

### C) DIRECT EFFECT AND THE COVENANT

As part of the Committee's reporting guidelines, it specifically requests information as to whether the provisions of the Covenant "can be invoked before, and directly enforced by, the courts, other tribunals or administrative authorities...".<sup>70</sup> Very little information has been provided in response to this request and thus far no cases have been reported in which provisions of the Covenant have been given direct effect. All discussions with the Committee on the issue have centered merely upon the potentiality of direct effect.

A number of those States that have adopted the Covenant into domestic law, have stressed before the Committee, that that fact alone does not mean that the Covenant may be relied upon by an individual in the courts. Some States, whilst noting that certain rights are "operational" (such as the right to education), have considered that others (like the right to housing) require intervention by public authorities and therefore could not be invoked as individual rights.<sup>71</sup> Other States, however, have denied the direct-effect of the Covenant as a whole. In those cases it has been argued that the nature of the rights<sup>72</sup> and the object and purpose of the Covenant,<sup>73</sup> affirmed its non-self-executing character.

In the case of Luxembourg however, a number of members of the Committee were dissatisfied with the explanation offered by the government representative as to why the Covenant was not self-executing in domestic law. The representative referred *inter alia* to the intentions of the drafters, the purpose and subject-matter of the Covenant,<sup>74</sup> the nature of the obligations,<sup>75</sup> and the view of the Council of State at the time of accession to the Covenant.<sup>76</sup> Members of the Committee argued that the Covenant was more than merely a series of reciprocal obligations, and should be seen

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<sup>70</sup> Reporting Guidelines, ESCOR, Supp.(No.3), Annex IV, at 89, UN Doc.E/C.12/1990/8, (1991).

<sup>71</sup> *See e.g.* Strassera (Argentina), E/C.12/1990/SR.19, at 3, para.9; Gonzalez Martinez (Mexico), E/C.12/1990/SR.9, at 5, para.14.

<sup>72</sup> *See*, Walkate (Netherlands), E/C.12/1989/SR.14, at 3, para.8.

<sup>73</sup> *See*, Weitzel (Luxembourg), E/C.12/1990/SR.33, at 8, para.29.

<sup>74</sup> *See*, Weitzel (Luxembourg), E/C.12/1990/SR.35, at 2, para.4.

<sup>75</sup> *Ibid*, at 11, para.44.

<sup>76</sup> *See*, Weitzel (Luxembourg), E/C.12/1990/SR.33, at 8, para.29.

to represent an objective standard containing individual rights,<sup>77</sup> a number of which were self-executing.<sup>78</sup>

This debate encouraged the Committee, in its General Comment No.3 (1990), to assert that certain provisions within the Covenant (it cited in particular articles 3, 7(a)(i), 8, 10(3), 13(2)(a), 13(3), 13(4) and 15(3)) were capable of immediate application. It concluded:

"Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain".<sup>79</sup>

On the face of it, the Committee would not seem to be in a position to make decisions as to the degree to which the provisions in the Covenant are self-executing. In contrast to the question of the domestic validity of treaties, as a rule,<sup>80</sup> it is for the national authorities themselves to decide whether or not a provision is self-executing.<sup>81</sup>

However, as will be shown below, national courts generally have considerable lee-way in deciding what provisions may be given direct effect. In so far as those courts have to examine the provisions of the Covenant in the exercise of their discretion, the

<sup>77</sup> See, Simma, E/C.12/1990/SR.34, at 9, para.64.

<sup>78</sup> See, Mratchkov, E/C.12/1990/SR.34, at 7, para.46; Simma, E/C.12/1990/SR.34, at 9, para.64; and E/C.12/1990/SR.36, at 9, para.37.

<sup>79</sup> General Comment No.3, E/1991/23, Annex III, at 84, para.5, UN ESCOR, Supp.(No.3), (1991).

<sup>80</sup> In the exceptional case of the European Communities the direct effect of provisions is provided by the treaty itself. Moreover the ECJ itself is competent to decide whether a provision is directly applicable or not through its preliminary ruling procedure under article 177 of the EEC Treaty. 298 U.N.T.S. 150. Human rights treaty bodies do not have this power to make preliminary rulings and therefore cannot intervene in the process. With regard to the ECHR see, Bossuyt, *supra*, note 56, at 321-322.

<sup>81</sup> As one commentator stated:

"The definition of self-executing treaties, which is essentially a problem of the enforcement of treaties, is a matter to be determined by the municipal law of a given state, interpreted with due consideration of the constitutional history of the State, the organisation of its government, and, indeed, of the political currents of a given period".

Evans A.E., "Self-Executing Treaties in the United States of America", 30 *B.Y.I.L.* 178, at 193 (1953). See also, Winter, *supra*, note 3, at 428; Iwasawa, *supra*, note 15, at 650; Leary, *supra*, note 1, at 39.

Committee may provide its own interpretation of the provisions as a means of assisting and influencing the national courts.<sup>82</sup>

#### D) THE CRITERIA FOR DIRECT EFFECT

That the question whether or not a treaty provision has direct effect is one for the domestic courts to decide has meant that different criteria are utilised in different countries. Nevertheless, the intention here is to analyse some of the common criteria in relation to the Covenant provisions to determine whether, in principle at least, those provisions may be directly relied upon by domestic courts.

In general, domestic courts have looked to whether the provision confers a right upon private citizens that may be applied by the courts directly without recourse to further implementation through legislative or administrative intervention. To some extent this seems to suggest that the degree to which a provision will be considered self-executing is dependent upon the presence of an existing "cause of action": *ubi remedium, ibi jus*. Although criticised by certain commentators,<sup>83</sup> it does mean that a human rights treaty provision is only likely to be considered self-executing if a similar constitutional or legislative right is already guaranteed by judicial remedies.

From the practice of a number of States and institutions, including the US, the Netherlands, Belgium, Italy, Switzerland, Germany and the EEC the following criteria seem to have been utilised: whether the provision relates to private citizens; whether the provision is capable of judicial enforcement; the purpose of the treaty; the intentions of the creators of the treaty; the existence of domestic procedures for enforcement; the nature of the obligations; the availability of alternative enforcement procedures; the necessity of further implementation; the precision and detail of the text; the language of the agreement; the class and subject matter of the agreement; and the amount of discretion given to the means of implementation.

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<sup>82</sup> Tomuschat comments with regard to the ICCPR:

"Since the Human Rights Committee, the body primarily entrusted with responsibility for ensuring compliance with the CCPR, sees no obstacle against inferring directly enforceable obligations from the CCPR, national authorities would lack any justification for adopting a more reluctant attitude".

Tomuschat, *supra*, note 2, at 42. Such arguments would apply equally to the Committee on Economic, Social and Cultural Rights.

<sup>83</sup> *E.g.*, Iwasawa, *supra*, note 15, at 648, note 98.

A number of the more commonly utilised criteria will be considered in the following section. Reference will be made to US and EEC practice despite having little direct relevance to the Covenant, on the basis that it demonstrates a fairly well-developed approach to the concept of direct-effect.<sup>84</sup> Particular emphasis will, however, be placed upon the case-law of the Netherlands which is the State in which the courts have paid most attention to economic and social rights in general, and the Covenant in particular.

### 1) The Intention of the Parties

In the United States, the courts have frequently looked to the intent of the treaty-drafters in determining the direct-effect of the provisions. Thus, in Sei Fujii v. California,<sup>85</sup> Judge Gibson commented:

"...in order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts".<sup>86</sup>

Although there is a tendency for courts to look to the intent of the contracting parties as to whether or not the provision should be self-executing,<sup>87</sup> it is very rare for treaties to indicate either positive or negative intent in this regard. Certainly as far as the Covenant is concerned there is no explicit provision that refers to its domestic application, nor was the matter considered during the drafting of the Covenant. Indeed, whether or not States parties were actually concerned about the domestic application of the

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<sup>84</sup> The concept of the self-executing and non-self-executing treaty was first developed in the US in Foster and Elam v. Neilson, 27 US (2 Pet.) 253 (1829). Since then, the US has developed a considerable body of jurisprudence. Similarly, the notion of direct effect has been a key concept in the evolution of the EEC.

<sup>85</sup> Supreme Court of California, 38 Cal.2d 718, 242 P.2d 617, (1952).

<sup>86</sup> *Ibid*, at 620. This is also the case in Belgium. There, in Thonon v. Belgian State [Cass. April 21, 1983, 1985 R.C.J.B. 22], the Belgian Court of Cassation referred *inter alia* to the intentions of the contracting parties as a determinant of the treaty's direct effect. *Cited in*, Maresceau, *supra*, note 13, at 16.

<sup>87</sup> Jackson, *supra*, note 15, at 151.

treaty,<sup>88</sup> it would be highly unusual for trenchantly "dualist" States such as the UK to have specifically agreed to the direct effect of the Covenant's provisions.<sup>89</sup>

In the absence of explicit statements of intent, the US courts have generally looked to objective indications in the text itself.<sup>90</sup> In particular note has been made of the purpose of the agreement and the language used. Given the uncertainty of actual intent, it would seem to be a rather fictitious pursuit to infer such intent from the wording of the Covenant itself.<sup>91</sup> The Dutch Supreme Court has adopted a more realistic approach in considering intent only in so far as it is manifest in the text or the travaux préparatoires. Thus in Netherlands Railways v. Transport Union of the Federation of Netherlands Trade Unions<sup>92</sup> the Supreme Court held:

"Whether or not the contracting parties intended Article 6(4) of the ESC to have direct effect is not important since it cannot be inferred either from the text or from the history of the Charter that they agreed that Article 6(4) could not have direct effect".<sup>93</sup>

Accordingly, in absence of any manifest intention, the court went on to analyse the content of the provision to determine its effect.

Occasionally, courts look to the intent of the executive in ratifying the treaty concerned. Thus in one case, the Dutch Supreme Court referred to a Government statement made in Parliament during the process of approval of the Covenant, to the effect that the Covenant's provisions were not to be considered self-executing.<sup>94</sup> Nevertheless, practice suggests that it is unlikely that

<sup>88</sup> One commentator at least considers that States were not concerned about the domestic application of the ICESCR. *See*, Iwasawa, *supra*, note 15, at 654.

<sup>89</sup> *See*, Reisenfeld S., "The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgement", 65 A.J.I.L., 548 at 550 (1971).

<sup>90</sup> *See e.g.*, Frovlova v.U.S.S.R. 761 F.2d, 370 (7th Cir.1985).

<sup>91</sup> *Cf.* Iwasawa, *supra*, note 15, at 655.

<sup>92</sup> Supreme Court, 30 May 1986, RvdW (1986) No.120, *in*, 18 Neth.Y.I.L., 389 (1987).

<sup>93</sup> Neth.Y.I.L., *ibid*, at 392.

<sup>94</sup> The State of the Netherlands v.L.S.V.B.[The National Union of Students], Supreme Court, 14th April, 1989, AB, at 207 (1989), *in* 21 Neth.Y.I.L., 362 at 369 (1990). *See also*, Heringa A., "Social Rights in the Dutch Legal Order", Working Paper at 4, (1991).

courts in most States will consider such executive statements as conclusive.<sup>95</sup>

## 2) The Precision and Detail of the Language Employed.

In Sei Fujii<sup>96</sup> and later in the Frovlova Case<sup>97</sup> the Supreme Court of the United States found articles 55 and 56 of the UN Charter to be too broad and general to be considered self-executing. Similar considerations have been decisive in Swiss<sup>98</sup> Italian,<sup>99</sup> Belgian,<sup>100</sup> and Dutch<sup>101</sup> cases. It is clear that in theory, the generality of a legal norm does not impede judicial decision-making per se. The decision so made might require the courts to indulge in a certain amount of "judicial legislation" in the interpretation of the norm, but it is a decision nevertheless. The justiciability of a particular issue depends, not upon the generality

<sup>95</sup> See generally, Iwasawa, *supra*, note 15, at 666-669. With respect to a US Department of State proposal that if the Covenants were to be ratified they should be said to be non-self-executing see, Craig M., "The International Covenant on Civil and Political Rights and U.S. Law: Department of State Proposals for Preserving the Status Quo", 19 I.C.L.Q., 845 (1978).

<sup>96</sup> Judge Gibson stated that the provisions of the Charter "lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification". Sei Fujii, *supra*, note 85 at 621-622.

<sup>97</sup> *Supra*, note 90, at 74.

<sup>98</sup> See, Banque de Credit Internationale c. Conseil D'Etat du Canton de Geneve Chambre de Droit Administratif, 13 Oct. (1972), ATF 98 I b 385. *Cited (and translated) in*, Leary, *supra*, note 1, at 68. There the court stated that the direct effect would be given if the treaty provision "is sufficiently precise to be applied as such in a particular case and to provide the basis for a concrete decision". The court went on to comment that "this is not the case with a treaty provision which announces a programme or lays down general principles which should guide the legislation of contracting states".

<sup>99</sup> See, Leary, *supra*, note 1, at 70. In re Laglietti, 69 Rivista di Diritto Internazionale, 143 at 145 (1986), the Court of Cassation stated:

"...the norms of the European Convention on Human Rights- apart obviously from those provisions the content of which, after the use of the habitual methods of interpretation, is to be considered so general that it does not express sufficiently specific rules- are directly applicable in Italy".

*Cited (and translated) in*, Gaja, *supra*, note 17, at 104.

<sup>100</sup> See, Verhoeven J., "Traité-Applicabilité Directe", 24 R.B.D.I. 306 (1991).

<sup>101</sup> In The Netherlands v. L.S.V.B., the court rejected the claim that article 2(1) ICESCR had direct effect *inter alia* because it was too general (by the fact it covered all the rights granted under the Covenant). *Cited in*, 21 Neth.Y.I.L., 362, at 369 (1990).

of the norm concerned, but rather upon the authority of the body making the decision. Thus it is apparent that in a number of cases, national courts have undertaken to apply constitutional provisions of an exceedingly broad and general nature.<sup>102</sup>

The perceived jurisdictional authority of the courts is of crucial importance. It is commonly considered that the judiciary should not attempt to usurp the function of the legislature by applying provisions that would normally require further legislative implementation.<sup>103</sup> Certainly, if legislation already exists, the Courts will not be obliged to take on such a creative role. To a great extent, the degree to which courts will apply general provisions is dependent upon the amount of existing legislation and the traditional role of the courts in the constitutional system.

It has to be accepted that certain provisions of the Covenant are very general, such as article 11 (the right to an adequate standard of living). However this is not exclusively so: domestic court practice has shown (albeit in different contexts) that the basic principles contained in article 7(a)(i) (equal remuneration for work of equal value), article 8(1)(a) (the right to form and join trade unions), and article 8(1)(d) (the right to strike), for example, are capable of direct application. Moreover, as the Committee continues to develop the substantive content of the rights, an increasing number of elements within the rights may be found to be sufficiently precise to be self-executing.

An important question is raised here, namely the extent to which domestic courts will apply a single element of a provision where other elements are clearly not self-executing. An example might be the right to work, found in article 6 of the Covenant. This is read not merely as imposing an obligation to achieve full

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<sup>102</sup> See e.g., The 14th Amendment of the US Constitution (equal protection of the law). See, Schachter O., "The Charter and the Constitution: The Human Rights Provisions in American Law", 4 Vand.L.R., 643 (1951).

Tomuschat comments:

"It is the current tendency in many countries for judges not to hesitate to base their decisions on the most general and abstract principles of their legal order".

Tomuschat, *supra*, note 2, at 44. Zander argues that rights which are phrased in vague and general terms are "more an advantage than a disadvantage". He maintains that detailed solutions have to be left to the courts to work out. Whilst recognising that general terminology might lead to a degree of uncertainty, he considers that it gives people a chance to argue their case and allows the rights to be interpreted in a dynamic manner. Zander, *supra*, note , at 38.

<sup>103</sup> Cf. The Brind Case, *supra*, note 20.

employment, but also as containing a prohibition of forced labour.<sup>104</sup> Whereas the former element would clearly seem to require implementing policies on the part of the government, there is nothing, outside the imposition of penalties, to prevent the courts enforcing the prohibition of forced labour directly. Commentators have found no objection to applying elements of a provision separately:

"Simply because a provision requires future negotiation or legislative action does not, however, render it non-self-executing if the provision also creates specific obligations or proscribes certain acts".<sup>105</sup>

The matter is less clear where the two elements are not specifically defined in the text itself, but are to be found merely in the jurisprudence of the Committee. Again with reference to article 6, this could be the case with respect to the prohibition of arbitrary dismissal. It is indisputable that the Committee's interpretations of the provisions of the Covenant are not legally binding on the States parties. However, to the extent they might come to reflect the agreement of the States parties as to the meaning of the provisions, they could be seen to have some legal significance in international law.<sup>106</sup>

### 3) The Necessity of Legislation

It is a universally accepted principle that a treaty provision will not be self-executing if further implementing legislation is required by the authorities concerned.<sup>107</sup> By implication, this

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<sup>104</sup> See below, Chapter 5.

<sup>105</sup> Burke *et al*, *supra*, note 15, at 302. See also, Iwasawa, *supra*, note 15, at 668. In the case of Gabrielle Defrenne v. Sabena (No.1), (Case 43/75), [1976] E.C.R., 455, the European Court of Justice distinguished between direct and indirect discrimination under article 119 of the EEC Treaty. Whereas the former was capable of being detected "on the basis of a purely legal analysis of the situation", the latter required in certain cases "the elaboration of criteria whose implementation necessitates the taking of appropriate measures at Community and National level".

<sup>106</sup> See, Meron T., Human Rights Law-Making in the United Nations, 10 (1986).

<sup>107</sup> Paust J., "Self-Executing Treaties" 82 A.J.I.L. 760, at 764 (1988); Winter, *supra*, note 3, at 429; Jackson, *supra*, note 15, at 150.

would mean that treaties may be self-executing where existing legislation is adequate for their enforcement by the courts.<sup>108</sup>

It has often been argued accordingly that a provision calling for domestic implementation (through legislation) indicates that the treaty is not to be considered directly applicable.<sup>109</sup> Thus, as under article 2(1) of the Covenant, States Parties are called upon to take the necessary measures "including particularly the adoption of legislative measures", the Covenant could be considered non-self-executing. However, it would seem that the matter is not quite so simple. First, as one commentator has noted:

"A domestic implementation clause merely reinforces the customary international rule that a State which has contracted a valid treaty is bound to take every measure necessary to give full effect to the treaty".<sup>110</sup>

Such references to legislation could thus be interpreted to refer to the domestic validity of the treaty rather than its domestic application.<sup>111</sup> Certainly as far as the ICESCR is concerned, there is no reason to assume that legislation is required in every case. Rather, the provision should be interpreted to require legislation only to the extent that the rights are not already sufficiently protected and where legislation is the appropriate means for ensuring that protection.<sup>112</sup> As the Committee comments in its General Comment No.3:

"Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable".<sup>113</sup>

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<sup>108</sup> Evans, *supra*, note 81, at 186. In the case of Warren v.U.S., 340 U.S., 523 at 526 (1951), the Supreme Court held that article 2(2) ILO Convention No.55 was directly applicable because the general maritime law already recognized the exceptions allowed under the treaty.

<sup>109</sup> *See, Tel Oren v.Libyan Arab Republic Case* 517 F.Supp.542 (D.D.C.1981). Tomuschat argues that the reference to "legislation" in article 2(2) ICCPR was intended "to emphasise that States should play an active role in ensuring the relevant rights, explicitly discarding a naive belief that the CCPR amounted to a self-executing treaty". Tomuschat, *supra*, note 2, at 42.

<sup>110</sup> Iwasawa, *supra*, note 15, at 660.

<sup>111</sup> This would apply in particular to the UK, where treaty provisions are generally "transformed" into domestic law.

<sup>112</sup> *Cf. Craig, supra*, note 95, at 861.

<sup>113</sup> General Comment No.3, *supra*, note 79, at 84.

It cannot be sustained, then, that the reference to legislation in article 2(1) of the Covenant automatically makes the individual provisions non-self-executing.<sup>114</sup> As has been noted, the crucial factor is not the call for implementation, but rather the precision of the rule invoked<sup>115</sup> and the degree to which it is already implemented in the domestic legal system.

#### 4) The Subject Matter of the Treaty

There has been a tendency in the US courts at least, to classify treaties as self-executing or otherwise according to their subject matter.<sup>116</sup> Thus where the subject matter of a treaty falls within the exclusive powers of Congress then that treaty will be considered non-self-executing.<sup>117</sup> However, the crucial question in such cases is not really the subject matter, but rather whether financial appropriations are required.<sup>118</sup> Indeed, it has been asserted that treaties should not be dealt with entirely on the question of their subject matter, rather each provision should be dealt with separately. Numerous examples may be found where although a treaty is generally non-self-executing, a specific provision is considered to be directly effective.<sup>119</sup> Accordingly, the direct effect of provisions of the ICESCR should not be denied merely because they do involve certain questions of public policy (such as the provision of housing); each provision should be considered upon its merits. It cannot be maintained that every provision requires financial appropriations from the treasury.

#### 5) Rights and Duties of the Individual

In a number of cases, courts have looked to the wording of the provision concerned to determine whether it is of a nature such

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<sup>114</sup> It was recognised by the Dutch Supreme Court that the wording of article 2(1) did not automatically imply that the substantive provisions were non-self-executing, D. Hoogenraad v. Organisation for Pure Research in the Netherlands, Supreme Court, 20 April 1990, RvdW (1990) No.88, cited in 22 Neth. Y.I.L. 376 at 378 (1991).

<sup>115</sup> Iwasawa, *supra*, note 15, at 662.

<sup>116</sup> See e.g., Leary, *supra*, note 1, at 57.

<sup>117</sup> See e.g., Evans, *supra*, note 81, at 187.

<sup>118</sup> Craig, *supra*, note 93, at 859; Evans A., "The Self-Executing Treaty in Contemporary American Practice", in De Lege Pactorem: Essays in Honour of Wilson R.R., 3, at 17 (1970).

<sup>119</sup> See below, text accompanying note 127.

that individuals may benefit from it.<sup>120</sup> Clearly, a provision that is addressed to State organs will not provide a basis for individual action in the courts.<sup>121</sup> On the other hand, it has been asserted that where the rules create private rights they will be *prima facie* self-executing.<sup>122</sup> The Dutch Constitution is particularly clear in this case. Under article 93, provisions of treaties "the contents of which may be binding on everyone" have direct effect.<sup>123</sup> Thus obligations directed solely to State organs could not be said to be "binding on everyone".

It might be assumed that human rights treaties would automatically be considered as providing for private rights in this sense. However, that has not always been the case. For example, in Germany the prevailing view is that the European Social Charter is not self-executing as the provisions generally lay down obligations for States and their legislatures rather than individuals.<sup>124</sup> Similarly in the Netherlands, the Supreme Court has taken the view that the European Social Charter is generally non-self-executing by the fact that its provisions require the Contracting Parties to introduce regulations. However, it has found article 6(4) to be an exception in that it provides that States "recognise" the right of workers and employers to collective action in cases of conflicts of interest".<sup>125</sup>

It might be argued that the ICESCR suffers from the same problem. Whereas provisions of the ICCPR refer directly to the rights of the individual, those in the ICESCR are phrased in terms

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<sup>120</sup> See, Reisenfeld, *supra*, note 89, at 552.

<sup>121</sup> See, Iwasawa, *supra*, note 15, at 684.

<sup>122</sup> Jackson, *supra*, note 15, at 150.

<sup>123</sup> See, Van Dijk, *supra*, note 5, at 636; Heringa, *supra*, note 92, at 3; Drzemczewski A., European Human Rights Convention in Domestic Law, 86-92 (1983).

<sup>124</sup> Frowein, *supra*, note 16, at 70. Part III of the Appendix to the European Social Charter (1961) is understood to have specifically excluded the possibility of direct effect. It reads:

"It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided in Part IV thereof."

<sup>125</sup> Netherlands Railways v. Transport Union of the Federation of Netherlands Trade Unions et al. *supra*, note 92, at 392. However Frowein argues that article 6(4) should be seen as non-self-executing otherwise it would be inconsistent with article 5 (freedom of association). Frowein, *supra*, note 16, at 70.

of State obligations.<sup>126</sup> Similarly there are a number of provisions in the latter that specifically outline the process of implementation (such as article 6(2)). On this basis, the Dutch Supreme Court has found the wording of article 8(1)(d)<sup>127</sup> and article 13(1)<sup>128</sup> of the Covenant to be conclusive as to their non-executing character.

Such decisions however, do display a certain prejudgement of the issues involved. It is hard to deny that the object and purpose of the ICESCR and the European Social Charter is to provide for individual rights in the economic and social fields. That those rights are framed in terms of State obligations does not deprive them of that central attribute. Indeed, if provisions of the ICCPR were to be read in conjunction with the general terms of article 2(1), they too could be said to be framed in terms of State obligations. Indeed, this is an inescapable conclusion given the fact that such treaties are primarily inter-State agreements. This has led one commentator to argue that the fact that a provision is grammatically addressed to the States Parties "is not considered a reliable criterion for determining whether a given provision is directly applicable".<sup>129</sup>

That the Dutch courts have demonstrated a particular lack of consistency is apparent in two respects. First, the decision relating to article 6(4) of the European Social Charter could equally apply to many of the rights in the ICESCR in that the pattern of wording is almost identical.<sup>130</sup> Secondly, in a more recent case, the Dutch Central Appeals Court, whilst finding that article 7(a)(i) of the ICESCR (equal remuneration for work of equal value) did not have direct effect in the particular circumstances before it, suggested that if the alleged unequal remuneration occurred in a framework "which has such a clear structure and involves such patently unequal remuneration... the direct effect of Article 7(a)(i)

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<sup>126</sup> See, in particular, articles 10 and 14 which make no mention of "rights" of the individual.

<sup>127</sup> W.d.K. v. Public Prosecutor, Supreme Court, 6 Dec. 1983, NJ (1984) No. 557, cited in, 16 Neth. Y. I. L., 526, at 528 (1985).

<sup>128</sup> Netherlands v. L.S.V.B., *supra*, note 101.

<sup>129</sup> Iwasawa, *supra*, note 15, at 684.

<sup>130</sup> Compare for example:

Article 6(4) ESC: "...the Contracting Parties... recognise... the right of workers and employers to collective action...".

Article 7 ICESCR: "The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work..."

of the Covenant cannot reasonably be refused".<sup>131</sup> That no mention was made of the wording of the provision, which has been so decisive in other cases, underlines the fact that it is realistic to argue that provisions of the ICESCR may be considered as "binding upon everybody" and therefore self-executing.

#### 6) Negative Obligations

It follows from the rule that self-executing treaty provisions should not require further measures of implementation, that those provisions that establish negative obligations or prohibitions, are *prima facie* good candidates to be directly effective.<sup>132</sup> Even where individual rights and duties are spelt out, it would seem that the courts will sometimes look, in addition, to the positive or negative nature of the obligations to determine their direct effect.<sup>133</sup> This has been evident in both US<sup>134</sup> and EEC<sup>135</sup> case law. More particularly, with the exception of a more recent case,<sup>136</sup> the courts in the Netherlands have tended to discount the possibility of the direct effect of Covenant articles on the basis of a general reading of article 2(1) of the Covenant, which provides that the rights be implemented by positive State action in a progressive manner.<sup>137</sup>

However, to decide upon a provision's direct effect merely on the positive or negative nature of the obligation is somewhat arbitrary. For example, in so far as a prohibition requires horizontal application (that is inter-individual application), there is a necessity for the existence of requisite sanctions and enforcement measures by the State. Moreover, even if a right requires the

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<sup>131</sup> The Board of the Teaching Hospital at the University of Amsterdam v.F.W. and MC.C.H.G., Central Appeals Court, 16 Feb.1989, AB (1989) No.164, *cited in*, 21 Neth.Y.I.L. 375, at 377 (1990). *See also*, Heringa, *supra*, note 92, at 4-5.

<sup>132</sup> Leary, *supra*, note 1, at 58.

<sup>133</sup> Jackson, *supra*, note 15, at 152.

<sup>134</sup> Frovlova v.U.S.S.R., *supra*, note 90.

<sup>135</sup> Van Gend en Loos, *supra*, note 33, where the E.C.J., in confirming the self-executing nature of article 12, it mentioned that "The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation...".

<sup>136</sup> *See above*, note 114.

<sup>137</sup> *See e.g.*, S.W.M.B. v.Mayor and Aldermen of Arnhem, Central Council of Appeal, 1 Nov.1983, NJCM-Bulletin, 22 (1983), *cited in*, 16 Neth.Y. I.L., 501, at 504 (1985).

establishment of certain State structures (thus being a positive obligation), but those structures already exist, the right may be safely considered self-executing.

The matter is even less clear if it is accepted that all human rights possess tripartite obligations, namely the obligation to respect, to protect and to fulfil. Under this approach, elements of rights which might be considered *prima facie* progressive in nature, will be capable of immediate implementation to the extent that they contain a prohibition upon the State. As one commentator has noted:

"...there is no qualitative difference between negative and positive provisions. It is merely a difference of degree: the former is more likely to be directly applicable than the latter because it is more likely to be precise".<sup>138</sup>

This has certainly been the approach of the Committee, which has strongly maintained the possibility of immediate implementation of certain provisions, notwithstanding the progressive application clause in article 2(1).<sup>139</sup> Indeed, that there are exceptions to the general rule of progressive application has been recognised by the Dutch courts.

#### IV) CONCLUSION

Although technically it is beyond the competence of the Committee to concern itself with the precise manner in which States give effect to their obligations under the Covenant, it cannot be denied that the modalities of implementation have a significant impact upon the extent to which the individual may enjoy the rights under the Covenant. The most effective method of ensuring the enjoyment of human rights is undoubtedly to provide the individual with appropriate remedies at a national level. The concept of direct effect is of considerable importance in this context in so far as it is a mechanism through which the individual may rely directly upon the terms of the treaty in asserting his or her rights before national courts.

It has to be noted that direct effect is not the only means by which treaty provisions might be given force in domestic courts. A largely unexplored area in this work has been the extent to which treaty provisions might be used in the interpretation of domestic

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<sup>138</sup> Iwasawa, *supra*, note 15, at 675.

<sup>139</sup> *Supra*, note 79.

legislation and in the development of the common law.<sup>140</sup> Although the use of treaty provisions in the interpretation of domestic norms has considerably potential, it does not provide the individual with an independent cause of action. This is particularly significant in the context of economic, social and cultural rights which are rarely to be found as constitutional rights and even when they are, have generally been deemed incapable of providing the individual with a cause of action in the courts.

This does not augur well for the direct effect of provisions in the Covenant. So long as domestic courts maintain the traditional view that economic, social and cultural rights in general are not "justiciable", they are unlikely to consider the provisions in the Covenant as being self-executing. In turn, it is primarily the failure of national courts to give judicial consideration to economic, social and cultural rights, that has meant that those rights have remained largely inchoate. It is in the Committee's interest, not only from the point of view of ensuring the effectiveness of the guarantees in the Covenant, but also from the point of view of developing the normative content of the rights in the Covenant, that the rights be given direct effect.

Ultimately, the direct effect of the Covenant's provisions will depend upon the extent of existing legislation and the traditional constitutional position of the courts which renders it virtually impossible to predict to what degree a particular provision might be self-executing. Nevertheless, although not all the possible criteria have been analysed here, it is clear that there can be no overriding presumption that the economic, social and cultural rights in the Covenant are not self-executing.

It is arguable that those rights in the Covenant, that are not dependent for their implementation upon State financial resources, are *prima facie* good candidates for being given direct effect. One might cite for example, freedom from forced labour (article 6), freedom from arbitrary dismissal (article 6), the right to join and form trade unions (article 8), the right to strike (article 8), freedom from arbitrary eviction (article 11), the right not to be arbitrarily deprived of food or medical attention (articles 11 and 12), the right to choose schools for one's children (article 13(3)), the right to establish and direct educational institutions (article

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<sup>140</sup> To the writer's knowledge, there are no United Kingdom cases in which the Covenant has been mentioned. It is notable, however, that article 11 of the Covenant was relied upon in two US cases regarding equal access to higher education, *see, Re Alien Children Education Litigation* 501 F.Supp. 544, (S.D.Tex. July 21 1980); *Tayyari v. New Mexico State University*, 495 F.Supp.1365 (D.N.M. Aug.29 1980).

13(4)) and freedom for scientific research and creative activity (article 15(3)). In addition, although having certain resource implications, the rights might be generally given direct effect to the extent that they are read in conjunction with article 2(2) which prohibits discrimination in the exercise of those rights.<sup>141</sup>

For those States that do recognise the concept of self-executing treaty provisions, perhaps the greatest obstacle has been the excessively strict manner in which criteria have been applied<sup>142</sup> and the almost summary fashion in which the courts have dealt with economic and social rights in general and the Covenant in particular. A more sophisticated relativist approach would recognise the degree to which such rights are capable of judicial implementation rather than to dismiss them out of hand.

The Committee, whilst not being competent to rule as to the self-executing nature of rights, may exercise some influence on domestic courts in so far as those courts need to interpret provisions of the Covenant. In that sense, bold statements by the Committee are not unwarranted. Nevertheless, if the Committee wishes to influence domestic courts in this manner, it will have to develop a sophistication that is currently lacking. In particular, given that many of the rights within the Covenant have been identified as incorporating a mixture of obligations (respect, protect and fulfil), the Committee will have to be more precise as to what exact right or obligation is to be considered directly effective.

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<sup>141</sup> The rights to equal pay for equal work, and equal remuneration for work of equal value in Article 7(a)(i) are also relevant here.

<sup>142</sup> Van Dijk, *supra*, note 5, at 639.

## **CHAPTER FOUR: NON-DISCRIMINATION AND EQUALITY**

### *Article 2(2)*

*"The States Parties to the Present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".*

### *Article 3*

*"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant".*

### **I) INTRODUCTION**

As a human rights instrument, the manifest purport of the Covenant is to protect the fundamental rights of every person by virtue of their humanity. That human rights are seen to derive from the innate and common nature of every human being means that they are possessed by every person to an equal extent. As the Preamble stresses, the Covenant is based upon an idea of the "equal and inalienable rights of all members of the human family". The concept of "equal rights" is confirmed in the Covenant in a general manner by the fact that the rights pertain to "everyone". More specifically however, article 3 makes express reference to the equal rights of men and women.

References to equality may also be found in a number of other provisions in the Covenant. Article 7 refers to "equal remuneration for work of equal value", to "equal pay for equal work" and to "equal opportunity for everyone to be promoted". Similarly, article 13 provides that "higher education shall be made equally accessible to all". However, it follows from the structure of the Covenant that the most important provision as regards the promotion of equality or of equal rights within the Covenant is article 2(2). In that provision, recognition of a concept of equality is to be discovered in a negative formulation prohibiting discrimination.

It could be said that the dual concepts of non-discrimination and equality deriving from article 2(2) "constitute the dominant

single theme of the Covenant."<sup>1</sup> This is true not merely by virtue of the fact that human rights reflect the common innate dignity of every human being, but also by the fact that the implementation of the Covenant is marked by a redistributive philosophy.

## **II) THE CONCEPTS OF NON-DISCRIMINATION AND EQUALITY**

The idea of equality has been peculiarly resistant to definition and, over the centuries, has been attributed with all forms of meanings and characteristics. For example, it is common enough to find references to "equality of treatment", "equality of access", "equality of result or achievement", "equality of opportunity", "absolute equality", "relative equality", "precise equality", "formal equality", "*de facto* equality" and "*de jure* equality". Despite the inconsistencies in terminological usage and the continuing disputes over certain peripheral issues, a number of basic principles are generally accepted.

The idea of human rights assumes that all human beings have some basic commonly shared characteristics and that as a result they should be viewed and judged as members of the human race rather than as members of a particular group. The recognition of these shared qualities gives rise to a principle of equality which requires that all persons be treated with equal respect. Thus "certain forms of state and governmental behaviour which consistently exploit or degrade men and deny both the possession of the shared qualities and 'the moral claims that arise (therefrom)' by certain groups while conceding and indeed recognising them in the case of others should be excluded".<sup>2</sup>

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<sup>1</sup> Ramcharan B., "Equality and Nondiscrimination", in Henkin L.(ed), The International Bill of Rights, 246 (1981). In saying this he was referring to the ICCPR; as we shall see however this is also true for the ICESCR.

<sup>2</sup> Polyviou P., The Equal Protection of the Laws, 11 (1980). Sieghart comments in this vein:

"The primary characteristic which distinguishes 'human' rights from other rights is their universality: according to the classical theory, they are said to 'inhere' in every human being by virtue of his humanity alone. It must necessarily follow that no particular feature or characteristic attaching to any individual, and which distinguishes him from others, can affect his entitlement to his human rights, whether in degree or in kind, except where the instruments specifically provide for this for a clear and cogent reason- for example, in restricting the right to vote to adults, or in requiring special protection for women and children."

Sieghart P., The International Law of Human Rights, 75 (1985).

Recognition has to be paid to the fact that although people have certain common characteristics, they nevertheless possess independent attributes and qualities (whether innate or assumed) which may legitimately be taken into account in the distribution of goods, services and advantages. It is commonly asserted here that equality demands that those who are equal be treated in an equal manner,<sup>3</sup> and that those who are different should be treated differently.<sup>4</sup> The fundamental question here is what considerations are deemed to be legitimate justifications for differential treatment.

One commentator has usefully categorised such justifications into two groups: differentiations based upon "character and conduct imputable to the individual" (such as industriousness, idleness, lawfulness, merit, and carelessness)<sup>5</sup>; and differentiations based upon individual qualities which are relevant to social values (such as physical and mental capacities and talent).<sup>6</sup> However, these criteria do not exhaust all the possible justifications for differential treatment in every circumstance.

The achievement of an equitable balance between identical and differential treatment, however, may be approached from either a positive or a negative vantage point. In positive terms it might be said that everyone should be treated in the same manner unless some alternative justification is provided. On the other hand, in negative terms, it might be said that differences in treatment are legitimate except upon a number of expressly prohibited grounds.

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<sup>3</sup> Ramcharan commented in this light: "Equality... means equal treatment for those equally situated". Ramcharan, *supra*, note 1, at 252. Cf. also, Vickers J., "Majority Equality Issues of the Eighties", Can.H.R.Y., 47 (1980).

<sup>4</sup> This derives essentially from the Aristotelian principle of distributive justice, Aristotle, Nicomachean Ethics, Bk.5, (Trans. Ross W., 1925). See also, Dworkin, who distinguishes between "equal treatment" and "treatment as an equal", Dworkin R., Taking Rights Seriously, xii (1977). Vierdag notes however that an essential element of proportionality exists in determining the extent of different treatment. He therefore concludes that non-discrimination requires:

"Equal treatment of equals and unequal treatment of unequals in proportion to the inequality".

Vierdag E., The Concept of Discrimination in International Law, 7 (1973).

<sup>5</sup> For example a State may legitimately disqualify convicted criminals from the exercise of certain rights on the basis of their own actions.

<sup>6</sup> Ramcharan, *supra*, note 1, at 253. These have been termed by another commentator as "natural endowments". Raphael D., Justice and Liberty, 48 (1980).

The principle of non-discrimination approaches the matter of equality from the negative standpoint.<sup>7</sup> It is primarily a legal technique employed to counteract unjustified inequality.<sup>8</sup> The concept of non-discrimination is, however, only a limited means to pursue equality. First, it operates upon the presumption that differential treatment is legitimate unless based upon a proscribed ground. Even in such a case, differential treatment is only *prima facie* discriminatory. Secondly, the concept of non-discrimination is merely a procedural principle (or an obligation of conduct), governing the treatment of people as equals.<sup>9</sup> It may be conditioned by, but certainly does not recognise itself, a wider concept of equality that may take cognisance of factual social inequalities.<sup>10</sup> In particular, non-discrimination tends to concentrate upon the prohibition of differential treatment and does not take account of the fact that differential treatment may actually be required in certain circumstances.

The notion that people are "equal" may give rise to claims as to different forms of equality. At one extreme, it might be interpreted as "equality of consideration" recognising merely that

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<sup>7</sup> The most coherent discussion of the notion of discrimination in legal terms is to be found in Judge Tanaka's dissenting opinion in the South West Africa Cases (Second Phase). I.C.J. Rep. 1966, 6 at 284-316.

<sup>8</sup> Partsch comments that the creation of the legal norm of non-discrimination was primarily aimed at avoiding the uncertainties of the notion of equality. He goes on to say:

"The basic consideration in favour of this negative approach is to achieve a higher degree of clarity and certainty in arriving at equality".

Partsch K., "Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination", in Luard E., The International Protection of Human Rights, at 69 (1957). Similarly the P.C.I.J. commented in the Minority Schools in Albania Case, (1935) P.C.I.J., Ser.A/B, no.64:

"Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations."

<sup>9</sup> Some commentators see the object of the non-discrimination clauses as being the promotion of "equality of treatment". See e.g. Klerk Y., "Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights", 9 Hum.Rts.Q., 250, at 255 (1987).

<sup>10</sup> Cf. Meron T., "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", 79 A.J.I.L. 283, at 286 (1985). For the view that equality and non-discrimination are merely positive and negative formulations of the same idea see, Dinstein Y., "Discrimination and International Human Rights", 15 Isr.Y.H.R., 11, at 19 (1985); Bayefsky A., "The Principle of Equality or Non-Discrimination in International Law", 11 H.R.L.J., 1, at 1-2 (1990).

everyone should have their claims considered.<sup>11</sup> Essentially this is no more than saying that those claims exist. At the other extreme, equality can be seen as "equality of result",<sup>12</sup> in which there should be a numerically equal distribution of goods, services and advantages. This is universally considered to be neither desirable nor possible.<sup>13</sup>

Between these two extremes may be found claims as to "equality of opportunity". In a weak sense this may be interpreted as allowing everyone to develop their capabilities and pursue their interests without unjustified restrictions. A stronger sense of equality of opportunity, however, requires that opportunity be made meaningful and effective through, in particular, the removal of external barriers that affect the acquisition of benefits and distribution of social "goods", and through the positive promotion of maximum opportunity (for example through training).<sup>14</sup> The notion of equality here demands differential treatment on the basis of initial *de facto* inequality.<sup>15</sup> Efforts to maximise equality of

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<sup>11</sup> Polivou, *supra*, note 2, at 12; Raphael, *supra*, note 6, at 51.

<sup>12</sup> Also referred to as absolute equality, material equality, or equality of satisfaction.

<sup>13</sup> If this approach was taken then the policy of maintaining reasonable differentiations between people in terms of merit or virtue, for example, is untenable. See, Flew A., Equality in Liberty and Justice, 177 (1989).

<sup>14</sup> An example of the necessity of different treatment is the provision of special access facilities for the physically disabled in educational facilities. Clearly if they were to be treated "equally" there would be no grounds for building special ramps or lifts. This would effectively deprive them of access to educational opportunities that are open to others. Vickers comments in this respect:

"If we interpret equal treatment as identical treatment regardless of the different needs of individuals, few equality goals will be realized and most equality rights will exist simply on paper."

Vickers, *Supra*, note 3, at 58.

<sup>15</sup> The question of different treatment is particularly problematic with regard to minorities. On the one hand the social disadvantage of such groups might require a long term integrationalist stance emphasising equality of treatment. On the other hand, notions of cultural independence and self-determination argue in favour of different treatment. Schachter distinguishes between races and ethnic groups:

"In respect of race, one should follow a "universalist-integrationalist" policy (eliminating distinctions) whereas in regard to ethnic groups a pluralist solution, based on the separate but equal doctrine, can be justified and achieved".

Schachter O., "How Effective are Measures Against Racial Discrimination?" 4 H.R.J., 293, at 296 (1971).

Capotorti argues that the essential difference between the protection of minorities

opportunity have commonly involved the imposition of redistributionalist taxation policies to finance social welfare programmes for the advancement of vulnerable and disadvantaged groups in society.

Whereas there is acceptance of the idea that the benefits of individual development may be distributed to reduce material inequality, the idea of utilising "suspect" criteria to direct such a distribution is more controversial. In particular the institution of affirmative action policies which aim to ensure some equalisation of result has been subject to considerable criticism.<sup>16</sup>

### III) EQUALITY IN THE COVENANT

#### A) THE TEXT OF THE COVENANT

It is very much apparent that a notion of equality runs through the heart of the Covenant. In so far as the Covenant demands the creation of State-welfare institutions and benefits (for example for the provision of housing, food, clothing and social security), it is openly redistributionalist.<sup>17</sup> Certainly the Covenant does not envisage an absolute equalisation of result in the sense of achieving an equal distribution of material benefits to all members of society, but it does recognise a process of equalisation in which social resources are redistributed to provide for the satisfaction of the basic rights of every member of society.<sup>18</sup> As an ideal then, an

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and non-discrimination is that the former requires the maintenance of certain differential treatment to allow them to continue developing their own characteristics. Capotorti F., Study On the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/384/Rev.1, at 41, para.242 (1979). However he seems not to recognize that failure on the part of the State to protect the right to cultural identity of minorities is also a question of discrimination.

Indeed, Sigler confounds the argument further by asserting that the definition of a minority as:

"any group category of people who can be identified by a sizable segment of the population as objects for prejudice or discrimination or who, for reasons of deprivation, require the positive assistance of the State. A persistent nondominant position of the group in political, social, and cultural matters is the common feature of the minority".

Sigler J., Minority Rights: A Comparative Analysis, 5 (1983).

<sup>16</sup> See below, text accompanying notes 203-231.

<sup>17</sup> It is arguable that all the rights (possibly with the exception of articles 9 and 13) are achievable in a purely free-market setting through economic growth.

<sup>18</sup> As Raphael stated:

"...differential distribution according to need implies a belief in a right to a certain kind of equality. The man who is said to be in

uneven distribution of material benefits is only tolerable in so far as the satisfaction of the basic economic, social and cultural rights of every member of society is already achieved.<sup>19</sup> On a broad view, the objectives of the Covenant are underlined by the idea of equality of opportunity in its strongest sense.

Both the text of the Covenant and the intentions of the drafters appear to bear out this conclusion. The idea of equality of opportunity is specifically recognised in articles 7(c) and 13(2)(c). Article 7(c) in particular, specifies that the only legitimate considerations in achieving equality of opportunity for promotion are seniority and competence.<sup>20</sup> States would thus appear to be under an obligation to eliminate all other barriers to promotion that might exist both *de jure* and *de facto*. In particular this might require the adoption of positive measures to promote the opportunities of groups in society that are under-represented in higher management positions. That positive measures may (and indeed should) be taken on behalf of certain groups in society is confirmed by the text of articles 10(2) and 10(3) of the Covenant which provide for special measures of protection to be accorded to mothers before and after childbirth and to children especially in the workplace.

Article 3 itself is not so clear in this respect. It provides for the "equal right" of men and women to the enjoyment of all rights in the Covenant. This might be interpreted as saying no more than that men have no greater claim to the enjoyment of the rights than women. However, it is clear that the drafters intended the provision to have more substance. Although article 3 did not require absolute equality of treatment or result,<sup>21</sup> there was

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need falls below a level of benefits which is taken to be the right of all. When special provision is made for him, this is an attempt to bring him, so far as possible, up to the level of what is due equally to all."

Raphael, *supra*, note 6, at 85.

<sup>19</sup> The principle of non-discrimination would, however, still operate in this field.

<sup>20</sup> Article 13(2)(c) requires that higher education be "equally accessible to all, on the basis of capacity". It is not as specifically stated here that capacity should be the only consideration.

<sup>21</sup> McKean comments:

"Some representatives considered that the paragraph might be taken to decree an 'absolute' or 'precise' equality or 'identity of treatment' but others urged that what was being sought was an effective equality in fact- not the abolition of differences between the roles of men and women in marriage, but rather the equitable

certainly a feeling that factual equality should be increased. As the USSR representative commented, the Third Committee was "elaborating principles of *de jure* equality; from these principles would arise the *de facto* equalization of human rights".<sup>22</sup> He continued, "...equality of rights went further than mere non-discrimination; it implied the existence of positive rights in all the spheres dealt with in the draft Covenant".<sup>23</sup>

It might be argued from the presence of article 3 that the concept of equal rights only applies in relation to the position of women. However, there is no reason to approach article 3 in such a restrictive manner. Not only is the scope of the non-discrimination provision considerably wider, the presence of article 3 merely reflects the preoccupation of the United Nations at the time of drafting, with the issue of sexual equality.<sup>24</sup>

#### B) THE APPROACH OF THE COMMITTEE

The approach of the Committee towards the realisation of the rights in the Covenant is marked by its insistence upon a process of equalisation. Thus the Committee has recognised that the first step in the realisation of the rights in the Covenant is the identification of disadvantaged sectors of the population.<sup>25</sup> Those groups should be the focus of positive State action aimed at securing the full realisation of their rights. That the Committee considers that action should be prioritised in favour of the vulnerable and disadvantaged groups in society affirms that it considers that the full realisation of the rights will not be achieved merely through economic growth, but rather through providing for a more equal enjoyment of the rights.<sup>26</sup> Indeed, to the extent that the Committee relies upon State-specific benchmarks or indicators, the definition of disadvantage becomes a relative,

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distribution of rights and responsibilities".

McKean W., Equality and Discrimination under International Law, 182 (1983).

<sup>22</sup> USSR, UN Doc.A/C.3/SR.1183, para.10, (1962).

<sup>23</sup> *Ibid.*

<sup>24</sup> Klerk, *supra*, note 9, at 256.

<sup>25</sup> This is stated as being one of the aims of the reporting process. *See*, General Comment No.1, UN Doc.E/1989/22, Annex III, at 87, UN ESCOR, Supp.(No.4), (1989).

<sup>26</sup> For a criticism of such an approach *see*, Flew, *supra*, note 13, at 182-209. He argues instead for the issue of poverty, for example, to be dealt with through a process of economic growth.

as opposed to a universal, or absolute, definition. In such a situation, measures to combat disadvantage may be seen to be openly redistributionalist in nature.<sup>27</sup>

If a process of equalisation is considered to be a means by which States should achieve the full realisation of the rights, it is difficult to assess the degree to which the Committee is really concerned with the question of equality. For example, if a State builds special homes for persons with physical disabilities, that might alternatively be seen as a step towards the realisation of the right to housing, or as a measure aimed at achieving real equality of access to adequate housing.

Nevertheless, the concept of equality is relevant outside the achievement of specific levels of enjoyment of economic, social and cultural rights. Thus it might be considered that even where the minimum core content of the rights is achieved for all persons, the State is under an obligation to ensure that everyone has equality of opportunity or access to higher levels of enjoyment of the rights concerned.<sup>28</sup>

In addition to its action in relation to discrimination, which will be dealt with below, members of the Committee have made numerous references to equality of access and opportunity.<sup>29</sup> In doing so, Committee members have tended to rely upon the factual situation in dealing with the question of discrimination.<sup>30</sup> Members have further enquired as to State policies designed to remedy

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<sup>27</sup> The rejection by the Committee of development approaches that stress growth over poverty alleviation reinforces the conclusion that a link between disadvantage and equality underlies its methodology.

<sup>28</sup> This is relevant to the discussion of whether article 2(2) is subordinate or autonomous, *see below*, text accompanying notes 158-175.

<sup>29</sup> *See e.g.*, Alston, E/C.12/1990/SR.31, at 3, para.10; Jimenez Butragueno, *ibid*, SR.43, at 8, para.4; Rattray, E/C.12/1991/SR.11, at 8, para.45.

<sup>30</sup> For example it was commented that a higher proportion of unemployed women in a State suggested a certain amount of inequality in education and training, *see e.g.*, Muterahjuru, E/C.12/1987/SR.5, at 10, para.4; Neneman, E/C.12/1988/SR.3, at 7, para.29. Similar concern has been expressed over situations where the number of girls in education is lower than that of boys, *see e.g.*, Texier, E/C.12/1988/SR.14, at 7, para.40; Alston, E/C.12/1988/SR.17, at 8, para.48; Rattray, E/C.12/1990/SR.31, at 4, para.13; Jimenez Butragueno, E/C.12/1991/SR.3, at 11, para.51.

situations of *de facto* inequality,<sup>31</sup> and have looked for improvements in the position over time.<sup>32</sup>

However, to determine the extent of equality of opportunity in terms of the result achieved, seems to confuse the notion of equality of opportunity or access with equality of result.<sup>33</sup> As Nickel comments:

"Success in providing equal opportunities will have to be judged in ways that... require reference to the presence of quality programs to educate and protect against discrimination. Statistical measures of outcomes may be useful as practical guides, but they will not serve as criteria of success".<sup>34</sup>

It is clear that the Committee does not countenance the creation of a situation of absolute equality of result. It has emphasised, in particular, the necessity of some autonomy for ethnic minorities to ensure the enjoyment of their own culture,<sup>35</sup> and has placed emphasis on the individual right to pursue his or her own development.<sup>36</sup> As one member stated:

"'Full' realisation of the economic, social and cultural rights recognised in the Covenant did not mean equalling out for all persons in the areas concerned but the fact that everyone was entitled, *de facto*, to the equal opportunity to enjoy his rights with dignity".<sup>37</sup>

However, although the Committee does attempt to draw a distinction between the concepts of equality of opportunity and equality of result, the problem essentially lies in the means by

<sup>31</sup> See e.g., Sviridov, E/C.12/1987/SR.20, at 2, para.2; Alston, E/C.12/1990/SR.31, at 3, para.10.

<sup>32</sup> See e.g., Jimenez Butragueno, E/C.12/1988/SR.11, at 2, para.5.

<sup>33</sup> Some commentators have taken the view that the full realization of equality of opportunity is to be determined by whether "the allocation of the good in question in fact works out unequally or disproportionately between different sections of society; if the unsuccessful sections are under a disadvantage which could be removed by further reform or social action". Williams B., "The Idea of Equality", in Williams B.(ed), Problems of the Self, (1973).

<sup>34</sup> Nickel J., "Equal Opportunity in a Pluralistic Society", in Paul E., Miller F., Paul J., and Ahrens J.(eds), Equal Opportunity, 115 (1987).

<sup>35</sup> See e.g., Alvarez Vita, E/C.12/1991/SR.11, at 10, para.54.

<sup>36</sup> Indeed one member, in stressing the necessity of protective action for women during and after pregnancy, commented that "they should not be excessively protected in every sphere of activity". Jimenez Butragueno, E/C.12/1987/SR.7, at 16, para.25.

<sup>37</sup> Taya, E/C.12/1990/SR.46, at 9, para.42.

which former is to be measured.<sup>38</sup> The Committee already does take note of legislative and educational programmes to combat discrimination in addition to statistical data,<sup>39</sup> but it is doubtful whether analysis of this information alone would take it any closer to assessing real equality of opportunity and access.<sup>40</sup>

It would appear then that the Committee must, as it does at present, take cogniscence of material inequality between groups in society as evidenced in statistical data. It should, however, be aware that the ultimate objective is not to establish some numerical distribution in the enjoyment of the rights, but rather to ensure that there is sufficient equality of opportunity.<sup>41</sup> Accordingly, not every difference in the distribution of benefits will necessarily be evidence of inequality of opportunity. The Committee will have to exercise some discretion in establishing causality.

#### **IV) ARTICLE 2(2): NON-DISCRIMINATION**

The only indication as to the precise meaning of non-discrimination in the drafting of the Covenant was provided by a discussion over whether the term "discrimination" or the term "distinction" should be used. There, an overwhelming majority<sup>42</sup> endorsed a three-power amendment (Argentina, Italy and Mexico) to replace the word "distinction" with the word "discrimination".<sup>43</sup> The stated purpose was to confirm that certain distinctions may be justified to promote the position of certain backward and underprivileged sectors of the population.<sup>44</sup> The word

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<sup>38</sup> This is partially due to the fact that "equality of opportunity and access" is a form of equality of result in its widest sense: it does envisage an ideal situation towards which non-discrimination policy should aim.

<sup>39</sup> See e.g., Neneman, E/C.12/1987/SR.5, at 10, para.49. Rattray, E/C.12/1987/SR.6, at 12, para.66; Alston, E/C.12/1990/SR.42, at 11, para.50.

<sup>40</sup> Indeed the problem facing the Committee is not one of access to information regarding State policy and legislation, but rather the way in which such policies are carried out.

<sup>41</sup> There is some evidence that certain members of the Committee are aware of the shortcomings of statistical evidence in the determination of discrimination. E.g. Neneman, E/C.12/1987/SR.7, at 7, para.29.

<sup>42</sup> 76-2, 13 abstentions. UN Doc.A/5365, at 22, 17 UN GAOR, Annex, (Ag.Item 43), (1962).

<sup>43</sup> UN Doc.A/C.3/L.1028/Rev.2 (1962).

<sup>44</sup> There were also fears that the guarantee of rights without distinction would also prevent States from place any restrictions *inter alia* on the rights of aliens to take up employment in a country. The replacement of the word distinction by discrimination was intended to avoid such ambiguity. UN Docs.

discrimination seemed to convey more accurately the requirement that the distinction be of an unjustified nature or arbitrary. That this decision was not of any decisive importance is borne out by the fact that during the drafting of the ICCPR the term distinction was not altered.<sup>45</sup> In that case it was made clear that not all distinctions would be forbidden.<sup>46</sup> Similarly, in the drafting of article 3 there is some evidence that not all differences in treatment would be considered illegitimate. McKean comments:

"Some representatives considered that the paragraph might be taken to decree an 'absolute' or 'precise' equality or 'identity of treatment' but others urged that what was being sought was an effective equality in fact- not the abolition of differences between the roles of men and women in

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A/C.3/SR.1182, at 241 (1962); A/C.3/SR.1202, at 338 (1962); and A/C.3/SR.1203, at 341 (1962).

<sup>45</sup> The representative of Italy in particular held out in favour of the term discrimination because:

"There were cases in which the law was justified in making distinctions between individuals or groups, but the purpose of the article was to prohibit discrimination, in any sense of unfavourable and odious distinctions which lacked any objective or reasonable basis".

Italy, A/C.3/SR.1099, para.10 (1961).

<sup>46</sup> UN Doc.A/C.3/SR.1258, paras.244-245 (1963); UN Doc.A/C.3/SR.1259, para.249 (1963). *See also*, Klerk, *supra*, note 9, at 252. McKean comments that the change in attitude from that taken with regard to the ICESCR was largely due to the change in composition of the Committee in the intervening time. McKean, *supra*, note 21, at 149. The use of the word "distinction" is also surprising considering article 4 ICCPR refers to "discrimination".

An important exchange of views took place over the meanings of "distinction" and "discrimination" with regard to article 26 ICCPR (draft article 24). It was pointed out that the law was justified in making reasonable differentiations in the treatment of certain groups of individuals such as minors, aliens or persons of unsound minds. *See*, UN Docs.A/C.3/SR.1097-1102, (1962). Discrimination in this sense did not mean distinctions of a favourable kind (negative discrimination), nor did it include private individual preferences. McKean, *supra*, note 21, at 139-140.

McKean comments that article 2(1) ICCPR "does not prevent the drawing of distinctions on the grounds of merit or capacity, nor does the equality principle require identical treatment for all, or forbid relevant and reasonable distinctions". Indeed article 25 ICCPR seems to recognize that it is only "unreasonable restrictions" that qualify as discrimination. Similarly, objections to the phrase "equality before the law" in article 26 ICCPR, were dispelled by the argument that it was a procedural and not substantive equality that was sought, which did not preclude reasonable differentiations between individuals or groups of individuals.

marriage, but rather the equitable distribution of rights and responsibilities".<sup>47</sup>

It would appear that the drafters understood the term "discrimination" to mean an unjustified differentiation in treatment. Indeed this point has been emphasised by the European Court of Human Rights in the Belgian Linguistic Case.<sup>48</sup> Here the French text of article 14 used the term "distinction". The Court held that the article "does not forbid every difference in treatment in the exercise of the rights and freedoms recognized".

However, during the drafting of the Covenant, a number of references were made to "discrimination in its classical juridical meaning"<sup>49</sup> and to "discrimination... in international usage".<sup>50</sup> It seems to have been suggested that there existed a specific juridical meaning of the term "discrimination" as used in the Covenant.<sup>51</sup> It is possible that reference was being made to the ILO Convention Concerning Discrimination in Respect of Employment and Occupation (ILO No.111)<sup>52</sup> and the UNESCO Convention Against Discrimination in Education<sup>53</sup>, both of which contain definitions of discrimination. Certainly, if a clear international test for discrimination in all fields were

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<sup>47</sup> McKean, *supra*, note 21, at 182.

<sup>48</sup> Case "Relating to certain aspects of the laws on the use of languages in education in Belgium"(Merits), Eur.Court H.R., Series A, Vol.6, Judgement of 23 July 1968, (1979-80) 1 EHRR 578.

<sup>49</sup> Pakistan, A/C.3/SR.1102, para.4, (1961)

<sup>50</sup> Argentina, A/C.3/SR.1184, para.7 (1962).

<sup>51</sup> Ramcharan argues with regard to the provisions of the ICCPR, that the status of the concept of non-discrimination in international law has effect both as to the permissibility of derogations from the principle in the Covenant, but also to the determination of State compliance with its obligations under the Covenant. Ramcharan, *supra*, note 1, at 250.

<sup>52</sup> Adopted 25 June 1958, entered into force 15 June 1960, 362 U.N.T.S. 32. Article 1(1) reads:

"For the purposes of this Convention the term "discrimination" includes: a. Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

<sup>53</sup> Adopted 14 Dec. 1960, entered into force 22 May 1962, 429 U.N.T.S. 93. Article 1(1) reads:

"For the purposes of this Convention the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education".

established, it would have considerable relevance to the interpretation of article 2(2).<sup>54</sup>

The definitions of discrimination provided in the above mentioned Conventions may also be compared with those in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>55</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>56</sup> Their similarities have led certain commentators to conclude that a universal "composite concept" of discrimination can be discerned in the various instruments<sup>57</sup>:

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<sup>54</sup> This is particularly so if the principle of non-discrimination is thought to have the status of customary international law.

In the Barcelona Traction Case the ICJ included among the obligations of states *erga omnes* "the principles and rules concerning the basic rights of the human person including protection from slavery and racial discrimination". ICJ Rep., (1970), at 3. Similarly in its Advisory Opinion on Namibia (1971) the ICJ stated that "to establish... and to enforce distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national origin... constitutes a denial of fundamental human rights" and "is a flagrant violation of the purposes of the Charter". Advisory Opinion, I.C.J.Rep., (1971), at 16.

Reference to other international instruments is also suggested in paragraph 41 of the Limburg Principles which states:

"In the application of article 2(2) due regard should be paid to all relevant international instruments including the Declaration and Convention on the Elimination of all Forms of Racial Discrimination".

9 Hum.Rts.Q., 122, at 127, (1987).

<sup>55</sup> Adopted 21 Dec. 1965, entered into force 4 Jan. 1967, 660 U.N.T.S., 195. Article 1(1) reads:

"In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

<sup>56</sup> Adopted 18 Dec. 1979, entered into force 3 Sept. 1981. GA Resn. 34/180, 34 UN GAOR, Resns, Supp.(No.46) at 193, (1980), 1249 U.N.T.S. 243. Article 1 reads: "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

<sup>57</sup> The outline of such a definition has been accepted by the Human Rights Committee in its General Comment on article 2(1) ICCPR where it stated that the term discrimination:

"Should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."

General Comment No.18 (37), UN Doc.A/45/40, at 174, para.7, 45 UN GAOR,

- 1) a difference in treatment,
- 2) which is based upon certain prohibited grounds,
- 3) and has a certain purpose or effect,
- 4) in selective fields.<sup>58</sup>

The Committee on Economic, Social and Cultural Rights however, has not as yet established its own definition of the term "discrimination" in a General Comment. The only definition to be found in its work is in the reporting guidelines on the subject of article 6. There, the Committee requests States to provide it with information as to:

"...any distinctions, exclusions, restrictions or preferences, be it in law or in administrative practices or in practical relationships, between persons or groups of persons, made on the basis of race, colour, sex, religion, political opinion, nationality or social origin, which have the effect of nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity or treatment in employment or occupation".<sup>59</sup>

The similarity between this definition and that adopted in other human rights contexts suggests that the Committee will approach the question of discrimination in the same manner.

The four elements of discrimination will be dealt with separately below.

#### A) DIFFERENTIAL TREATMENT

The Committee utilises the common terms to describe differential treatment. They are "distinctions", "exclusions", "restrictions" or "preferences". Clearly any one of these terms would suffice to establish an action for the purpose of discrimination. The inclusion of the term "preferences" suggests that the action does not necessarily have to be directed against the group alleging discrimination, but may be effected through unreasonable promotion of one group at the expense of others.<sup>60</sup> The crucial aspect is that these terms are all relative, presuming a

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Supp.(No.40), (1990).

<sup>58</sup> Schwelb E., "The International Convention on the Elimination of All Forms of Racial Discrimination", 15 *I.C.L.Q.*, 996, at 1001 (1966).

<sup>59</sup> Reporting Guidelines, UN Doc.E/1991/23, Annex IV, at 91, para.3, UN ESCOR, Supp.(No.3), (1991).

<sup>60</sup> It has to be pointed out that from the point of view of equality of opportunity, differential treatment may actually be required in certain circumstances. It is particularly in this respect that the principle of non-discrimination falls short of providing for equality.

one commentator has noted, "the discriminatory or equal treatment of one person must be measured by the relative treatment of somebody else".<sup>61</sup>

As was established during the drafting of the Covenant, differential treatment, although being a pre-requisite, is not in itself sufficient to establish a case of discrimination. The Committee's definition goes on to speak of actions that have the effect of "nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity...".<sup>62</sup> Accordingly, differentiations in treatment are not to be considered discriminatory as long as they do not negatively affect the equal opportunities of other individuals or groups. This might be read as not preventing justifiable differentiations. However, by defining "discrimination" in terms of "equality of opportunity" does little to clarify the complex of issues. In the context of employment, for example, it has to be accepted that certain job requirements may indirectly limit the access to employment of certain groups (such as women in jobs that require heavy manual labour).<sup>63</sup> Similarly in some cases, preference may be legitimately given to members of specific racial groups for the purpose of authenticity.<sup>64</sup>

This matter has been underlined in other human rights fora. In the Mauritian Women's Case<sup>65</sup> the Human Rights Committee in finding a violation of articles 2(1) and 3 ICCPR, considered that a distinction based on sex was not in itself conclusive. The determining factor was that no "sufficient justification" had been given for such a distinction.<sup>66</sup> Similarly, the European Court found in the Belgian Linguistics Case<sup>67</sup> that the principle of equality of treatment is violated "if the distinction has no objective and reasonable justification." It went on to define what it considered to be reasonable:

"The existence of such a justification must be assessed in relation to the aim and effects of the measure under

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<sup>61</sup> Dinstein, *supra*, note , at 11.

<sup>62</sup> *Supra*, note 59.

<sup>63</sup> *See below*, Chapter 5.

<sup>64</sup> For example a theatrical production might require an actor of a specific racial background.

<sup>65</sup> HRC Resn.9/35, UN Doc.A/36/40, at 134, 36 UN GAOR, Supp.(No.40), (1981).

<sup>66</sup> *Ibid*, para.9.2 (b) 2(ii) 3

<sup>67</sup> *Supra*, note 48.

consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."<sup>68</sup>

That consideration is given to "principles that normally prevail in democratic societies" is underlined by the approach of the European Court of Human Rights in allowing a "margin of appreciation" to be given to States in the determination of "to what extent differences in otherwise similar situations justify a different treatment in law".<sup>69</sup> It has commented in this respect that "the scope of this margin will vary according to the circumstances, the subject-matter and its background".<sup>70</sup>

As far as the Committee is concerned, it has not readily addressed such issues. However, it has exercised a certain amount of restraint in making determinations of violations in relation to article 2(2). For example, in both the cases of Iran and of Afghanistan the Committee gave the State concerned some leeway as regards the compatibility of certain laws and practices, with the requirement of non-discrimination.<sup>71</sup> In particular, despite the failure of the Iranian delegate to answer the questions of the Committee as to the access of Bahai's to university education in Iran,<sup>72</sup> the Committee failed to make any specific finding of violation. Whether or not the restraint in such cases is a result of lack of sufficient information or in anticipation of some justification, it does suggest that the Committee in fact allows States a "margin of appreciation" in this regard.

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<sup>68</sup> *Ibid.*

<sup>69</sup> That this may give rise to overemphasis of public interest in the determination of what is a justified distinction has been criticised by Van Dijk and Van Hoof. They admit nevertheless that the requirement of reasonableness deprives this objection of much of its force. Van Dijk P. and Van Hoof G., Theory and Practice of the European Convention on Human Rights, 396 (4th Ed, 1991).

<sup>70</sup> Inze v. Austria, Eur.Court.H.R., Series A, Vol 126, Judgement of 28 Oct.1987, para.41. However there has been little articulation of what constitutes those circumstances, subject-matters or backgrounds in which the margin of appreciation will operate. Bayefsky, *supra*, note 10, at 18.

<sup>71</sup> For Afghanistan *see*, Jimenez Butragueno, E/C.12/1991/SR.8, at 5, para.21; For Iran *see*, Jimenez Butragueno, E/C.12/1990/SR.45, at 3, paras 10-11.

<sup>72</sup> *See*, Alston, E/C.12/1990/SR.42, at 13, para.70.

## B) PURPOSE OR EFFECT

The Committee's definition of discrimination, refers, like the ILO Convention to the "effect" of that differential treatment. ICERD, CEDAW and the UNESCO Convention refer, in addition, to discrimination that has the "purpose" of impairing or nullifying the enjoyment of the rights concerned.<sup>73</sup> Although the Committee makes no reference to "purpose" this does not affect State responsibility for intentional but ineffective discriminatory measures. Thus the presence of discriminatory legislation would amount to a breach of the Covenant even if it were not enforced. Accordingly, members of the Committee criticised a legal provision in Zaire which required women to seek the permission of their husbands in order to work outside the home. The fact that permission was rarely denied was immaterial.<sup>74</sup>

In practice, the actual intention of the State concerned seems to be of little importance. It is clear that in the majority of States some form of discrimination is inherent in the civil, political, social, economic, and cultural traditions of that country.<sup>75</sup> A particular government at any given juncture cannot be considered to have willed that situation whether expressly or impliedly.<sup>76</sup> The necessity of eliminating discrimination requires that the government take action to remedy circumstances for which it is not itself responsible. This is particularly clear in so far as States are obliged to eliminate discrimination between private individuals.<sup>77</sup> Thus, although discriminatory intention might be determined merely by the existence of discriminatory policies and

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<sup>73</sup> As regards the ICCPR, there is some evidence that the practice of the Human Rights Committee suggests that a notion of foreseeability has been incorporated in which some results would not be considered as the true consequences of discriminatory rules. Bayefsky, *supra*, note 10, at 10.

<sup>74</sup> See e.g. Alvarez Vita, E/C.12/1988/SR.17, at 2, para.3.

<sup>75</sup> See, Alston, E/C.12/1990/SR.31, at 3, para.10.

<sup>76</sup> There is the possibility that the "State" is to be considered in an a-historical manner, unlike the notion of government. In this way the "State" could be said to have intentioned past discriminatory practices. However the confusion that might entail in the case of newly independent States suggests that this approach is probably not the most effective.

<sup>77</sup> See below, text accompanying notes 232-245.

legislation,<sup>78</sup> the Committee has not refrained from criticising governments on the basis of the *de facto* situation alone.<sup>79</sup>

The emphasis on the "effect" of policies rather than their intention also means that neutral measures will be considered "discriminatory" if in fact they negatively affect a group in society that may be deemed to be singled out for protection. As Judge Tanaka commented in the South West Africa Cases (Second Phase), 1966<sup>80</sup> with regard to racial discrimination:

"The arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to ... motive or purpose".<sup>81</sup>

This form of discrimination, as found in certain jurisdictions,<sup>82</sup> has often been termed "indirect discrimination".<sup>83</sup> Although a certain amount of recognition has been paid, by Committee members, to the notion of indirect discrimination,<sup>84</sup> no effort has been made to define the concept as yet. As a general principle, however, indirect discrimination is not established if only one person is adversely affected by the provision concerned; it must affect the group concerned preponderately or in a disproportionate manner.

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<sup>78</sup> This is not conclusive in itself however as discrimination may operate as an unfortunate side-effect of a piece of legislation. In such a case a test of foreseeability would have to be made to impute discriminatory intention. In this respect, it is difficult to concur with Meron's assertion that discriminatory intention is easy to establish. Meron, *supra*, note 10, at 287.

<sup>79</sup> See e.g., Simma, E/C.12/1990/SR.16, at 7, para.32. The P.C.I.J. advocated a similar conclusion in its advisory opinion relating to German Settlers in Poland (1923), P.C.I.J., Ser.B, No.6: "There must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law";

<sup>80</sup> *Supra*, note 7.

<sup>81</sup> *Ibid*, at 293.

<sup>82</sup> It has been defined and most fully developed in the United States following the case of Griggs v.Duke Power Co. 401 U.S. 424 (1971). In the UK see, Race Relations Act 1976, sect.1(1)(b), Sex Discrimination Act 1975 sect.1(1)(b).

<sup>83</sup> The Commission of the EEC describes indirect discrimination as follows: "There is a presumption of indirect discrimination as soon as an apparently neutral regulation in fact preponderantly touches the workers of one of the sexes and this without the need to indicate the intention to discriminate."

European Commission Intermediate Report on Application of Directive No.79/7, (Com.83), 793 (1984).

<sup>84</sup> See e.g., Jimenez Butragueno, E/C.12/1989/SR.5, at 10, para.58; Simma, E/C.12/1989/SR.8, at 8, para.46.

An emphasis on the discriminatory "effect" of policies and programmes does raise two important points about the Committee's approach. First, it places some emphasis upon what might be termed "equality of result" as opposed to procedural equality. In effect, the principle of non-discrimination has been given a broad interpretation to embody ideas of equality of opportunity. Secondly, in so far as indirect discrimination may be established by reference to effects upon a particular group (for example a racial group), it might be said to give rise to a notion of collective rights.<sup>85</sup>

### C) GROUNDINGS UPON WHICH DISCRIMINATION IS PROHIBITED

Most non-discrimination provisions proscribe discrimination on a specified number of grounds, such as sex, race, or ethnic origin "to make clear that certain factors are unacceptable as grounds for distinction".<sup>86</sup> As seen above, this does not mean that all distinctions made upon those grounds will necessarily be discriminatory, rather that they are "suspect classifications". At most, distinctions made upon these suspect grounds could be said to amount to *prima facie* discrimination, depending upon whether or not there is any reasonable justification.

The list of "prohibited" or "suspect" grounds tends to vary from one treaty to another. It might be the purpose of the treaty for example, to deal with a specific type of discrimination, in which case, the grounds on which discrimination is prohibited are more restricted.<sup>87</sup> It is clear that the ICESCR, in containing a list of ten prohibited grounds, was not intended to be limited in such a way. Nevertheless, the question of whether the enunciated grounds are the only ones on which distinctions are prohibited, is not specifically addressed.

#### 1) Exhaustive or Illustrative

The ten illegitimate grounds for discrimination, parallel those found in the UDHR. Additional grounds found in other Conventions are notably "association with a national minority",<sup>88</sup> "ethnic origin",<sup>89</sup> and

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<sup>85</sup> It cannot be said to be a fully-fledged "collective right" however, as the group identity merely acts as a condition for the protection of the individual. It does not, for example, give rise to claims for a specific benefit to be granted to that group.

<sup>86</sup> Ramcharan, *supra*, note 1, at 252.

<sup>87</sup> Examples of this type of treaty are the Racial Discrimination Convention which is limited to distinctions made on the basis of "race, colour, descent, or national or ethnic origin", and the Discrimination against Women Convention which relates to distinctions "on the basis of sex".

<sup>88</sup> Article 14, European Convention on Human Rights (1950), 213 U.N.T.S. 221. It is unlikely that this adds much to the prohibition of discrimination on the ground of national origin. See e.g., Dinstein, *supra*, note , at 12.

"disability".<sup>90</sup> It seems unlikely, however, that the drafters wished to exclude these as possible grounds for discrimination.

It could be argued on the basis of the principle *expressio unius est exclusio alterius*, that the specification of some prohibited grounds for discrimination automatically excludes the possibility of adding other grounds. Indeed, the reference to discrimination "of any kind", found in the UDHR was dropped in the drafting of the ICESCR leading a commentator at the time to conclude that the enumerated grounds were intended to be exhaustive.<sup>91</sup>

Nevertheless, during the drafting of the ICCPR, certain proposals for grounds of discrimination were deemed unnecessary because they fell into the ambit of the expressions "discrimination on any ground" and "other status".<sup>92</sup> It would be logical to read the term "other status" in the ICESCR as having a similar open-ended meaning. Moreover, it has been asserted that, even though a three power amendment replaced the words "such as"<sup>93</sup> with the phrase "as to", the lack of discussion that took place over the change indicates that the enumeration was intended to remain merely illustrative.<sup>94</sup>

If the grounds for discrimination are not seen as being exhaustive it might be suggested that any distinction can bring into operation the non-discrimination principle.<sup>95</sup> It would thus fall to the Committee to develop a rationale to justify under what circumstances and on what grounds different treatment is legitimate. The Committee has not in fact gone so far in its treatment of article 2(2). However, it has arguably extended its scrutiny of differential treatment to grounds other than those specifically enumerated.

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<sup>89</sup> Article 2(1) Convention on the Rights of the Child, 28 I.L.M. 1448 (1989).

<sup>90</sup> *Ibid.*

<sup>91</sup> Bayefsky, *supra*, note 10, at 5.

<sup>92</sup> UN Doc.A/2929, para.181, 10 UN GAOR, Annexes, (Ag.Item 28), Pt.II, (1955).

<sup>93</sup> This phrasing is still to be found in article 2 UDHR and article 2(1) ICCPR.

<sup>94</sup> Klerk, *supra*, note 9, at 256. For the opinion that article 2 UDHR is illustrative *see*, Verdoot A., Naissance et Significane de la Déclaration Universelle des Droits de l'Homme, 95 (1964).

<sup>95</sup> This was the position adopted by the European Court of Human Rights in Rasmussen v. Denmark Eur.Court H.R, Series A, Vol.87, Judgement of 28 Nov.1984. The Human Rights Committee does not seem to have adopted this approach with regard to article 26 however. Bayefsky, *supra*, note , at 6-7.

In addition to asking questions on the status of ethnic minorities,<sup>96</sup> natural children,<sup>97</sup> women<sup>98</sup> and men,<sup>99</sup> or discrimination on the basis of religious belief,<sup>100</sup> alternative political philosophies<sup>101</sup> and class bias,<sup>102</sup> it has directed itself to the situation of those in particular regional areas,<sup>103</sup> aliens,<sup>104</sup> (including the stateless,<sup>105</sup> migrant workers,<sup>106</sup> and

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<sup>96</sup> *E.g.* Taya, E/C.12/1987/SR.16, at 4, para.14; Alvarez Vita, E/C.12/1988/SR.14, at 6, para.32; Muterahajuru, E/C.12/1990/SR.18, at 13, para.78; Simma, E/C.12/1990/SR.40, at 10, para.42. This could be seen to include indigenous populations, *cf.* Neneman, E/C.12/1989/SR.8, at 9, para.49; Konate, E/C.12/1990/SR.7, at 4, para.13; Bonoan-Dandan, E/C.12/1991/SR.3, at 10, para.44.

These groups should accordingly have the right to express themselves in their own language and enjoy their own culture. Texier, E/C.12/1988/SR.13, at 9, para.39. The maintenance of a separate identity is considered essential to indigenous populations. Assimilationist policies are therefore considered illegitimate. Alston, E/C.12/1988/SR.13, at 13, para.71.

<sup>97</sup> *E.g.* Fofana, E/C.12/1987/SR.7, at 8, para.39; Texier, E/C.12/1987/SR.9, at 6, para.27; Badawi El Sheikh, E/C.12/1988/SR.8, at 2, para.3; Fofana, E/C.12/1989/SR.7, at 3, para.6.

<sup>98</sup> The Committee have asked numerous questions as to the position of women. As regards the legal situation of women *see e.g.*, legal prohibition against discrimination against women, Jimenez Butragueno, E/C.12/1987/SR.7, at 6, para.23.; *de jure* and *de facto* differences between men and women, Alvarez Vita, E/C.12/1987/SR.8, at 7, para.29.; equality under the law, Jimenez Butragueno, E/C.12/1987/SR.8, at 8, para.33.; different marriageable ages for men and women, Rattray, E/C.12/1987/SR.9, at 9, para.41.; Legislative measures to prevent dismissal of pregnant women, Mrachkov, E/C.12/1988/SR.10, at 6, para.25.

<sup>99</sup> Especially in relation to paid leave to look after children, *e.g.* Jimenez Butragueno, E/C.12/1987/SR.12, at 4, para.14. Texier, E/C.12/1987/SR.19, at 10, para.47; or the enjoyment of parental benefits, Jimenez Butragueno, E/C.12/1988/SR.18, at 3, para.12. Also in respect to widower's pension, *e.g.* Alvarez Vita, E/C.12/1988/SR.10, at 6, para.23.

Unlike the Discrimination Against Women Convention, the prohibited ground of "sex" is not confined to the position of women. The presence of articles 3 and 10 confirm however, that the position of women is of primary importance.

<sup>100</sup> *E.g.* Simma, E/C.12/1987/SR.11, at 10, para.48.

<sup>101</sup> *E.g.* Konate, E/C.12/1987/SR.11, at 12, para.58. This includes the expression of opposition to the established political views, Simma, E/C.12/1987/SR.13, at 8-9, para.40; Alston, E/C.12/1987/SR.19, at 9, para.45..

<sup>102</sup> Rattray, E/C.12/1990/SR.7, at 5, para.16.

<sup>103</sup> *E.g.* The treatment of populations in overseas and dependent territories: Daudi, E/C.12/1987/SR.5, at 4, para.15 (Netherlands Antilles); Badawi, E/C.12/1988/SR.8, at 2, para.3 (Greenland and Faroe Islands); Mrachkov, E/C.12/1989/SR.12, at 13, para.73 (French Overseas Territories). The position of rural populations: Mrachkov, E/C.12/1988/SR.7, at 6, para.43; Sparsis, E/C.12/1988/SR.7, at 2, para.2; Muterahajuru, E/C.12/1990/SR.2, at 11, para.67. Poor urban populations: Texier, E/C.12/1989/SR.12, at 10, para.50.

refugees,<sup>107</sup>) unmarried couples and parents,<sup>108</sup> people with AIDS,<sup>109</sup> the physically<sup>110</sup> and mentally disabled,<sup>111</sup> homosexuals,<sup>112</sup> the poor,<sup>113</sup> and the elderly.<sup>114</sup>

It has to be borne in mind, however, that the Committee, in asking questions on the situation with regard to such groups, is not necessarily attempting to discover elements of discrimination, but rather merely assessing the enjoyment of economic, social and cultural rights. Thus *de facto* differences in the enjoyment of rights between different regions would not normally be considered a matter of discrimination. Nevertheless, in centering its attention on these social groups, the Committee appears to consider that possible additional grounds exist under which discrimination is prohibited, such as health, nationality, disability, poverty, age and sexual orientation.

Of these possible grounds, there would seem to be little reason to object to the inclusion of grounds such as health,<sup>115</sup> disability,<sup>116</sup> or

<sup>104</sup> See below, text accompanying notes 121-140.

<sup>105</sup> E.g. Texier, E/C.12/1988/SR.10, at 12, para.66; Badawi El Sheikh, E/C.12/1988/SR.11, at 3, para.15.

<sup>106</sup> E.g. Mratchkov, E/C.12/1987/SR.6, at 12, para.61; Simma, E/C.12/1990/SR.34, at 4, para.22.

<sup>107</sup> E.g. Taya, E/C.12/1988/SR.3, at 6, para.27; Texier, E/C.12/1989/SR.8, at 5, para.22; Texier, E/C.12/1990/SR.7, at 2, para.5.

<sup>108</sup> E.g. Wimer Zambrano, E/C.12/1987/SR.11, at 12, para.60; Texier, E/C.12/1989/SR.14, at 16, para.70; Muterahjuru, E/C.12/1987/SR.12, at 3, para.8.

<sup>109</sup> E.g. Rattray, E/C.12/1987/SR.20, at 3, para.10; Alston, E/C.12/1988/SR.9, at 5, para.25; Texier, E/C.12/1990/SR.2, at 10, para.56; Simma, E/C.12/1990/SR.34, at 5, para.25.

<sup>110</sup> E.g. Deaf children, Jimenez Butragueno, E/C.12/1990/SR.8, at 11, para.52.

<sup>111</sup> See e.g., Jimenez Butragueno, E/C.12/1987/SR.20, at 4, para.13.

<sup>112</sup> E.g. Simma, E/C.12/1989/SR.16, at 18, para.95.

<sup>113</sup> E.g. Neneman, E/C.12/1988/SR.3, at 9, para.43; Texier, E/C.12/1990/SR.16, at 9, para.44.

<sup>114</sup> E.g. Butragueno, E/C.12/1988/SR.14, at 3, para.13; Simma, E/C.12/1988/SR.6, at 4, para.18; Jimenez Butragueno, E/C.12/1990/SR.40, at 5, para.71.

<sup>115</sup> Reaction to the discovery of HIV/AIDS has entailed many instances of discrimination in the field of economic, social and cultural rights. It is considered that denials of education, marriage, social services and employment go far beyond those measures necessitated by the nature of the infection. See e.g., UN Doc. E/CN.4/Sub.2/1990/9, at 6-8, paras.30-40; "AIDS and Discrimination", 41 *I.C.J.Rev.*, 35-49 (1988); Center for Human Rights, Report of an International Consultation on AIDS and Human Rights, (1989).

age.<sup>117</sup> Clearly, this does not mean that all differences in treatment based upon such grounds are discriminatory. For example, it is accepted in a number of States that the elderly might be deprived of their right to work through compulsory retirement.<sup>118</sup> It does mean that differences justified on such grounds will be subjected to a stricter level of scrutiny than others.

On the other hand, the posited grounds of sexual orientation, poverty and nationality all present difficulties with respect to their inclusion which will be discussed below:

#### a) Sexual Orientation

The acceptance of equality with regard to those with alternative sexual orientations is clearly subject to a great deal of controversy. It is submitted that, in principle, there is no conceivable reason why the extent of a person's enjoyment of economic, social and cultural rights should depend, in any respect, upon their sexual orientation. However, the fact that homosexuality is still illegal in a number of countries suggests that there is, as yet, no agreement as to the moral position in this regard.<sup>119</sup>

It is open for the Committee to make its own view of the matter clear, but it would undoubtedly encounter difficulties if it attempted to bind States to ensuring non-discrimination on the grounds of sexual orientation. Nevertheless, if the Covenant were to be interpreted as a "living instrument" with dynamic standards that reflect the moral and legal developments within the States parties,<sup>120</sup> it might be possible for sexual orientation to be established as a prohibited ground for discrimination at some stage in the future.

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<sup>116</sup> The Committee's interest in disability issues is underlined by the proposal of Mr Despouy, the Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, that the Committee monitor legal standards to protect disabled persons. E/C.12/1990/SR.49, at 3, paras.10-11.

<sup>117</sup> Vickers, *supra*, note 3, at 52. *See also*, UN Doc.E/C.12/1991/WP.1.

<sup>118</sup> On this point *see*, Alston, E/C.12/1991/SR.9, at 6, para.24.

<sup>119</sup> The European Court of Human Rights however has recognised an increased tolerance of homosexual behaviour in the European context. Accordingly, it found the imposition of criminal sanctions to be in breach of the right to privacy under article 8 of the ECHR. Dudgeon v. United Kingdom, Eur.Court H.R., Series A, Vol.45, Judgement of 22 Oct.1981, (1981) 4 EHRR 149.

<sup>120</sup> *Cf.* Tyrer v. United Kingdom, Eur.Court HR, Series A, Vol.26, Judgement of 25 Apr.1978, (1979-80) 2 EHRR 1.

### b) Nationality

With regard to nationality as a prohibited ground for discrimination, it should be noted that article 2(2) rules out discrimination on the grounds of national origin but not on the basis of nationality.<sup>121</sup> Indeed article 2(3) specifically allows limitations to be placed upon the enjoyment of the rights of non-nationals in the case of developing States.<sup>122</sup> Lillich draws the conclusion that the ICESCR "does not embody a general norm of non-discrimination against aliens".<sup>123</sup>

However, an interesting "interpretative declaration" was made by Belgium upon ratification:

"With respect to article 2, paragraph 2, the Belgian Government interprets non-discrimination as to national origin as not necessarily implying an obligation on States automatically to guarantee to foreigners the same rights as to their nationals. The terms should be understood to refer to the elimination of any arbitrary behaviour but not of differences in treatment based on objective and reasonable

<sup>121</sup> Whereas "nationality" refers to the position of aliens and migrant workers, "national origin" seems to relate to the ethnic or racial origin of the individual irrespective of their nationality. For a discussion of the differences between the terms *see*, comments of Lord Simon in Ealing London Borough Council v. Race Relations Board [1972] AC 342, at 362-3. *Cf.* Kartashkin V., "Economic, Social and Cultural Rights" in Meron T.(ed), Human Rights in International Law, 111, at 131 (1985). Schwelb concurs in this view in commenting that "national origin" relates to present and past "nationality" in an ethnographic sense. He also comments that with respect to the term "nationality" in its legal sense, only previous nationality is a prohibited ground for discrimination. Schwelb, *supra*, note 58, at 1007.

<sup>122</sup> It might be argued on the basis of article 2(3) that this does not entitle developed countries to discriminate in such a manner and that in any case differentiations may not be made with regard to non-economic rights, Lillich R., The Human Rights of Aliens in Contemporary International Law, 47 (1981).

The definition of economic rights in itself is unclear. It is assumed that they are rights "that enable a person to earn a living or that relate to that process". Dankwa E., "Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights", 9 Hum.Rts.Q., 230, at 240 (1987). McKean comments with respect to article 2(3):

"the term 'developing country' is not defined, and the language used is unconscionably vague. It must therefore be regarded as an unfortunate inclusion in a covenant of this nature and likely to cause invidious and unreasonable distinctions to be made against aliens on the ground of their foreign nationality".

McKean, *supra*, note 21, at 201.

<sup>123</sup> Lillich, *ibid*, at 48. He continues however:

"It must be emphasised that this conclusion is not tantamount to stating that international law now authorises discrimination against aliens in these areas. All one may conclude is that this particular instrument is not in and of itself the source of such a general norm of non-discrimination."

considerations, in conformity with the principles prevailing in democratic societies."<sup>124</sup>

Whilst overtly being intended to limit the scope of obligations as regards non-nationals, the declaration in fact confirms that the term "national origin" is to be read in a wide sense to include non-nationals. It then merely reiterates the idea that not all differences in treatment will necessarily amount to discrimination.

Some members of the Committee however have tended to assume that any differentiation in treatment between nationals and non-nationals is principally illegitimate.<sup>125</sup> One member's interpretation of article 2(3) reinforces the view that the only exception to this rule is to be found in relation to economic rights in developing countries.<sup>126</sup> At times individual Committee members have limited their attention to the provision of social benefits, health care and education,<sup>127</sup> but often they have gone further to include employment rights.<sup>128</sup>

Criticism of such differential treatment has gone to the extent of violations being found in a number of cases. For example with regard to the French report, one member considered the fact that a disabled adults' allowance was only payable to French nationals was contrary to article 2.<sup>129</sup> Similarly it was considered

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<sup>124</sup> Multilateral Treaties Deposited with the Secretary-General as of 31 Dec.1991. UN Doc.ST/LEG/SER.E/10, at 123 (1991).

<sup>125</sup> The Limburg Principles state:

"As a general rule the Covenant applies equally to nationals and non-nationals".

Limburg Principles, *supra*, note 54, at 127, para.42.

<sup>126</sup> It was commented with respect to a provision in the Austrian report (E/1984/6/Add.17, para.49(b)) that if foreigners in Austria did not receive the same benefits as nationals, it would be contrary to article 2(3) as it was not a developing country. Alvarez Vita, E/C.12/1988/SR.3, at 4-5, para.13; Badawi El Sheikh, E/C.12/1988/SR.4, at 8, para.45.

<sup>127</sup> See e.g., Texier, E/C.12/1987/SR.12, at 5, para.16.

<sup>128</sup> One member commented thus that measures taken under Jordanian law to restrict the employment of foreigners were contrary to the non-discrimination clauses of the Covenant. Konate, E/C.12/1987/SR.7, at 10, para.51.

<sup>129</sup> Alvarez Vita, E/C.12/1989/SR.12, at 12, para.61. This conclusion in itself was somewhat suspect given the French declaration on ratification regarding restrictions on aliens' rights to social security and employment. It was argued that the provision should be considered in light of articles 9 and 2 read together; as there was no declaration in respect to article 2, there was a breach of the provisions of the convention. Alvarez Vita, E/C.12/1989/SR.13, at 9, para.38. That this did not represent the view of the Committee as a whole is

that the restrictions upon the trade union rights of non-nationals in Costa Rica constituted a violation of the Covenant.<sup>130</sup> It is notable however that such statements do not represent a Committee consensus,<sup>131</sup> and that certain members feel the question has not been debated sufficiently in the Committee.<sup>132</sup>

The general reluctance of the Committee to commit itself to defending the equal treatment of aliens would seem to be a result of the force of State practice.<sup>133</sup> For example, many States reporting to the Committee operate different systems of social security in relation to non-nationals,<sup>134</sup> particularly where reciprocal agreements are in force.<sup>135</sup> In addition it is somewhat unlikely that States would consider themselves bound by a provision forcing them to eliminate any restrictions on the employment of aliens.<sup>136</sup>

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reflected in the Committee's concluding observations which merely state that "the observation was made...". UN Doc.E/1989/22, at 35, para.160 (1989).

<sup>130</sup> See, Alvarez Vita, E/C.12/1990/SR.40, at 12, para.52.

<sup>131</sup> This was made particularly clear in the Costa Rican case. Alston, E/C.12/1990/SR.50, at 4, para.28.

<sup>132</sup> Mr Simma commented that he hesitated to concur with Mr Alvarez Vita regarding the Costa Rica question "since the Committee had not debated the point sufficiently". He continued, "It should be made clear that the view was not that of the Committee as a whole". E/C.12/1990/SR.50, at 4, para.29.

<sup>133</sup> It might also be noted that the Committee on the Elimination of Racial Discrimination has tended to allow the differential treatment of non-nationals. Meron, *supra*, note 10, at 312.

During the drafting of article 26 ICCPR, it would seem that States were not ready to accept that aliens should have equal rights as citizens. See, Ramcharan, *supra*, note 1, at 263.

<sup>134</sup> See e.g. Luxembourg, E/C.12/1990/CRP.4/Add.4, at 5, para.16. Netherlands, E/C.12/1989/5, E/1989/22, at 4.

<sup>135</sup> Cf. Mahalic D. and Mahalic J., "The Limitation Provisions of the International Convention on the Elimination of All Forms of Racial Discrimination", 9 *Hum.Rts.Q.*, 74, at 78 (1987). It might be difficult to establish then that a State must not discriminate against a particular nationality even if that were to be considered inequitable. See *contra*, Lerner N., The Convention on the Elimination of All Forms of Racial Discrimination, 30 (1980).

<sup>136</sup> It might be noted that Article 1(2) of the Racial Discrimination Convention provides that its non-discrimination provisions do not apply to distinctions, exclusions or restrictions made by a State party between citizens and non-citizens.

Whereas restrictions are usually accepted on the employment of aliens, this is not so with respect to the conditions of employment. A number of ILO Conventions operate in this area: e.g. the Migration for Employment Convention (Revised) of 1949 (No.97), 120 U.N.T.S. 71; and the Migrant Workers

However, these facts alone do not necessarily imply that the application of the principle of non-discrimination is totally irrelevant. For example, in the majority of cases, differential treatment is justified on the basis of economics.<sup>137</sup> It is open for the Committee to determine the validity of the differential treatment of aliens by assessing whether it is motivated by sound economic reasons or mere prejudice.<sup>138</sup> In this respect one member of the Committee commented that the Jordanian report:

"seemed to indicate that foreigners were penalized solely because they were foreigners, rather than because they threatened the employment opportunities of Jordanian nationals -in short, that foreigners were the object of discrimination".<sup>139</sup>

If this approach is adopted by the Committee, it could be said that even though equality of treatment is not necessarily prescribed, discrimination on the basis of nationality is by no means legitimate. The question for the Committee is to what extent differential treatment is legitimate.

Moreover, even if non-nationals are not entitled to equal treatment in all respects, it is important to stress that this does not deprive them of all rights under the Covenant. Certainly, in so far as the Covenant establishes the rights of "everyone" non-nationals would have a right to the enjoyment of the minimum core content of those rights. Thus in practice, the Committee will censure situations where aliens enjoy few rights and are the object of exploitation.<sup>140</sup>

### c) Wealth

The general limitations upon the poor to equality of access or opportunity with regard to employment, education, culture or housing have led some commentators to regard "wealth" as an additional ground

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(Supplementary Provisions) Convention of 1975 (No.143), 1120 U.N.T.S. 77.

<sup>137</sup> See, Lillich, *supra*, note 122, at 123.

<sup>138</sup> It is by no means axiomatic that aliens are prejudicial to the economy of a State. See, Konate, E/C.12/1987/SR.7, at 2, para.2. Meron comments in this light:

"It can perhaps be argued that economic constraints may justify limiting some entitlements (such as welfare or health care) to citizens, but limiting employment-related benefits would not be supportable under this rationale".

Meron, *supra*, note 10, at 312.

<sup>139</sup> Konate, E/C.12/1987/SR.7, at 2, para.2.

<sup>140</sup> Members of the Committee expressed great concern over the position of Haitian workers on sugar plantations in the Dominican Republic. See e.g., Texier, E/C.12/1990/SR.44, at 13, para.54.

upon which discrimination is prohibited. Hence the Czechoslovakian representative commented before the Committee that:

"The fact that some persons might be prevented from enjoying certain rights because they did not have the means to do so could be regarded as *de facto* discrimination".<sup>141</sup>

The Committee does seem to be concerned about extreme inequalities in wealth<sup>142</sup> and inadequate action being taken on the part of the poor.<sup>143</sup> Recognition has also been made of the particular disadvantage of the poor in the area of access to culture.<sup>144</sup> Some members have occasionally made an express recognition of the link between poverty and discrimination.<sup>145</sup>

The major problem with regard to positing "wealth" as an independent ground of discrimination is that the majority of cases of such discrimination will involve a simultaneous violation of article 2(2) and one of the substantive articles of the Convention. The independent utility of the non-discrimination provision becomes apparent only when the State has gone further than it is obliged to under the provisions of the Covenant.<sup>146</sup> A case in point might be the establishment of special schools for the academically gifted. If access to such a school was restricted to males only or members of a minority ethnic group, article 2(2) would quite legitimately be invoked. However, to restrict access to the wealthy by the requirement of fee-payment would rarely be considered discriminatory.<sup>147</sup> The fact that access to many higher social "goods" often depends upon economic wealth suggests that "wealth" itself

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<sup>141</sup> E/C.12/1987/SR.12, at 10, para.40.

<sup>142</sup> Sparsis, E/C.12/1988/SR.12, at 12, para.63; Sparsis, E/C.12/1989/SR.16, at 17, para.92; Simma, E/C.12/1990/SR.8, at 10, para.43. Simma commented in relation to the Columbian report that the Committee had to address itself to the underlying causes of difficulties, mentioning "in particular the lack of equality... and the apparent lack of concern of the upper classes for the problems of the most vulnerable". E/C.12/1990/SR.13, at 11, para.47.

<sup>143</sup> See e.g., Alston, E/C.12/1990/SR.11, at 5, para.24.

<sup>144</sup> See e.g., Texier, E/C.12/1990/SR.16, at 9, para.44.

<sup>145</sup> One member thus commented in regard to the vast disparities in wealth, that "Santiago is a city of apartheid". Texier, E/C.12/1988/SR.12, at 10, para.50.

<sup>146</sup> Assuming that the right is "autonomous" in nature. See below, text accompanying notes 158-175.

<sup>147</sup> It could be attacked on different grounds however. For example if the establishment of such a school drew finances away from projects that were aimed at the relief of poverty and disadvantage, the State might be criticised for confusing its priorities.

is often a legitimate ground for differential treatment and for that reason could hardly be considered "suspect".<sup>148</sup>

## 2) The Suspect Nature of Classifications

Given the emphasis that race,<sup>149</sup> sex<sup>150</sup> and religion<sup>151</sup> have been accorded on the international plane, it might be argued that, in assessing the legitimacy of differential treatment, actions based upon such grounds might be given stricter scrutiny.<sup>152</sup> This might be appropriate given the extraordinary prominence given to racial discrimination in international

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<sup>148</sup> With respect to wealth classifications in the US *see*, Polivou, *supra*, note 2, at 437-444.

<sup>149</sup> For evidence of the international community's interest in Racial Discrimination *see*, The International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Resn.3068, 28 U.N. GAOR, Supp.(No.30), at 166, U.N. Doc. A/9030, (1973), 1015 U.N.T.S. 243; The Declaration on the Elimination of All Forms of Racial Discrimination, G.A. Resn.1904, 18 U.N. GAOR, Supp.(No.15), at 35, U.N. Doc. A/5515, (1964); The Convention on the Elimination of all Forms of Racial Discrimination, *supra* note 55.

<sup>150</sup> Evidence of the interest of the international community in the status of women *see*, The Convention on the Political Rights of Women, GA Resn.640, 7 UN GAOR, Supp.(No.20), at 27, UN Doc.A/2361, (1952), 193 U.N.T.S. 135 (1953); The Convention on the Nationality of Married Women, (1957), 309 U.N.T.S. 65; The Declaration on the Elimination of All Forms of Discrimination Against Women, GA Resn.2263, 22 UN GAOR, Supp.(No.16), at 35, UN Doc.A/6716, (1967); The Convention on the Elimination of all Forms of Discrimination Against Women, *supra*, note 56.

<sup>151</sup> Bayefsky, *supra*, note , at 19. *See generally*, Benito E. (Special Rapporteur), Elimination of all forms of intolerance and discrimination based on religion and belief, (1989).

<sup>152</sup> This appears to be the position under the ECHR. *See*, Abdulaziz, Cabales and Balkandali v. United Kingdom, Eur.Court HR, Series A, Vol.94, Judgement of 28 May 1985, (1985) 7 EHRR 471, where the court stated (para.78):  
 "...the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would have to be advanced before a difference of treatment on the grounds of sex could be regarded as compatible with the Convention."

case law,<sup>153</sup> and the emphasis on sexual discrimination in the Covenant.<sup>154</sup>

As far as the Committee is concerned the position of women has been given by far the most consideration. Questions are invariably asked as to equality before the law,<sup>155</sup> equal rights,<sup>156</sup> and factual differences in the position of women in relation to men.<sup>157</sup> To this extent, the Committee could be said to exercise a particularly strict test as to differentiations *de jure* and *de facto* on the basis of sex. That the Committee as a whole has never actually established a State to be in violation of the Covenant on this basis is probably more a reflection of the lack of sufficient information than the weakness of its standards.

The main failing of the Committee thus far is that it has not established any clear test for evaluating differences in treatment upon the

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<sup>155</sup> See above note 98.

<sup>156</sup> See *e.g.*, the right of women to chose their own spouse, Rattray, E/C.12/1987/SR.8, at 7, para.26; Kouznetsov, E/C.12/1990/SR.2, at 12, para.72.; the authority to start a business or open a bank account, Jimenez Butragueno, E/C.12/1989/SR.9, at 6, para.24; differential retirement ages, Sviridov, E/C.12/1987/SR.6, at 5, para.18. Simma, E/C.12/1988/SR.3, at 3, para.8.; the right to administer their own assets, Jimenez Butragueno, E/C.12/1987/SR.8, at 8, para.33.; restrictions on the employment of women, Alvarez Vita, E/C.12/1987/SR.6, at 11, para.53.

<sup>157</sup> See *e.g.*, the number of women unemployed, Rattray, E/C.12/1987/SR.6, at 12, para.66. Neneman, E/C.12/1987/SR.7, at 7, para.29; access of women to social security, Rattray, E/C.12/1987/SR.6, at 13, para.69; the proportion of women receiving technical training, Konate, E/C.12/1987/SR.7, at 2, para.3; the percentage of women employed in the public sector, Muterahajuru, E/C.12/1987/SR.7, at 3, para.7; the proportion of women in higher education, Jimenez Butragueno, E/C.12/1988/SR.3, at 8, para.36; the percentage of women in management positions, Alvarez Vita, E/C.12/1989/SR.5, at 10, para.62; the existence of training and support for women's cooperatives, Simma, E/C.12/1989/SR.6, at 10, para.45.

The main failing of the Committee thus far is that it has not established any clear test for evaluating differences in treatment upon the grounds enumerated in article 2(2). It is submitted that in so far as the list of prohibited grounds is open-ended, virtually any difference in treatment is open to scrutiny by the Committee. The virtue of having specifically stated grounds, however, is not to prevent review of differentiations on other grounds, but rather to establish that certain classifications are *prima facie* suspect and therefore will be subject to more detailed scrutiny. As an initial step then, it would be necessary for the Committee to establish what classifications it sees as falling within the realm of article 2(2), and the test by which State action will be reviewed.

#### D) THE SCOPE OF THE NON-DISCRIMINATION PROVISION

Some guarantees of non-discrimination only operate in relation to specific, narrowly defined areas such as the ILO or UNESCO Conventions.<sup>158</sup> Article 2(2) ICESCR, in contrast, is applicable to a much broader range of rights. It provides that the guarantee of non-discrimination should operate in relation to all the economic, social and cultural rights enunciated in the Covenant. However, by specifically referring to the rights in the Covenant, article 2(2) would appear to be a partially subordinate provision, prohibiting discrimination only in so far as it relates to matters covered by those rights.<sup>159</sup> Indeed, there is little evidence that article 2(2) was intended to be wholly "free-standing" or "autonomous", in the sense of article 26 ICCPR.<sup>160</sup>

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<sup>158</sup> The ILO Convention is limited to discrimination in employment and the UNESCO Convention to discrimination in education.

<sup>159</sup> Article 3 similarly relates to "all economic, social and cultural rights set forth in the present Covenant". As a matter of comparison, it is thought that the ICCPR non-discrimination clause is limited to those rights recognized by that Convention. Ramcharan, *supra*, note 1, at 257. This is also the practice of the European Court of Human Rights. Thus in the Sunday Times Case, Eur.Court H.R., Series A, Vol.30, Judgement of 26 Apr.1979, (1979-80) 2 EHRR 245, the Court reaffirmed that "Article 14 safeguards individuals, or groups of individuals, placed in comparable situations, from all discrimination in the enjoyment of the rights and freedoms set forth in the other normative provisions of the Convention and Protocols".

<sup>160</sup> Article 26 ICCPR has been interpreted as operating as an "autonomous right" whose application was "not limited to those rights which are provided for in the Covenant", *see*, General Comment, *supra*, note 57. Thus, in practice, the HRC has dealt with matters outside the strict context of civil and political rights, *see e.g.*, Broeks v.Netherlands, 2 Selected Decisions HRC, 196 (1987). *Cf.* Scott C., "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights", 27 Osg.H.L.J. 769, at 851-859 (1989); Opsahl T., "Equality in Human Rights Law with Particular Reference to Article 26 of the International Covenant on Civil and Political Rights", in Nowak M., Steurer D., and Treter H.(eds), Progress in the Spirit of Human Rights, 51 (1988).

According to the traditional definition of discrimination adopted by a number of international treaties, the test for whether an action is discriminatory can be determined by whether it has a negative effect on the realization of the rights protected. For discrimination to have occurred, the difference in treatment must have the effect of "nullifying" or "impairing"<sup>161</sup> the recognition, enjoyment or exercise<sup>162</sup> of human rights. As such, a violation of the non-discrimination provision will inevitably involve a simultaneous violation of one of the substantive articles. It might appear, accordingly, that such non-discrimination provisions are essentially superfluous.<sup>163</sup>

Three arguments mitigate against such a conclusion. First, even though there often exists a distinct correlation between covert discriminatory situations and general social stratification of power, wealth, prestige and education, it is important to recognize that discrimination is not merely a consequence of that stratification, but also a cause.<sup>164</sup> As such the recognition and elimination of discrimination is central to the improvement of the well-being of such groups. Secondly, recognition of historical discrimination can serve to justify and even require positive and affirmative action programmes.<sup>165</sup> Finally, to the extent that the principle of non-discrimination may give rise to claims to positive State action in the realisation of equality of opportunity, the fulfilment of basic needs alone would not necessarily sufficiently dispose of State obligations with respect to disadvantaged groups.

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<sup>161</sup> ILO Convention, the Racial Discrimination Convention, and the Discrimination against Women Convention. The UNESCO Convention only includes the term "impairing". On the basis that "nullifying" is the narrower term, meaning not merely a restriction on the enjoyment of a right, but the total denial of that right, "impairment" can be said to cover the same field.

<sup>162</sup> The meaning of all of these three terms is unclear, particularly as to any differences between them. It is presumed that "recognition" refers to the ability of an individual to know or identify his or her rights. If, as can be assumed, States are under an obligation to disseminate information and inform people of their rights, then a failure to do so for an identifiable section of the population could be said to be discriminatory under this leg of the definition.

"Enjoyment" can be said to refer to the *de facto* realization of the rights in the Covenant. Finally "exercise" perhaps relates most closely to the ability of each individual to enforce their rights through judicial or administrative remedies.

<sup>163</sup> Flew argues in this respect that the relief of poverty cannot be achieved through the promotion of equality but solely through growth and the production of wealth. Equality and non-discrimination thus retain little justification in his view. Flew A., *supra*, note 13, at, 182-189.

<sup>164</sup> Schachter, *supra*, note 15, at 296.

<sup>165</sup> *Ibid.* at 295.

The position under the European Convention is interesting in this regard. That a violation can occur merely by the discriminatory exercise of a particular right has been recognised by the European Court in the Belgian Linguistic Case<sup>166</sup> where it held with respect to the ECHR:

"Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason while making them available to others in respect of the same type of actions."<sup>167</sup>

The Court appears to want to give the non-discrimination provision a degree of independence without implying that it operates outside the realm of the rights contained within the Convention.<sup>168</sup> Certainly, the Court has been trenchantly opposed to dealing with economic, social and cultural rights.

A number of points suggest that article 2(2) is a strictly "subordinate" non-discrimination clause. First, as a provision that lies in part II of the Covenant, it is not deemed to be a right in itself but a "service provision" outlining obligations in relation to the substantive articles in part III. Secondly, it expressly states that it refers to the

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<sup>166</sup> *Supra*, note 48.

<sup>167</sup> This passage has been interpreted variously by commentators. Dinstein argues that the court implied that the non-discrimination provision was free standing- that there could be a violation of article 14 without there being a corresponding violation of any other article. Dinstein, *supra*, note 10. On the other hand Bayefsky comments that this case underlines the fact that the discrimination clause has no independent existence in that the violation only occurred in conjunction with the substantive articles. Bayefsky, *supra*, note 10, at 4.

It is interesting to note the view of Judge Fitzmaurice in the National Union of Belgian Police Case, Eur.Court HR, Series A, Vol.19, Judgement of 27 Oct.1975, (1979-80) 1 EHRR 578, where he argued that article 14 was subordinate in that it only applied insofar as it related to a State obligation under the ECHR.

<sup>168</sup> This is underlined by its decision in Inze v. Austria *supra*, note , para. 36, where it stated:

"Art.14 complements the other substantive provisions of the Convention and its protocols. It has no independent existence, since it has effect solely in relation to the "rights and freedoms" safeguarded by those provisions. Although the application of Art.14 does not presuppose a breach of one or more of such provisions- and to this extent it is autonomous- there can be no room for its application unless the facts of the case fall within the ambit of one or more of the latter".