of resource constraints. The Committee has already dealt with these issues in its General Comment No.1 (1989).

12. Similarly, the Committee underlines the fact that even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled "Adjustment With a Human Face: Protecting the Vulnerable and Promoting Growth",<sup>2</sup> the analysis by UNDP in its Human Development Report 1990<sup>3</sup> and the analysis by the World Bank in the World Development Report 1990.<sup>4</sup>

13. A final element of article 2(1), to which attention must be drawn, is that the undertaking given by all States parties is "to take steps, individually and through international assistance and co-operation, especially economic and technical...". The Committee notes that the phrase "to the maximum of its available resources" was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international co-operation and assistance. Moreover, the essential role of such co-operation in facilitating the full realisation of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23. With respect to article 22 the Committee has already drawn attention, in General Comment No.2 (1990), to some of the opportunities and responsibilities that exist in relation to international co-operation. Article 23 also specifically identifies "the furnishing of technical assistance" as well as other activities, as being among the means of "international action for the achievement of the rights recognised...".

14. The Committee wishes to emphasise that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international co-operation for development and thus for the realisation of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a

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<sup>2</sup> Cornia G., Jolly R. and Stewart F.(eds), (Oxford: Clarendon Press, 1987).

<sup>3</sup> Oxford, Oxford University Press, 1990.

<sup>4</sup> Oxford, Oxford University Press, 1990.



position to assist others in this regard. The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognised therein. It emphasises that, in the absence of an active programme of international assistance and co-operation on the part of all those States that are in a position to undertake one, the full realisation of economic, social and cultural rights will remain an unfulfilled aspiration in many countries. In this respect, the Committee also recalls the terms of its General Comment No.2 (1990).



## GENERAL COMMENT No.4 (1991)

### The Right to Adequate Housing (Article 11(1) of the Covenant)

1. Pursuant to article 11(1) of the Covenant, States parties "recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.

2. The Committee has been able to accumulate a large amount of information pertaining to this right. Since 1979, the Committee and its predecessors have examined 75 reports dealing with the right to adequate housing. The Committee has also devoted a day of general discussion to the issues at each of its third (see E/1989/22, para.312) and fourth sessions (E/1993, paras.281-285). In addition, the Committee has taken careful note of information generated by the International Year of Shelter for the Homeless (1987) including the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987.<sup>5</sup> The Committee has also reviewed the relevant reports and other documentation of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>6</sup>

3. Although a wide variety of international instruments address the different dimensions of the right to adequate housing<sup>7</sup> article 11(1) of

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<sup>5</sup> Official Records of the General Assembly, Forty-third Session, Supplement No.8, addendum (A/43/8/Add.1).

<sup>6</sup> Commission on Human Rights resolutions 1986/36 and 1987/22; reports by Mr Danilo Türk, Special Rapporteur of the Subcommission (E/CN.4/Sub.2/1990/19, paras. 108-120; E/CN.4/Sub.2/1991/17, paras. 137-139); see also Subcommission resolution 1991/26.

<sup>7</sup> See, for example, article 25(1) of the Universal Declaration on Human Rights, article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14(2) of the Convention on the Elimination of All Forms of Discrimination Against Women, article 27(3) of the Convention on the Rights of the Child, article 10 of the Declaration on Social Progress and Development, section III (8) of the Vancouver Declaration on Human Settlements, 1976 (Report of Habitat: United Nations Conference on Human Settlements (United Nations publication, Sales No.E.76.IV.7 and corrigendum), chap I), article 8(1) of the Declaration on the Right to



the Covenant is the most comprehensive and perhaps the most important of the relevant provisions.

4. Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11(1) of the Covenant and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resource and other constraints, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed.<sup>8</sup> There is no indication that this number is decreasing. It seems clear that no State party is free of significant problems of one kind or another in relation to the right to housing.

5. In some instances, the reports of States parties examined by the Committee have acknowledged and described difficulties in ensuring the right to adequate housing. For the most part, however, the information provided has been insufficient to enable the Committee to obtain an adequate picture of the situation prevailing in the State concerned. This General Comment thus aims to identify some of the principal issues which the Committee considers to be important in relation to this right.

6. The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of "family" must be understood in a wide sense. Further, individuals, as well as families are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article 2(2) of the Covenant, not be subject to any form of discrimination.

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Development and the ILO Recommendation Concerning Workers' Housing, 1961 (No.115).

<sup>8</sup> See footnote 1.



7. In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. Thus "the inherent dignity of the human person" from which the rights in the Covenant are said to derive requires that the term "housing" be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11(1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means... adequate privacy, adequate privacy, adequate space, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities- all at a reasonable cost".

8. Thus the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute "adequate housing" for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) Legal Security of Tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;



(b) Availability of Services, Materials, Facilities and Infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) Affordability. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) Habitability. Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing<sup>9</sup> prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(e) Accessibility. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs

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<sup>9</sup> Geneva, World Health Organisation, 1990.



of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) Location. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) Cultural Adequacy. The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernisation in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, *inter alia*, modern technological facilities, as appropriate are also ensured.

9. As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other right- such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making- is indispensable if the right to adequate housing is to be realised and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.

10. Regardless of the state of development of any country, there are certain steps which must be taken immediately. As recognised in the Global Strategy for Shelter and in other international analyses, many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitate "self-help" by affected groups. To the extent that any such steps are considered to be beyond the maximum resources



available to a State party, it is appropriate that a request be made as soon as possible for international cooperation in accordance with articles 11(1), 22 and 23 of the Covenant, and that the Committee be informed thereof.

11. States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others. The Committee is aware that external factors can affect the right to a continuous improvement of living conditions, and that in many States parties overall living conditions declined during the 1980s. However, as noted by the Committee in its General Comment No.2 (1990) (E/1990/23, annex III), despite externally caused problems, the obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction. It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.

12. While the most appropriate means of achieving the full realisation of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy which, as stated in paragraph 32 of the Global Strategy for Shelter, "defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of the necessary measures". Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives. Furthermore, steps should be taken to ensure coordination between ministries and regional and local authorities in order to reconcile related policies (economics, agriculture, environment, energy, etc.) with the obligations under article 11 of the Covenant.

13. Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a State party to satisfy its



obligations under article 11(1) it must demonstrate, *inter alia*, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction. In this regard, the revised general guidelines regarding the form and contents of reports adopted by the Committee (E/C.12/1991/1) emphasise the need to "provide detailed information about those groups within... society that are vulnerable and disadvantaged with regard to housing". They include, in particular, homeless persons and families, those inadequately housed and without ready access to basic amenities, those living in "illegal" settlements, those subject to forced evictions and low-income groups.

14. Measures designed to satisfy a State party's obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. While in some States public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing. The promotion by States parties of "enabling strategies", combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged. In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the maximum of available resources.

15. Many of the measures that will be required will involve resource allocations and policy initiatives of a general kind. Nevertheless, the role of formal legislative and administrative measures should not be underestimated in this context. The Global Strategy for Shelter (paras.66-67) has drawn attention to the types of measures that might be taken in this regard and to their importance.

16. In some States, the right to adequate housing is constitutionally entrenched. In such cases the Committee is particularly interested in learning of the legal and practical significance of such an approach. Details of specific cases and of other ways in which entrenchment has proved helpful should thus be provided.

17. The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of



court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

18. In this regard, the Committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

19. Finally, article 11(1) concludes with the obligation of States parties to recognise "the essential importance of international cooperation based on free consent". Traditionally, less than 5 per cent of all international assistance has been directed towards housing or inhuman settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups. States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. States parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. Such requests should take full account of the needs and views of the affected groups.



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