

would seem to require that the State structure allowed for the existence of more than one trade union,¹¹⁷ and the non-discrimination provisions arguably require the separation of the Church and State.¹¹⁸ 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.¹¹⁹ 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."¹²⁰

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.¹²¹ Although the final text does not contain any reference to democratic government, there appears to have been agreement as to that interpretation.¹²² 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.¹²³

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

¹¹⁷ 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.

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

¹¹⁹ 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.

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

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

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

¹²³ 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.¹²⁴ 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.¹²⁵ 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".¹²⁶

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.¹²⁷

This view seems to have been adopted by the Committee. As in the case of the Working Group,¹²⁸ 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

¹²⁴ 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).

¹²⁵ 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).

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

¹²⁷ See above, text accompanying notes 1-3.

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

administrative remedies.¹²⁹ 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".¹³⁰

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.¹³¹ Legislation might also become obligatory if alternative measures undertaken by the State such as education or persuasion were manifestly ineffective.¹³² 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.¹³³ 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".¹³⁴

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

¹²⁹ 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.

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

¹³¹ Limburg Principle 18, *supra*, note 54, at 125.

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

¹³³ 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.

¹³⁴ 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.¹³⁵ 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,¹³⁶ was not necessarily adequate to secure the rights effectively.¹³⁷ 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".¹³⁸

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.¹³⁹ This has been expressly recognised by the Committee, which commented that:

¹³⁵ Tomuschat, *supra*, note 85, at 42.

¹³⁶ With the implicit limitations above.

¹³⁷ 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).

¹³⁸ Cassin (France), E/CN.4/SR.232, at 11 (1951).

¹³⁹ 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."¹⁴⁰

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.¹⁴¹ 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).¹⁴² 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.¹⁴³

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

¹⁴⁰ General Comment No.3, *supra*, note 5, at 84, para.4.

¹⁴¹ 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.

¹⁴² *See below*, Chapter 7.

¹⁴³ 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.¹⁴⁴ In addition, the State should provide information on the progress made in the practical implementation of the rights.¹⁴⁵

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.¹⁴⁶ 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

¹⁴⁴ 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.

¹⁴⁵ 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.

¹⁴⁶ 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))."¹⁴⁷

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".¹⁴⁸ These include articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3).¹⁴⁹

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.¹⁵⁰ 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

¹⁴⁷ General Comment No.3, *supra*, note 5, at 84, para.5.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ 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.¹⁵¹ 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.¹⁵² 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.¹⁵³ 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".¹⁵⁴ 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".¹⁵⁵

The Committee itself has noted that the principal obligation of result in article 2(1) is the "full realisation" of the rights.¹⁵⁶ That this objective is conditioned by the phrase "progressive realisation" is merely a recognition of the fact that "the full

¹⁵¹ 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.

¹⁵² 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).

¹⁵³ *See*, Sparsis, E/C.12/1988/SR.9, at 5, para.26.

¹⁵⁴ Cassin (France), E/CN.4/SR.223, at 8, (1951).

¹⁵⁵ *Ibid*, E/CN.4/SR.237, at 7 (1952).

¹⁵⁶ 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".¹⁵⁷ Although reference has occasionally been made to the need to establish an understanding of the "ideal situation",¹⁵⁸ 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",¹⁵⁹ and that "the realization of those rights did not stop at a given level".¹⁶⁰ This is reflected particularly in article 11 which refers to "the continuous improvement of living conditions".¹⁶¹ 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,

¹⁵⁷ *Ibid.*

¹⁵⁸ Taya, E/C.12/1990/SR.4, at 2, para.2.

¹⁵⁹ Sorensen (Denmark), E/CN.4/SR.236, at 21 (1951).

¹⁶⁰ Mr Whitlam (Australia), E/CN.4/SR.237, at 5 (1951).

¹⁶¹ 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.¹⁶² 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,¹⁶³ 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.¹⁶⁴ 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.¹⁶⁵ Considerable debate has centred upon whether the obligation in the ICCPR is in itself immediate.¹⁶⁶ Particular emphasis has been placed upon the

¹⁶² With regard to the ECHR *see*, Tyrrer Case, Eur.Court H.R., Series A, Vol.26, Judgement of April 25 1978, (1979-80) 2 EHRR 1.

¹⁶³ African Charter on Human Rights and Peoples' Rights (1981), 21 I.L.M. 59.

¹⁶⁴ 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.

¹⁶⁵ *See*, Buergenthal, *supra*, note 20.

¹⁶⁶ 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".¹⁶⁷

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.¹⁶⁸

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,¹⁶⁹ 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

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).

¹⁶⁷ Alston and Quinn, *supra*, note 6, at 172.

¹⁶⁸ 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.

¹⁶⁹ 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 indefinitely¹⁷⁰ or entirely avoid their obligations.¹⁷¹ The majority however did not agree with this view; it was felt that implementation should be continued "without respite"¹⁷² so that full realization could be achieved "as quickly as possible".¹⁷³ 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."¹⁷⁴

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,¹⁷⁵ and indeed they must take the course which would achieve that objective in the shortest possible time.

¹⁷⁰ UN Doc. A/2929, *supra*, note 61, at 20.

¹⁷¹ 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).

¹⁷² 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.

¹⁷³ 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).

¹⁷⁴ General Comment No.3, *supra*, note 10, at 85.

¹⁷⁵ *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."¹⁷⁶

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

¹⁷⁶ 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,¹⁷⁷ 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 States¹⁷⁸ was opposed by the view that each State must ensure the rights "except in circumstances where retarded economic development made that impossible".¹⁷⁹ 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.¹⁸⁰

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.¹⁸¹ Indeed it has been unwilling to

¹⁷⁷ In addition, States will have to overcome matters such as existing structural impediments within the social and economic system and personal ignorance and prejudice.

¹⁷⁸ *E.g.* Lebanon, UN Doc. E/CN.4/SR.271, at 11 (1952).

¹⁷⁹ 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.

¹⁸⁰ 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).

¹⁸¹ *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.¹⁸²

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,¹⁸³ ageing populations¹⁸⁴ and rising unemployment¹⁸⁵ can represent significant problems for developed countries.¹⁸⁶ The dynamic approach of the Committee as to the objectives in the Covenant¹⁸⁷ has led it to require information on the "progress made"¹⁸⁸ 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

¹⁸² 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.

¹⁸³ The Committee expressed some concern over the expense of social welfare institutions in Sweden. E/C.12/1988/SR.9.

¹⁸⁴ 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.

¹⁸⁵ See, Sparsis, E/C.12/1987/SR.14, at 9, para.30.

¹⁸⁶ E.g. Sparsis, E/C.12/1988/SR.10, at 4, para.13.

¹⁸⁷ See below, text accompanying notes 159-162.

¹⁸⁸ 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.¹⁸⁹ Similarly the obligation to "guarantee" suggests an undertaking considerably more stringent than that found in article 2(1).¹⁹⁰ 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).¹⁹¹

¹⁸⁹ 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.

¹⁹⁰ 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).

¹⁹¹ 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).¹⁹² 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".¹⁹³ 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.¹⁹⁴ 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,

¹⁹² General Comment No.3, *supra*, note 10, at 84, para.5.

¹⁹³ 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).

¹⁹⁴ 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 10,¹⁹⁵ and specifically to the right to enter into marriage with full and free consent.¹⁹⁶ 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.¹⁹⁷ It was merely a recognition of the fact that many States did not have sufficient

¹⁹⁵ Reporting Guidelines, UN Doc.E/1991/23, Annex IV, 98-99, UN ESCOR, Supp.(No.3), (1991).

¹⁹⁶ *Ibid*, at 97.

¹⁹⁷ *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.¹⁹⁸ In particular it has found itself bound to use different yardsticks to judge the efforts of States with varying economic circumstances.¹⁹⁹ It has thus resorted to the use of national benchmarks as an initial indicator of State compliance with the obligations in the Convention.²⁰⁰ As such, States are given a degree of discretion in the assessment of what resources are available.²⁰¹ 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.²⁰²

It was apparent even in the drafting of the Covenant that a State's resources were not limited merely to those which it

¹⁹⁸ 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.

¹⁹⁹ 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).

²⁰⁰ See e.g. Rattray, E/C.12/1989/SR.19, at 7, para.41.

²⁰¹ See above, note 59.

²⁰² Such a view has been criticised by Alston and Quinn, *supra*, note 6, at 178-9.

provided for the purpose.²⁰³ 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.²⁰⁴ 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.²⁰⁵ However the various demands for public expenditure obviously have to be carefully weighed, a process in which the Committee would seem reluctant to interfere.²⁰⁶ 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.²⁰⁷

²⁰³ 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).

²⁰⁴ 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).

²⁰⁵ 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.

²⁰⁶ *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.

²⁰⁷ 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.²⁰⁸ It has questioned the increase in spending in other sectors such as defence²⁰⁹ 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.²¹⁰ 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.²¹¹

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.²¹² In addition it is considered that a State is under an obligation to seek international assistance in times of crisis.²¹³ 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.²¹⁴ It has adopted the

the need to assure to everyone the satisfaction of subsistence requirements as well as the provision of essential services."

Supra, note 54, at 26.

²⁰⁸ See e.g., Alston, E/C.12/1988/SR.17, at 7, para.44.

²⁰⁹ See e.g., Alston, E/C.12/1988/SR.13, at 2, para.25.

²¹⁰ *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.

²¹¹ See above, text accompanying notes 176-9.

²¹² 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.

²¹³ 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).

²¹⁴ 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."²¹⁵

As such the Committee has stressed that debt-servicing problems,²¹⁶ austerity programmes,²¹⁷ economic recession,²¹⁸ or simple poverty,²¹⁹ 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.²²⁰ 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."²²¹

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

²¹⁵ Simma, E/C.12/1990/SR.15, at 3, para.7.

²¹⁶ See e.g., Texier, E/C.12/1990/SR.21, at 9, para.33.

²¹⁷ See e.g., Alston, E/C.12/1990/SR.17, at 7, para.31.

²¹⁸ See e.g., Sparsis, E/C.12/1990/SR.15, at 3, para.10.

²¹⁹ E/C.12/1990/CRP.1/Add.7, at 12.

²²⁰ See e.g., Alston, E/C.12/1988/SR.10, at 11, para.59.

²²¹ General Comment No.3, *supra*, note 5, at 86, para.11.

resources.²²² Thus members of the Committee have advocated methods such as taxation²²³ and agrarian reform²²⁴ to combat poverty in countries experiencing economic hardship.²²⁵ 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 4.²²⁶ 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.1.²²⁷ Undertaking such basic obligations have been considered necessary to demonstrate good faith on the part of the State concerned.²²⁸

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

²²² 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.

²²³ *See*, Butragueno, E/C.12/1990/SR.13, at 9, para.43.

²²⁴ *See*, Texier, E/C.12/1990/SR.13, at 9, para.33.

²²⁵ 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).

²²⁶ 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.

²²⁷ General Comment No.3, *supra*, note 5, at 86, para.11.

²²⁸ *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.²²⁹ The idea that certain "trade offs" can be made is implicitly rejected.²³⁰ For example in the process of development it is held that economic, social and cultural rights cannot be sacrificed in favour of economic growth.²³¹ 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

²²⁹ 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.

²³⁰ 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).

²³¹ 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."²³²

According to this approach, it is indefensible that the poorer segments of society should suffer most during economic crises.²³³ It does operate on the assumption however that economic growth can be achieved without such sacrifices.²³⁴

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.²³⁵ 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."²³⁶

²³² General Comment No.2, *supra*, note 17. See also, General Comment No.3, *supra*, note 5, at 86, para.12.

²³³ See e.g., Sparsis, E/C.12/SR.15, at 3, para.10.

²³⁴ 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).

²³⁵ 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.

²³⁶ General Comment No.3, *supra*, note 5, at 86, para.10.

It is apparent that this "minimum threshold approach"²³⁷ does not entail the division of the rights according to their priority,²³⁸ but rather that each right should be realised to the extent that provides for the basic needs of every member of society.²³⁹ These minimum standards should be achieved by all States, irrespective of their economic situation, at the earliest possible moment.²⁴⁰ All available means should be utilised including, if necessary, international assistance.²⁴¹

What is less clear is whether these standards are international or State-specific.²⁴² The universal nature of the rights in the Covenant suggests that a common core should be established for application internationally.²⁴³ 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.²⁴⁴ There is some evidence however, that the Committee intends to establish international standards in future.²⁴⁵

²³⁷ 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).

²³⁸ 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.

²³⁹ See, Mratchkov, E/C.12/1990/SR.46, at 8, para.37.

²⁴⁰ 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.

²⁴¹ See, Taya, E/C.12/1990/SR.46, at 9, para.42.

²⁴² 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.

²⁴³ See Tomasevski, *supra*, note 22, at 151.

²⁴⁴ See *above*, text accompanying notes 86-7.

²⁴⁵ 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).²⁴⁶ The availability of resources has been seen alternatively as a limit on the obligation of the State to implement the rights in full,²⁴⁷ or as a conditional factor in determining what the State is obliged to achieve.²⁴⁸ 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.²⁴⁹ 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,²⁵⁰ 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

²⁴⁶ See also, Muterahjuru, E/C.12/1990/SR.46, at 11, para.51.

²⁴⁷ 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.

²⁴⁸ 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.

²⁴⁹ 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.

²⁵⁰ 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".²⁵¹ 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".²⁵²

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".²⁵³

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

²⁵¹ *Ibid.*

²⁵² *See*, Alston, E/C.12/1990/SR.48, at 9, para.43.

²⁵³ 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.²⁵⁴ 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.²⁵⁵ Although the primary obligation must be seen to be upon the State to do everything within its power to realise the rights within the

²⁵⁴ 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.

²⁵⁵ 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,²⁵⁶ it is recognised that lack of resources might oblige some States to look to the international community for assistance to that end.²⁵⁷

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."²⁵⁸

²⁵⁶ 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).

²⁵⁷ 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).

²⁵⁸ 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".²⁵⁹ 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".²⁶⁰ Not only is the Charter vague as to the meaning of international co-operation, but the Declaration does not seem to elucidate much further.²⁶¹ 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".²⁶²

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 Development²⁶³ as reflecting the context in which economic, social and cultural rights are to be

²⁵⁹ 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".

²⁶⁰ GA Resn.2625 (XXV), (Oct.24 1970) 25 UN GAOR, Resns, Supp.(No.28), (1970).

²⁶¹ 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.

²⁶² 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).

²⁶³ *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.²⁶⁴ 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.²⁶⁵ 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".²⁶⁶ 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

²⁶⁴ See e.g. Mratchkov, E/C.12/1990/SR.46, at 8, para.39.

²⁶⁵ 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),

²⁶⁶ 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".²⁶⁷ 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.²⁶⁸ 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.²⁶⁹ 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.²⁷⁰ The Committee has underlined such an obligation,²⁷¹ 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".²⁷² 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

²⁶⁷ Other references to international action may be found in articles 11(2) and 23.

²⁶⁸ See above, text accompanying notes 20-46.

²⁶⁹ Eide, *supra*, note 14, at 40; Alston, *supra*, note , at 43-45.

²⁷⁰ 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.

²⁷¹ 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.

²⁷² 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.²⁷³ Although the Committee has paid little attention to the activities of such corporations,²⁷⁴ 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.²⁷⁵ 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.²⁷⁶

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".²⁷⁷ This was almost universally opposed by the other representatives of all the groupings involved.²⁷⁸ The agreed sense of the provision on

²⁷³ 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).

²⁷⁴ *But see*, Wimer Zambrano, E/C.12/1989/SR.21, at 8, para.32.

²⁷⁵ General Comment No.2, *supra*, note 17.

²⁷⁶ Reporting Guidelines, *supra*, note 195.

²⁷⁷ E/CN.4/SR.1203, at 342, para.10 (1962).

²⁷⁸ *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.²⁷⁹ 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".²⁸⁰

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.²⁸¹ This does not mean that developed States are required to meet the needs of the poorer States,²⁸² 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,²⁸³ Norway,²⁸⁴ the Netherlands²⁸⁵ and Czechoslovakia²⁸⁶ as to the extent of their co-operation with of other countries. Members of the Committee have also questioned the adequacy of some aid programmes.²⁸⁷ There is no evidence, however, that the Committee expects a specific form of aid to be given, nor does it

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).

²⁷⁹ Paragraph 33 of the Limburg principles maintains that international co-operation and assistance should be based on the sovereign equality of States.

²⁸⁰ 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).

²⁸¹ See, Alvarez Vita, E/C.12/1989/SR.21, at 8, para.30.

²⁸² See, Alston, E/C.12/1990/SR.22, at 14, para.87; Muterahjuru, E/C.12/1990/SR.46, at 11, para.52.

²⁸³ See, Muterahjuru, E/C.12/1988/SR.10, at 7, para.28.

²⁸⁴ See, Alston, E/C.12/1988/SR.13, at 12, para.69.

²⁸⁵ See, Muterahjuru, E/C.12/1989/SR.14, at 15, para.62.

²⁸⁶ See, Muterahjuru, E/C.12/1987/SR.14, at 12, para.38.

²⁸⁷ See e.g. Muterahjuru, E/C.12/1989/SR.12, at 12, para.67.

prescribe to whom that aid should go.²⁸⁸ More attention seems to have been placed upon the utilisation of aid once it is received.²⁸⁹ 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).²⁹⁰

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.²⁹¹ 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

²⁸⁸ 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).

²⁸⁹ See e.g., Taya, E/C.12/1990/SR.46, at 9, para.42.

²⁹⁰ Reporting guidelines, *supra*, note 195, at 91, 94, 96, 99, 103, 106, 107, 108, and 110.

²⁹¹ World Bank (IBRD), *World Development Report 1990*, 127-8 (1990).

that aid does not fall as a proportion of the donors' GNP."²⁹²

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.

²⁹² *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.¹ Ideally, international treaty standards should operate within the domestic legal system, and should be enforceable through judicial remedies.² 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.³ Each matter will be dealt with separately below.

¹ 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).

² 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).

³ 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.⁴ 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.⁵ The State may not, however, invoke domestic law as an excuse for avoiding its international obligations.⁶

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".⁷ 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.⁸

In States that operate a system of "adoption" (otherwise known as "automatic incorporation"⁹), international law is treated as part of the same legal order as national law in accordance with the "monist view".¹⁰ Accordingly, treaty provisions automatically become operative in domestic law through the operation of some constitutional provision,

⁴ 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).

⁵ Van Dijk P., "Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary- The Dutch Case", in Nowak M., Steurer D. and Treter 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).

⁶ Article 27, Vienna Convention.

⁷ Holloway K., Modern Trends in Treaty Law, 248 (1967).

⁸ Van Dijk, *supra*, note 5, at 634.

⁹ 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).

¹⁰ 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.¹¹ This is to be seen in the case of France,¹² Belgium,¹³ the Netherlands¹⁴ and the US¹⁵.

A number of other States (Germany¹⁶ and Italy¹⁷ 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".¹⁸ 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.¹⁹ As in States applying the system of adoption, whether or not those provisions will be applied as domestic

¹¹ 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.

¹² See, de la Rochère J., "France", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 39 (1987).

¹³ Maresceau M., "Belgium", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 1 (1987).

¹⁴ 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).

¹⁵ 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.

¹⁶ Frowein J., "Federal Republic of Germany", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 63 (1987).

¹⁷ 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).

¹⁸ 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).

¹⁹ 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.²⁰ 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,²¹ 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.²² In States that operate on this basis, such as the UK²³ or Denmark,²⁴ consideration will be given to the nature and effects of the treaty concerned in deciding whether it should be incorporated or transformed.²⁵

The theoretical issues encompassed by the monist-dualist debate have given rise to a tendency to overstate the differences between the

²⁰ 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).

²¹ *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.

²² *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".

²³ 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).

²⁴ Gulmann C., "Denmark", in Jacobs F. and Roberts S., The Effect of Treaties in Domestic Law, 29 (1987).

²⁵ 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.²⁶ 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.²⁷

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".²⁸ 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.²⁹ 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".³⁰

However, as Leary has pointed out, "national governments have been slow to perceive that automatic incorporation does not guarantee effective national application of treaties".³¹ Even where a treaty has been adopted, its judicial enforcement will remain dependent upon the

²⁶ See e.g., Jacobs F., "Introduction", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, at xxiv-xxvi, (1987).

²⁷ 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.

²⁸ Pescatore P., "Conclusion", in Jacobs F. and Roberts S.(eds), The Effect of Treaties in Domestic Law, 282, (1987).

²⁹ Winter, *supra*, note 3, at 431.

³⁰ 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.

³¹ 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.³²

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.³³

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.³⁴ 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".³⁵ Commentators are almost unanimous in their opinion that the ICCPR entails no obligation

³² 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.

³³ *See, Van Gend En Loos*, Case (26/62), [1963] E.C.R., 1 at 12.

³⁴ *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.

³⁵ Schachter, *supra*, note 5, at 314.

to incorporate its provisions in domestic law.³⁶ 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.³⁷ In a number of States, such as Sweden,³⁸ Canada,³⁹ the UK,⁴⁰ 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,⁴¹ Costa Rica,⁴² Ecuador,⁴³

³⁶ 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".

³⁷ In the majority of cases, States have not provided sufficient information to answer even this very basic question.

³⁸ 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.

³⁹ See, de Montigny Marchand (Canada), E/C.12/1989/SR.8, at 2, para.2.

⁴⁰ 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.

⁴¹ See, Wahidi (Afghanistan), E/C.12/1991/SR.4, at 4, para.21.

⁴² See, Rhenan Segura (Costa Rica), E/C.12/1990/SR.38, at 15, para.85.

⁴³ See, Apunte (Ecuador), E/C.12/1990/SR.39, at 2, para.6.

Luxembourg,⁴⁴ Argentina,⁴⁵ Colombia,⁴⁶ Mexico,⁴⁷ Cyprus,⁴⁸ and Zaire.⁴⁹

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".⁵⁰ 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.⁵¹

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,⁵² 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.⁵³ This was criticised by one member of the Committee, who commented

⁴⁴ See, Weitzel (Luxembourg), E/C.12/1990/SR.33, at 8, para.29.

⁴⁵ See, Regazzoli (Argentina), E/C.12/1990/SR.18, at 4, para.14.

⁴⁶ See, Rivas Posada (Colombia), E/C.12/1990/SR.12, at 9, para.62.

⁴⁷ See, Gonzalez Martinez (Mexico), E/C.12/1990/SR.6, at 4, para.15.

⁴⁸ See, Markides (Cyprus), E/C.12/1990/SR.2, at 3, para.9.

⁴⁹ See, Ngimbi (Zaire), E/C.12/1988/SR.19, at 2, para.6.

⁵⁰ Tomuschat, *supra*, note 2, at 40.

⁵¹ See below, text accompanying notes 114-127.

⁵² But see, Alvarez Vita, E/C.12/1990/SR.35, at 11, para.43.

⁵³ Texier, E/C.12/1988/SR.12, at 9, para.45.

that there was "no justification for delaying formal implementation of the Covenant".⁵⁴ 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."⁵⁵

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".⁵⁶ 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.⁵⁷ 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

⁵⁴ Alston, E/C.12/1988/SR.13, at 5, para.19.

⁵⁵ Van Dijk, *supra*, note 5, at 631-2. *See also*, Leary, *supra*, note 1, at 37.

⁵⁶ *See*, Bossuyt M., "The Direct Applicability of International Instruments on Human Rights", 15 R.B.D.I., 317, at 318-9 (1980).

⁵⁷ 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.⁵⁸ 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.⁵⁹

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.⁶⁰ 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.⁶¹ 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

⁵⁸ 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.

⁵⁹ 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.

⁶⁰ 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".

⁶¹ 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 body⁶² or with those of other courts in other States. This may undermine the universal nature of the norm, and serve to weaken its content.⁶³

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.⁶⁴ 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".⁶⁵

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.⁶⁶

⁶² 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).

⁶³ 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).

⁶⁴ It is also relevant to note that treaties generally have more than one official language which might have considerable bearing upon the interpretation adopted.

⁶⁵ Leary, *supra*, note 1, at 103.

⁶⁶ 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.⁶⁷ 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.⁶⁸

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.⁶⁹ 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.

⁶⁷ Alkema, *supra*, note 62, at 188.

⁶⁸ See, Tomuschat, *supra*, note 2, at 48.

⁶⁹ Jacobs, *supra*, note 66, at 279.