

ii) Habitability

The Committee states that housing must be habitable "in terms of protecting the inhabitants from cold, damp or other threats to health, structural hazards, and disease vectors".⁴⁵⁸ To a certain extent the requirement of habitability co-incides with the provision of services (such as electricity for heating), but it also relates to the physical structure of the building. In so far as inadequate and deficient housing often contributes to higher mortality and morbidity rates, this is a priority.

The State should take a number of forms of action in respect to habitability outside the provision of services. For example, it should ensure that all public housing conforms to adequate standards as regards habitability. This would mean that all new housing construction projects should automatically take such considerations into account, and that renewal operations should be undertaken to improve old unsatisfactory housing.

It is apparent that there is a role for legislation in enforcing such standards on the construction of private housing. Although this is certainly appropriate where construction firms are operating in the private sector for profit, it is not necessarily so where housing is built by local communities, or by the individuals for themselves. In such cases, excessively stringent conditions may serve to dissuade people from building their own homes and therefore contribute to a continued shortage of housing generally.

iii) Location

According to the Committee's General Comment, housing "must be in a location which allows access to employment options, health care services, schools and other social facilities.... Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants".⁴⁵⁹ Location of housing thus is of importance not only in so far as it has an effect on the ability of people to carry on normal lives, but also to the extent that it might prejudice the health of the inhabitants.

A major consideration for the Committee seems to be that governments should not build large, low-cost housing settlements far from centres of population merely because land is cheap. In any case in the long run, this would be a false economy given State

⁴⁵⁸ General Comment No.4, *supra*, note 354, at 116, para.8(d).

⁴⁵⁹ *Ibid*, at 116-7, para.8(f).

obligations to provide accessible health care, education and full employment.

The Committee took up the question of location in its criticism of Panama. In its concluding observation the Committee noted *inter alia* that it "had received information which pointed to many complaints by the residents that had received alternative accommodation and which concerned the distance which now had to be travelled to and from places of employment on relatively expensive public transportation and the overall poor quality of the housing in the resettlement sites".⁴⁶⁰ As noted above, this was one of the considerations taken into account in finding Panama to be in violation of its obligations under the Covenant.

iv) Cultural Adequacy

In its General Comment the Committee states that "the way housing is constructed, the building materials used and the policies supporting these must appropriately reflect the culture in which they are undertaken".⁴⁶¹ The rationale for this is not immediately apparent from the General Comment itself, and it may seem on face value to be a matter of lesser importance. However, traditional housing in each country often reflects the form and nature of social interactions. Failure to take such concerns into account in the provision of housing may contribute to the alienation and disruption of community life and thence undermine the traditional forms of community support.

6) The Role of Law and Legislation

Unlike the right to food, the right to housing may be found in the Constitution of a number of States.⁴⁶² Although not often subject to judicial remedies, such constitutional entrenchment suggests quite rightly that housing as an issue does warrant a certain amount of legislative intervention. The Committee, in its guidelines, foresees the existence of a panoply of legislation relating to land use and distribution, security of tenure, housing finance, building codes and regulations, discrimination in housing,

⁴⁶⁰ UN ESCOR, Supp.(No.3), at 32, para.135(b), UN Doc.E/1992/23, (1992).

⁴⁶¹ General Comment No.4, *supra*, note 354, at 117, para.8(g).

⁴⁶² *See e.g.*, Mexico, UN Doc.E/1986/3/Add.13, at 14, para.57; Ecuador, UN Doc.E/1986/3/Add.14, at 11, para.55; Netherlands, UN Doc.E/1986/4/Add.24, at 1, para.2.

prevention from eviction, property speculation and environmental health and planning.⁴⁶³

Although clearly desirable, the Committee does not specifically expect the right to housing to be provided for by the Constitution,⁴⁶⁴ or that any specific legislative measure should be enacted.⁴⁶⁵ Its approach has rather been directed to the provision of domestic remedies in case of violation of the right.⁴⁶⁶ In its General Comment, the Committee has outlined a number of areas in which domestic legal remedies might be provided:

"(a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it might also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness".⁴⁶⁷

Although the Committee appears not to require the institution of such legal remedies, in a number of cases, such as discriminatory action by landlords, failure to provide remedies (whether legal or otherwise) would seem to be a major obstacle to the full realisation of the right.

⁴⁶³ Reporting guidelines, *supra*, note 180, at 14.

⁴⁶⁴ *Contra see*, Von der Weid (Antenna Internationale), E/C.12/1990/SR.23, at 5, para.18.

⁴⁶⁵ However, as one commentator noted, failure to repeal legislation which was clearly incompatible with the provisions of the Covenant, or the non-application of legislation could amount to a violation. Leckie (International Habitat Coalition), E/C.12/1990/SR.22, at 10, para.63.

⁴⁶⁶ General Comment No.4, *supra*, note 354, at 119, para.16; *see also*, Alston, E/C.12/1987/SR.9, at 5, para.22; Rattray, E/C.12/1987/SR.12, at 8, para.31.

⁴⁶⁷ *Ibid*, at 119, para.17.

7) International Co-operation

In addition to the general obligation in article 2(1) to take measures both domestically and through international co-operation to realise the rights in the Covenant, article 11(1) specifically provides that States should "recognise the essential importance of international co-operation based on free consent". As is apparent from the travaux préparatoires, there is no reason to suppose that this provision either adds to, or detracts from, the more general obligation.⁴⁶⁸ Indeed, in using the term "recognise" there is room to argue that the obligation in article 11(1) is hortatory rather than one conferring binding legal obligations.

Whereas the Committee has not in practice placed much emphasis on the role of international co-operation in its questions, it seems that it will do so in future. The guidelines require the provision of information as to the role of international assistance in the full realisation of the rights in article 11, and that measures be taken to ensure that such assistance is used "to fulfil the needs of the most disadvantaged".⁴⁶⁹ In addition, the General Comment provides that International Financial Institutions should ensure that structural adjustment measures should not compromise the enjoyment of the right to housing.⁴⁷⁰

D) THE RIGHT TO CLOTHING

The right to clothing, although specifically included in the Covenant, has had little attention either from the Committee or independent commentators. As far as the Committee is concerned, no reference to clothing is to be found in the reporting guidelines, and only the occasional question has been asked of States by individual members. The impression given is that clothing is not a matter in which the State may exercise a great deal of control, nor one that the Committee feels is of great importance.

IV) CONCLUSION

In comparison to other articles, the Committee has spent a considerable amount of its time addressing issues within article 11. Two of its general discussions have been on the subject of rights within article 11, and the third on the related issue of statistical indicators. In addition, it has adopted its first right-oriented General Comment on the right to housing. The prominence given

⁴⁶⁸ See above, text accompanying notes 98-103.

⁴⁶⁹ Reporting guidelines, *supra*, note 180, at 15.

⁴⁷⁰ General Comment No.4, *supra*, note 354, at 119, para.19.

to article 11 is a reflection of a number of considerations. First, article 11 contains rights that are closely associated with the "basic needs" of the individual. The enjoyment of a minimum level of the rights to food, housing and clothing, is a necessary condition for survival, and therefore warrants detailed consideration. Secondly, article 11 includes rights that are peculiar to the Covenant. Unlike articles 6-9, there is no other body equivalent to the ILO that has dealt with matters such as food and housing on an individual level or has established detailed legal standards that might be applied by the Committee. Article 11 thus presents itself as an area in which the Committee has considerable work to do and in which its work is innovative and particularly valuable.

Finally, a related point is that the article 11 is often viewed as being the epitome of economic, social and cultural rights. The rights are phrased in very general terms, they are accompanied by broad policy objectives and are clearly dependent for their realisation upon the economic resources of the State concerned. The extent to which the Committee deals effectively with article 11 will either sustain or destroy the criticisms of legal obligations in respect of economic, social and cultural rights in general. Article 11, to a large degree, is an acid-test of the Committee's effectiveness and of the fundamental utility of the Covenant.

The Committee has made headway in a number of areas. Its most significant achievement must be the General Comment on the right to housing. In its General Comment No.4, the Committee has clearly outlined the parameters of the right to adequate housing and has usefully described the qualitative considerations that must be taken into account in the realisation of the right. The General Comment is also a success in so far as it was produced with considerable collaboration by NGO representatives, not only in the previous general discussion but also in the drafting of the Comment itself. It is considered that this was an essential element in ensuring that the General Comment adequately reflected the interests and concerns of the disadvantaged worldwide.

The input of NGOs has also been significant in the cases of the Dominican Republic and Panama which the Committee found to be in violation of the Covenant. In each case, the Committee was only able to come to that opinion on the basis of the vast amount of material supplied by the NGO concerned. The significance of the decisions is not merely in the fact that it is the first time in which the Committee as a whole has found a State to be in violation of the Covenant, or that it signals a development in the role of the Committee itself, but that it clearly shows the justiciable nature (from an international point of view) of the rights in article 11.

Outside the specific question of the right to housing the Committee has made less headway. In particular, it has failed to give substantial meaning to the right to clothing and has yet to adopt an appropriate methodology with respect to the right to an adequate standard of living. It has been suggested that the Committee should attempt to identify those elements of the right to an adequate standard of living that are not already covered by other articles in the Covenant. As regards the right to food, the Committee has undertaken a useful general discussion which has generated awareness of a variety of issues which have occasionally arisen in its consideration of State reports. There is clearly a need, however, for more detailed consideration of the issues, with an emphasis upon the precise obligations to which States are bound.

Three main areas might be identified in which further work is necessary. First, the Committee will have to establish a means by which those persons without adequate food may be identified. This will require the establishment of qualitative criteria which define adequacy and the stipulation of means by which they may be measured. The Committee has begun to address the latter question at its sixth session, where there was a discussion of the use of statistical indicators. Secondly, although the method by which the rights are progressively realised is primarily within the discretion of the State, it would be useful for the Committee to identify the extent to which the State can be considered directly responsible for lack of adequate food. Thirdly, more consideration should be given to the question of international co-operation. For example, whereas developed States will not generally accept an obligation to provide a specific form of assistance to specific States, an exception could be made in the case of famines or other "natural" disasters.

CHAPTER NINE: THE SYSTEM OF SUPERVISION

D) INTRODUCTION

As has been pointed out, the concept of a human rights treaty is something of an anomaly.¹ In accordance with the horizontal nature of international law,² the large majority of treaties contain reciprocal obligations in which compliance by one State party is a condition for another State party to be bound by the terms of the treaty in their relations *inter se*.³ Human rights treaties, however, are not premised upon the mutuality of State obligations, rather, they are intended to create a legal order in which States make binding unilateral commitments to protect the basic rights of all individuals within their jurisdiction. As was noted by the European Court of Human Rights, the European Convention (as a human rights treaty):

"...comprises more than mere reciprocal engagements between contracting States. It creates, over above a network of mutual bilateral undertakings, objective obligations which... benefit from a 'collective enforcement'".⁴

Although it is possible to identify reciprocal State interests in ensuring the enjoyment of human rights,⁵ not least in so far as they contribute to international peace and security, the fact that human rights treaties essentially entail unilateral commitments, means that other States parties cannot be relied upon to ensure

¹ Sieghart P., The Lawful Rights of Mankind, 92-3 (1986).

² Henkin L., "The International Bill of Rights: The Universal Declaration and the Covenants", in Bernhardt R. and Jolowicz J.(eds), International Enforcement of Human Rights, 1, at 8 (1985).

³ Brierly J., The Law of Nations, 62 (6th ed. 1963); Morgenthau H., Politics Among Nations, 290 (5th ed. 1973).

⁴ Ireland v. United Kingdom, Eur.Court H.R., Series A, Vol.25, Judgement of 18 January 1978.

⁵ State A may become concerned with the treatment of individuals in State B in a number of situations *inter alia*:

- i) where the systematic mistreatment of citizens in State B threatens to destabilise the region as a whole.
- ii) where there are close economic, social, political, or cultural links between the States (for existence the presence of large minority groups) such that there is internal pressure within State A to react in cases of mistreatment of individuals in State B.
- iii) where the exploitation of workers in State B may be seen to undermine the economic competitiveness of State A.

compliance.⁶ The institution of international supervisory mechanisms through the creation of human rights committees has become the accepted form of effecting compliance with human rights treaty obligations.

At a superficial level the main function of such supervisory bodies is to ensure compliance with the relevant treaty obligations. What this entails and how it is to be achieved, however, requires more consideration.⁷ Three basic functions of the supervisory process in relation to human rights may be identified. First, the clarification of the standards that are to be applied. Secondly, establishing the degree to which States parties are actually acting in conformity with their obligations. Thirdly, taking either remedial or preventive action to ensure compliance.⁸ The degree to which emphasis is given to each of these functions and the method by which they are exercised, varies according to the type of system of supervision.

⁶ The fact that inter-state complaints systems have rarely been utilised is testament to the lack of commitment on the part of States to concern themselves with the human rights situation in other States. Henkin explains:

"While in legal principle every state party is a promisee and entitled to request compliance by any other state party, ordinarily no other state has any interest in doing so and is especially reluctant to demand compliance or threaten sanctions for violation at the expense of its friendly relations and diplomatic capital."

Henkin, *supra*, note 2, at 8. Cf. Bilder R., "Rethinking International Human Rights: Some Basic Questions", 2 *Hum.Rts.J.*, 557, at 569-574 (1969). Leary recognises:

"Reciprocity has traditionally been the most important enforcement mechanism in international law. It fails to function, however, when States do not perceive their own immediate interests as threatened by another State's non-compliance with international law."

Leary V., International Labour Conventions and National Law, 17 (1982).

⁷ Cf. Alston P., "Appraising the United Nations Human Rights Regime", in Alston P.(ed), The United Nations and Human Rights: A Critical Appraisal, at 1 (1992).

⁸ Cf. The analysis of supervisory functions in terms of the "review function", the "correction function" and the "creative function", van Dijk P. and Rood J., "Function and Effectiveness of Supervision in an Economically Interdependent World", in van Dijk P. *et al* (eds), Restructuring the International Economic Order: The Role of Law and Lawyers, 135, at 144 (1987). Each function is defined in the following manner:

"1) The review function: the process of judging whether behaviour conforms to a rule.

"2) The correction function: the function designed to ensure compliance with international legal obligations through outside pressure or persuasion.

"3) The creative function: the function which consists of the clarification and elaboration of existing rules in order to make them sufficiently specific to be applied in a concrete case."

Two main forms of supervisory (or implementation) systems exist on the international plane: the reporting system and the petition system. Each of these systems is thought to have its own theoretical and practical basis. Reporting systems, the most common⁹ and least politically sensitive method of supervision,¹⁰ require States to submit periodic reports on the domestic situation with regard to the rights within the treaty concerned. Generally, the reports are considered by a supervisory body entitled to review the reports and make general recommendations.

Reporting systems are dependent, to a large extent, upon the good faith of the States concerned.¹¹ They are reliant upon the provision of accurate and relevant information by States parties and the supervisory body is mandated purely with the function of assisting and advising the States parties. Reporting systems are therefore considered as mechanisms for fact finding¹² and more

⁹ Currently there are seven universal human rights instruments that impose reporting obligations: the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the International Convention on the Elimination of All Forms of Discrimination Against Women (1979), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) the International Convention on the Rights of the Child (1989), and the International Convention on the Protection of the Rights of Migrant Workers and Members of their Families. In addition, the ILO, UNESCO and the WHO all have periodic reporting provisions on matters that relate to human rights.

¹⁰ Buergenthal T., "Implementing the UN Racial Convention", 12 Tex.I.L.J., 187, at 189 (1977). Dormenval comments however that human rights are almost certain to be badly dealt with by UN supervisory bodies, "because the question of the relationship between a government and its nationals is, *par excellence*, political." Dormenval A., "UN Committee Against Torture: Practice and Perspectives", 8 N.Q.H.R., 26, at 27 (1990).

¹¹ Schoenberg H., "The Implementation of Human Rights by the United Nations", 7 Isr.Y.H.R., 22, at 37 (1977).

¹² Lippman M., "Human Rights Revisited: The Protection of Human Rights Under the International Covenant on Civil and Political Rights", 10 Cal.West.I.L.J., 450, at 486-7 (1980); Vasak comments more specifically that reporting systems fall halfway between the functions of information and investigation. Vasak K., "The Distinguishing Criteria of Institutions", in Vasak K. and Alston P.(eds), The International Dimensions of Human Rights, 215, at 218 (1982).

specifically the "verification"¹³ or the "promotion" of human rights in contrast to the protective functions of a petition system.¹⁴ Such a comparison has led many commentators to criticise reporting systems as being "state centred",¹⁵ "ineffective"¹⁶ and "self-contradictory".¹⁷

Petition systems, on the other hand, are generally considered the most effective means for the protection of human rights. They involve the receipt of communications from individuals or States parties alleging violations of the treaty concerned.¹⁸ The supervisory body takes on a "quasi-judicial" function¹⁹ in

¹³ Tumanov V., "International Protection of Human Rights: Soviet Report", in Bernhardt R. and Jolowicz J. (eds), International Enforcement of Human Rights, 21, at 23 (1985).

¹⁴ For a definition of the two opposed functions *see*, Vasak, *supra*, note 12, at 216.

¹⁵ Mower A., "The Implementation of the UN Covenant on Civil and Political Rights", 10 Hum.Rts J., 271, at 285 (1977); Capotorti F., "The International Measures of Implementation Included in the Covenants on Human Rights", in Eide A. and Schou A. (eds), International Protection of Human Rights, 131, at 147 (1968).

¹⁶ Schoenberg, *supra*, note 11, at 37.

¹⁷ Vasak considers that the lack of the court gives the process a conciliatory character which "suggests that, despite their sacred and inviolable nature, human rights can be 'negotiated'". Vasak, *supra*, note 12, at 220.

¹⁸ The main universal human rights treaties that possess petition systems are: The International Covenant on Civil and Political Rights (under its Optional Protocol); The UN Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment (art.22); The International Convention on the Elimination of All Forms of Racial Discrimination (art.14); the Apartheid Convention; and the Convention on the Rights of Migrant Workers and Their Families (art.77). As regards petition systems in general *see*, Cancado Trindade A., "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights", 202 Hague Recueil, (1987); Tardu M., Human Rights: The International Petition System, (1985).

The inter-State complaints facility is not as effective, probably as a result of the unwillingness of States to sacrifice their good relations with other States for the sake of human rights. Leary, *supra*, note 6, at 17. *See generally*, Leckie S., "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?", 10 Hum.Rts Q., 249 (1988).

¹⁹ There might be objections to use of the term "quasi-judicial" as it was never the intention for any of the UN human rights monitoring bodies to be considered "courts". It has been commented that the Human Rights Committee, when operating under its Optional Protocol, is "neither a court nor a body with a quasi-judicial mandate". However it is admitted that it does perform functions similar to those of the European Commission of Human Rights and "applies the provisions of the Covenant and Optional Protocol in a judicial spirit". de Zayas

interpreting the convention and making decisions or recommendations on the merits of each case. As regards the individual complaints system, which is generally optional for States parties,²⁰ the procedure may also be seen to provide the victim of a violation with an international "remedy" where a domestic remedy is unforthcoming. Although the supervisory body may not necessarily have the power to enforce its decision, this is generally not decisive as to its impact.²¹

It is often assumed, probably as a result of over-simplified analogies with domestic law, that the only really effective mechanism for supervision is the petition procedure. However, to really assess the utility of each mechanism they should be analysed in terms of the degree to which they fulfil the essential functions of a supervision.

First, in terms of review or the assessment of compliance, whereas the petition procedure allows for in depth analysis of particular situations, it cannot compare with the breadth and scale of action that takes place under the various reporting mechanisms. It has been noted that even in those cases where petition systems are operative, the reporting system has formed the mainstay of supervision²² in providing an essential form of continuous monitoring. This is partially due to the limited number of States that have agreed to be bound by the petition systems (which are generally optional), but also because the specific procedures for the receipt and consideration of complaints (including extensive

A., Möller J., and Opsahl T., "Application of the International Covenant on Civil and Political Rights under the Optional Protocol by the Human Rights Committee", 28 *Ger.Yrbk.I.L.*, 9, at 11 (1985). It is considered, however, that the CESCR has begun to exercise quasi-judicial functions in the context of the reporting system. *See below*, text accompanying notes .

²⁰ However the American Convention on Human Rights (1969), 1144 U.N.T.S. 123, has a compulsory individual petition procedure (art.44).

²¹ For changes in the domestic situation related to the work of the Human Rights Committee, *see*, Report of the Human Rights Committee, 45 UN GAOR, Supp.(No.A/45/40), Vol.II, Annex XII, at 207-211 (1990); Cohn C., "The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights", 13 *Hum.Rts.Q.*, 295 (1991).

²² See generally, Fischer D., "International Reporting Procedures", in Hannum H.(ed), *Guide to International Human Rights Practice*, 165 (1984). Such a point has been noted by Robertson with regard to the ICCPR. Robertson A., "The Implementation System: International Measures", in Henkin L.(Ed), *The International Bill of Rights*, 332, at 341 (1981). *See also*, with respect to the ILO. Leary, *supra*, note 6, at 18.

admissibility criteria),²³ mean that they are not always readily accessible to the disadvantaged who might be the victims of violations.²⁴

Secondly, in terms of enforcement or correction, both systems ultimately depend for their effectiveness upon the force of national and international pressure. Petition procedures are generally accompanied by greater public interest and therefore could be said to be more effective in "the mobilisation of shame". However, it cannot be maintained that the principal objective is to condemn and alienate States.²⁵ Supervisory bodies may play a much more constructive role in assessing the situation and advising countries as to possible remedial action.²⁶ Indeed petition procedures themselves require a certain amount of co-operation from States parties that may disintegrate if it was thought that the burdens of participation outweighed the benefits.

Additionally, it is often easy to overlook the importance of the promotional or preventive aspects of implementation. This has been most clearly pointed out by the Committee in its General Comment No.1 of 1989.²⁷ The reporting process has a number of objectives at its heart, namely that the State should monitor and

²³ For the operation of the Optional Protocol of the ICCPR in particular, see, McGoldrick D., *The Human Rights Committee*, 120-246 (1991); Ghandi P., "The Human Rights Committee and the Right of Individual Petition", 57 *B.Y.I.L.*, 201 (1986); Prounis O., "The Human Rights Committee: Toward Resolving the Paradox of Human Rights Law", 17 *Col.H.R.L.R.*, 103, (1985/6); Brar P., "The Practice and Procedures of the Human Rights Committee Under the Optional Protocol of the International Convention on Civil and Political Rights", 25 *Ind.J.I.L.*, 506 (1985); de Zayas A. *et al*, *supra*, note 20.

²⁴ Alston cites in particular: i) ignorance of the existence of an applicable international procedure; ii) a lack of time and/or resources; iii) the physical impossibility of lodging a complaint; iv) the difficulty of demonstrating sufficient individual, as opposed to general community, standing to justify lodging a complaint; and v) the assumption that the international body in question is unlikely to stand in favour of the victim in a given situation. Alston P., "Discussion Note", UN Doc. E/C.12/1991/WP.2, at 8, para.26 (1991).

²⁵ As Mower commented:

"The cardinal objective is to gain, for individuals and groups, the most complete enjoyment of rights which can possibly be obtained, not to find and punish 'criminal' governments."

Mower, *supra*, note 15, at 285.

²⁶ See, Gaer F., "First Fruits: Reporting by States under the African Charter on Human and Peoples' Rights", 10 *N.Q.H.R.*, 29, at 31 (1992).

²⁷ General Comment No.1, UN ESCOR, Supp.(No.4), Annex III, at 87-89, UN Doc.E/1989/22, (1989).

undergo a thorough review and evaluation of the actual situation prevailing within the country as concerns the rights within the Covenant. In doing so it should stimulate public scrutiny of government policy in the areas concerned and pinpoint difficulties and shortcomings in the existing arrangements. Higgins remarks, in this regard, that the reporting process can be a very "salutary exercise" for States in which failure to comply with substantive obligations is often "inadvertent".²⁸ Such considerations support the idea that reporting systems should form the basis of any supervisory mechanism, to be supplemented by petition systems where possible and appropriate. The "promotion" of human rights could be said to be "the first, and the necessary, stage leading to protection."²⁹

Finally, in terms of standard setting or normative development, it is clear that petition systems are particularly effective mechanisms for the creation of standards for application in specific cases. In comparison, the process of considering State reports does not give rise to similar opportunities for the specification of the norms in the treaty concerned. There has been a tendency, however, among supervisory bodies to adopt a distinct interpretative role in the guise of "general comments". Although still lacking in the specificity offered by a petition system the use of General Comments does give the supervisory body an opportunity to develop an understanding of the norms within the treaty concerned.

II) BACKGROUND TO THE COMMITTEE'S ESTABLISHMENT

A) THE DRAFTING OF THE IMPLEMENTATION SYSTEM

During the drafting of the Covenant, there was considerable disagreement as to the nature of the implementation procedure that should accompany the substantive articles. At one stage or another, three forms of supervision were mooted: the possibility of supervision through a petition procedure; supervision by the

²⁸ Higgins R., "Some Thoughts on the Implementation of Human Rights", Bull.H.R., 60, at 63 (1989).

²⁹ *Ibid.* See also Vasak who comments:
 "If an international body for the promotion of human rights is successful, it cannot help but assume the task of protection."
 Vasak, *supra*, note 12, at 218.

Specialised Agencies; and supervision by an expert committee specifically set up for that purpose.³⁰

1) A Petition Procedure

Despite the division of the draft Covenant into two separate texts over the question of implementation,³¹ the discussion over whether the Human Rights Committee procedure should apply to economic, social and cultural rights continued. Two proposals were submitted at the Commission's tenth session for the application of such a procedure to selective economic, social and cultural rights in certain circumstances.³² Doubts were expressed about the capability of the Committee to exercise its quasi-judicial functions with regard to rights that were of a programmatic nature.³³ The suggestions were also opposed by the Specialised Agencies who considered that they were technically better qualified to implement economic, social and cultural rights, and such a procedure would only lead to duplication of work.³⁴

On the other hand it was argued that certain rights could be subjected to the Human Rights Committee procedure "and, in time, most of the rights might become enforceable."³⁵ Accordingly it was argued that States should have the option to accept the jurisdiction of the Human Rights Committee of the ICCPR with

³⁰ See above, Chapter 1, text accompanying notes 201-227. See also, Alston P., "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights", 9 *Hum.Rts.Q.*, 332, at 335-340 (1987) (henceforth "Abyss"); and "The Committee on Economic, Social and Cultural Rights", in Alston P.(ed), *The United Nations and Human Rights: A Critical Appraisal*, 473, at 475-479 (1992).

³¹ See above, Chapter 1, text accompanying notes 126-143.

³² For the French proposal see, UN Doc.E/CN.4/L.338, 18 ESCOR, Supp.(No.7), UN Doc.E/2573, para.216 (1954). It was suggested that the States Parties might be given the opportunity of accepting the Human Rights Committee's complaints procedure for specific economic, social or cultural rights as they so desired. Such a procedure would be subject to reciprocal agreement by the States concerned.

³³ Not only was it considered that there was a lack of criteria to evaluate state compliance, it was argued that:

"Complaints relating to that covenant could only refer to insufficient programmes in the attainment of certain goals and it would be impossible for the committee to determine what the rate of progress in any particular case should be."

UN Doc.A/2929, 10 UN GAOR, C.3, Annexes, (Ag.Item 28), Pt.II, at 124, para.41 (1955).

³⁴ *Ibid* at 124, para.40.

³⁵ *Ibid*, at 124, para.42.

respect to certain rights. In case of competing procedures the Committee would defer to the authority of the Specialised Agency concerned.³⁶ However, as with a proposal to authorise ECOSOC to receive individual petitions,³⁷ in the face of significant opposition the suggestions were withdrawn before being taken to vote.

2) The Specialised Agencies³⁸

As suggested above, the Specialised Agencies were somewhat jealous of their technical and formal jurisdictions. Accordingly, the ILO made a proposal for an implementation system in which the ILO itself would review the state reports.³⁹ This was rejected in favour of a Secretariat draft proposing the submission of periodic state reports to the United Nations with reference of relevant extracts to the Specialised Agencies.⁴⁰ Although the co-operation of the Specialised Agencies is clearly of considerable importance, in terms of their knowledge and technical expertise, to the implementation of the Covenant, it would have been inappropriate for one of them to take on the central supervisory role.

First, as not all States Parties are members of the relevant Specialised Agencies, the UN would still have to develop its capabilities in those areas. Secondly, a divergence both in standards and implementation systems would emerge between members and non-members of the competent Specialised Agencies. The universality of the rights within the Covenant and the essential element of reciprocity in obligations would inevitably be

³⁶ *Ibid*, at 124, paras 42-45.

³⁷ The General Assembly requested the Commission on Human Rights in resolution 421 (V), Sect.F, to consider provisions "to be inserted in the draft Covenant or in separate protocols, for the receipt and examination of petitions from individuals and organizations with respect to alleged violations of the Covenant." GA Resn.421 (V), (Dec.4 1950), 5 UN GAOR, Resns, Supp.(No.20), at 42 (1950).

³⁸ *See generally*, Alston P., "The UN Specialised Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights", 18 Colum.J.Trans.L., 79 (1979); Samson K., "Human Rights Co-ordination within the UN System", in Alston P.(ed), The United Nations and Human Rights: A Critical Appraisal, 620, at 629-30 (1992).

³⁹ UN Doc. E/CN.4/AC.14/1 (1951).

⁴⁰ The Secretariat plan for implementation was inspired by the technical assistance program and "the idea that it was better to help governments to fulfil their obligations than to penalise them for violations", Humphrey J., Human Rights and the United Nations- A Great Adventure, at 143 (1984).

undermined. Thirdly, no single Specialised Agency could effectively take up supervisory duties with respect to the whole of the Covenant without extending their existing mandate.

3) An Expert Committee

Following earlier unsuccessful proposals to create a specialised Committee to supervise the implementation of economic, social and cultural rights,⁴¹ two last-minute proposals were made in 1966. On the one hand, the US representative proposed the establishment of an expert committee of independent experts to oversee the implementation similar to the model created for the Convention on the Elimination of all Forms of Racial Discrimination.⁴² Simultaneously, Italy proposed the creation of *ad hoc* Committees elected by ECOSOC.⁴³ Both proposals were based upon the premise that ECOSOC would not have the time or the expertise to examine the reports adequately⁴⁴ and would not properly represent the States Parties.⁴⁵ However, the suggestions were withdrawn at the General Assembly Third Committee's 1401st meeting when it became apparent that there was insufficient support.⁴⁶

In light of the discussion within the Third Committee it is clear that some form of compromise solution could have been achieved. The fact that no attempt was made at compromise was a reflection of the political situation at that time. In 1966, the Socialist States were still suspicious of any international means of implementation, the African States were disillusioned with "expert bodies" in light of the ICJ's recent decision in the South West

⁴¹ See, Alston (Abyss), *supra*, note 30, at 335-338.

⁴² A/C.3/L.1360, para.1., *in*, UN Doc.A/6546, 21 UN GAOR, C.3, Annexes, (Ag.Item 62) at 10, paras.13-14 (1966). It proposed that the reports should be considered by a "Committee on Economic, Social and Cultural Rights" consisting of independent experts elected by States Parties. It is considered that the independence of the proposed Committee and the fact it would have drawn on expert individuals from States Parties rather than ECOSOC, were matters that recommended the proposal, *see* Alston, *supra*, note 38, at 91-92.

⁴³ *Ibid*, at 11, paras 18 and 24.

⁴⁴ See *e.g.*, MacDonald (Canada), UN Doc.A/C.3/SR.1399, at 128, para.28 (1966).

⁴⁵ See *e.g.*, Capotorti (Italy), UN Doc.A/C.3/SR.1397, at 120, para.32 (1966).

⁴⁶ Un Doc.A/C.3/SR.1401, para.19; *ibid*, para.21.

Africa Cases⁴⁷ and the Western States had little political interest in economic, social and cultural rights. Essentially there was no "champion" to push for strong implementation procedures for the draft Covenant on Economic, Social and Cultural Rights.

However, the rejection of the proposals did not necessarily rule out the possibility of the subsequent creation of an expert committee. Schwelb comments:

"It appears, however, that the fact that the Italian amendment was withdrawn would not prevent the Council, which is the master of its own procedure (Art. 72 of the Charter) and which is empowered to set up 'such other commissions as may be required for the performance of its functions' (Art.68 of the Charter) from establishing a subsidiary body to study and report to it on the information transmitted by governments under the Covenant."⁴⁸

Thus although there was insufficient political will to endorse the creation of an expert committee in 1966, "the door was not irretrievably closed".⁴⁹

4) The Result

The final intentions of the drafters as regards the provisions on implementation are quite obscure. States parties are required to submit reports "in stages", in accordance with a programme to be established by ECOSOC after consultation with the States parties and the specialised agencies concerned.⁵⁰ The reports should indicate the "measures... adopted" and the "progress made" in achieving observance of the rights within the covenant.⁵¹ They may additionally indicate the factors and difficulties affecting the degree of fulfilment of the obligations.⁵² Such reports are to be submitted to the Secretary-General, who is required to transmit

⁴⁷ (1966) I.C.J.Rep., at 6.

⁴⁸ Schwelb E., "Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights", 1 H.R.J., 363, at 367 (1968). In particular *see e.g.*, Mr Richardson (Jamaica), A/C.3/SR.1401, at 142, para.26 (1966).

⁴⁹ Alston, *supra*, note 30, at 479.

⁵⁰ Article 17(1).

⁵¹ Article 16(1).

⁵² Article 17(2).

copies of the reports to ECOSOC "for consideration",⁵³ and copies of the relevant parts of the reports to the specialised agencies in so far as they relate to their responsibilities.⁵⁴ Where information has already been submitted to a specialised agency it is sufficient to refer thereto.⁵⁵ Arrangements may be made for the specialised agencies to report to ECOSOC on the progress made in achieving the observance of the rights within the Covenant including particulars of decisions and recommendations on such implementation adopted by their competent organs.⁵⁶ ECOSOC may also transmit the State reports to the Commission on Human Rights "for study and general recommendations or, as appropriate, for information".⁵⁷ Any such recommendation submitted by the Commission is open to comment by the specialised agencies and the States parties.⁵⁸

Finally ECOSOC may submit "from time to time" to the General Assembly, reports and recommendations "of a general nature" together with a summary of the information received from the States parties and the specialised agencies.⁵⁹ It may also bring to the attention of other organs of the UN or specialised agencies concerned with furnishing technical assistance, any matters that may help those bodies decide what measures are likely to contribute to the effective progressive implementation of the Covenant.⁶⁰

The system outlined in the Covenant is thus unclear as to the nature, purpose or degree of supervision to be given and as to the extent to which the bodies mentioned should involve themselves. First although ECOSOC is mandated with the "consideration" of the State reports, the Commission on Human Rights may similarly "study" the reports and make general recommendations. It is unclear on the face of it, as to which body has the primary responsibility for undertaking supervision. Given that the

⁵³ Article 16(2)(a).

⁵⁴ Article 16(2)(b).

⁵⁵ Article 17(3).

⁵⁶ Article 18.

⁵⁷ Article 19.

⁵⁸ Article 20.

⁵⁹ Article 21.

⁶⁰ Article 22.

Commission is a subsidiary body to ECOSOC it might be assumed that it would play the most significant role.

Secondly, although many assumptions may be made about the nature of reporting systems generally, the Covenant itself only provides for the submission of reports and their consideration. The periodicity, form and specific content of those reports are left open, as is the nature of the consideration undertaken. The most significant limits however are first that States parties are only obliged to submit reports on the measures adopted and the progress made in achieving observance of the rights; any further participation in the consideration of the reports is purely voluntary. Moreover, ECOSOC is at most authorised to submit recommendations to the General Assembly; it is in no way empowered to make decisions binding on States parties.

B) THE SESSIONAL WORKING GROUP

As noted above, ECOSOC has considerable discretion in the conduct undertaken in the consideration of reports.⁶¹ Accordingly, following the entry into force of the Covenant on Economic, Social and Cultural Rights on January 3rd 1976, ECOSOC undertook to consider the best means to supervise the implementation of the Covenant. Although there appears to have been considerable support for the idea that the Commission take on a central role in the supervisory process,⁶² the Council adopted an alternative strategy.

In Resolution 1988(LX) of 11th May 1976 ECOSOC laid down the implementation procedures that were to accompany the Covenant. It created a three-stage, biennial reporting process with a cycle of six years. For the first stage States would be required to

⁶¹ As Sohn commented:

"The Covenant does not specifically foresee the establishment of a specialist Working Group charged with responsibility for scrutinising reports submitted by the States Parties and the specialised agencies. That responsibility is vested in the Council itself which, in turn, must exercise its own discretion as to the most appropriate arrangements for ensuring effective supervision."

Sohn L., "The Role of the United Nations Organs in Implementing the International Covenant on Economic, Social and Cultural Rights", Background Paper, at 39-40 (1985).

⁶² See, Alston, *supra*, note 30, at 483. He comments:

"The Commission's already overcrowded agenda, its reluctance to take economic, social and cultural rights very seriously, and the undoubted need for specialist expertise in monitoring such rights would all seem to confirm the wisdom of that approach now that a committee of independent experts has been given the principal responsibility."

submit reports on the rights covered by articles six to nine. Two years later, States would be required to report on articles 10 to 12, and two years following that on articles 13 to 15. The reports were to be forwarded by the Secretary-General to ECOSOC which would be "assisted" in its consideration of the reports by a "Sessional Working Group" (the Working Group). The Specialised Agencies were also to receive the State reports as appropriate and could submit their own reports in response and have representatives take part in the proceedings of the Working Group.⁶³

The initial plans for a Sessional Working Group were criticised for having insufficient provision for the consideration of the reports by persons of requisite expertise⁶⁴ and for making no provision for enlisting the services of the Commission on Human Rights.⁶⁵ Notwithstanding such objections ECOSOC formally created the "Sessional Working Group" in Decision 1978/10 of 3rd May 1978.⁶⁶ Much of the discussion that preceded the decision was concerned with the composition and membership of the Working Group whilst its actual role in the consideration of the reports was left unclear.⁶⁷ The rather haphazard way the Working Group began was somewhat indicative of how it continued.⁶⁸ Following a review of its operation, the Working Group was renamed the

⁶³ See ECOSOC Resn.1988(LX), 11 May 1976, *found in* UN Doc.E/C.12/1989/4, at 3 (1988). *See generally*, Ramcharan B., "Implementing the International Covenants on Human Rights" in Ramcharan B.(ed), Human Rights: Thirty Years After the Universal Declaration, 159, at 163-165 (1978).

⁶⁴ Massip (Canada), UN Doc.E/SR.1999, at 71, para.16, 60 UN ESCOR, (Ag.Item 4), (1976).

⁶⁵ *See e.g.*, Sucharipa (Austria), *Ibid*, at 72, para.19.

⁶⁶ ECOSOC Decn.1978/10, (May 3 1978), *in* UN Doc.E/C.12/1989/4, at 6 (1988).

⁶⁷ *See e.g.* Ramcharan, *supra*, note 63, at 169. The French representative commented in the discussion:

"The form and composition of the sessional working group would be determined by the nature of the tasks entrusted to it and could therefore be determined only after the methods of work and the procedure for considering reports had been established."

UN Doc.E/1978/SR.9, para.5.

⁶⁸ *See generally*, Sohn, *supra*, note 61, 1-66; Commentary, "Implementation of the International Covenant on Economic, Social and Cultural Rights: ECOSOC Working Group", 27 ICJ Rev., 26 (1981); Alston (Abyss), *supra*, note 30, at 340-342; Westerveen G., "Towards a System for Supervising States' Compliance with the Right to Food", in Alston P. and Tomasevski K.(eds), The Right to Food, 119 (1984).

"Sessional Working Group of Governmental Experts" and its members were elected for three years from nominees put forward by states parties to the Covenant. The change did not seem to have any significant effect on the work that the group produced. The barrage of criticism that has been directed at the Working Group in both of its forms can be summarised as the following:

a) The examination of reports was superficial.⁶⁹ In particular it was marked by poor quality of questioning⁷⁰ and political disagreement.⁷¹

b) The Working Group failed to establish standards for the evaluation of reports⁷² or an effective procedure.⁷³

c) The Working Group reports were purely procedural, giving little indication of the substance of the reports or discussion.⁷⁴

Neither did they indicate any conclusions or recommendations.⁷⁵

d) There was continual dispute over the participation of the Specialised Agencies.⁷⁶

e) The State representatives presenting the reports were often not sufficiently qualified to answer the questions of the Working Group,⁷⁷ (members often presenting the reports themselves).

f) Disagreements within regional caucuses led to difficulty in filling its 15 membership position.⁷⁸

⁶⁹ Commentary, *ibid*, at 35.

⁷⁰ See e.g. Yakolev (USSR), who seems to respond to the questions of other members of the Working Group rather than pose questions himself, E/1985/WG.1/SR.9, at 6, para.29-30.

⁷¹ See e.g. Altercations between Texier (France) and Yakolev (USSR) over the Polish report, E/1986/WG.1/SR.26, at 2-4; and between Yakolev (USSR) and Hoppe (Denmark) over the restrictions on Solidarnosc in Poland, E/1986/WG.1/SR.27, at 7-8.

⁷² Westerveen, *supra*, note 68, at 125.

⁷³ Sohn, *supra*, note 61, at 45.

⁷⁴ Alston (Abyss), *supra*, note 30, at 342. See e.g. the comments of: Walkate (Netherlands), E/1981/SR.15, para.90; Bell (Canada), E/1981/SR.15, para.98.

⁷⁵ Westerveen, *supra*, note 68, at 341; Fischer, *supra*, note 22, at 175.

⁷⁶ Commentary, *supra*, note 68, at 36 and 38. It was finally agreed that the representatives of the Specialised Agencies should be able to make general statements but not pose questions to State representatives.

⁷⁷ *Ibid*, at 35.

⁷⁸ Sohn notes that two members were lacking in 1984, one member in 1983, and two members in 1982, Sohn, *supra*, note 61, at 42.

- g) The attendance of the Working Group members was poor,⁷⁹ and there was excessive use of alternates.⁸⁰
- h) The initial one year tenure of the members, and the later high turnover of members led to a lack of continuity and consistency.⁸¹
- i) State reports were considered too quickly due to the lack of time available to the Group.⁸²
- j) The Working Group was handicapped by the lack of publicity.⁸³
- k) The Working Group was not even-handed in its consideration of State reports.⁸⁴
- l) The Working Group's discussions often ignored the broader context in which the realisation of economic, social and cultural rights operates.⁸⁵
- m) The Working Group was insufficiently supported by the Secretariat.⁸⁶
- n) The lack of technical expertise on the part of States parties and the absence of sufficiently detailed reporting guidelines led to a poor level of compliance with the reporting obligations.⁸⁷

The general dissatisfaction with the effectiveness of the Working Group as a supervisory body, combined with the increasing interest being placed upon economic, social and cultural rights in the UN and a more conciliatory stance on the part of the Eastern European States,⁸⁸ all combined to put fresh impetus into the creation of a truly independent committee of experts. However, although the decision to create the Committee indicated the possibility of a fresh start, it was clear that the form of supervision would remain largely the same.

⁷⁹ One member noted that there was rarely more than ten members present at one time. Texier (France), E/1985/WG.1/SR.19, para.17.

⁸⁰ Alston (Abyss), *supra*, note 30, at 341.

⁸¹ Sohn, *supra*, note 61, at 43.

⁸² Initially the Working Group only had a two-week session. After 1980 this was extended to three weeks. *See*, Commentary, *supra*, note 68, at 37.

⁸³ *Ibid*, at 33.

⁸⁴ Certain States for example were given considerably harsher treatment. Indeed the Working Group actually refused to ask questions of the Chilean report in light of its general human rights abuses. *Ibid*, at 38.

⁸⁵ Alston (Abyss), *supra*, note 30, at 342.

⁸⁶ Sohn, *supra*, note 61, at 35.

⁸⁷ *Ibid*, at 39.

⁸⁸ *See*, Alston (Abyss), *supra*, note 30, at 345-349.

The Committee on Economic, Social and Cultural Rights did not so much replace the Working Group as inherit and develop the existing system. ECOSOC Resolution 1985/17 under which the Committee was formally established, states merely that the Working Group shall be "renamed" the Committee on Economic, Social and Cultural Rights.⁸⁹ Similarly paragraph (h) of the same resolution states that the procedures and methods of work established previously for the Working Group continue to remain in force in so far as they are not superseded by that resolution.⁹⁰ More importantly, there was no substantial reevaluation of the basic system of supervision such as to give effect to articles 19-21. The Committee merely inherited the existing procedures of the Working Group (such as the "constructive dialogue" approach to the consideration of reports), which it has attempted to undertake in a more effective manner.

III) THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

A) THE COMPOSITION OF THE COMMITTEE

The Committee on Economic, Social and Cultural Rights was created in ECOSOC Resolution 1985/17.⁹¹ Paragraph (b) of that decision reads:

"(b) The Committee shall have 18 members who shall be experts with recognised competence in the field of human rights, serving in their personal capacity, due consideration being given to equitable geographical distribution and to the representation of different forms of social and legal systems, to this end, 15 seats will be equally distributed among the regional groups, while the additional three seats will be allocated in accordance with the increase in the total number of States parties per regional group;"

1) Size of the Committee

The decision to create a Committee with 18 members was not necessarily an automatic one, particularly in light of the fact that its predecessor, the Sessional Working Group, had 15

⁸⁹ ECOSOC Resn.1985/17, para.(a), UN ESCOR, Supp.(No1), at 15, UN Doc.E/1985/85, (1985).

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

members. In contrast it might be noted that CAT has only 10 independent experts, the ILO Committee of Experts has 20, and CEDAW has 23. The increase in size of the Committee seems to have stemmed from a desire to emulate the Human Rights Committee and to satisfy the need for representation for the growing number of new States parties to the Covenant.

Smaller Committees arguably benefit from being able to operate by consensus,⁹² come to decisions quickly, and maximize the use of time and resources. However absences in a small Committee can disrupt both the ability to form quorum and the quality of decision-making.⁹³ With respect to the wide range of issues that confront the Committee, it is in theory essential for the Committee to be of a size large enough to include members from all the necessary areas of technical expertise whilst maintaining its ability to operate by consensus.

The Committee has operated relatively smoothly at its present size. The ideological conflicts that beset its earlier sessions have not reoccurred and although there have been a number of minor disagreements between members, there has been no serious challenge to its ability to come to decisions by consensus. In light of the Committee members' increasing work-load over and above the consideration of State reports (such as attending meetings of the pre-sessional working group, monitoring activities of other human rights bodies, and the preparation of concluding observations and general comments), there might be an argument for increasing the size of the Committee to spread the burden. However, it is considered that the cost this would have on the ability of the Committee to function quickly and effectively and come to decisions by consensus would greatly outweigh any benefit. Moreover, it has to be noted that ideally, many of the tasks undertaken by the Committee should be the responsibility of the Secretariat.

2) The Appointment of Members

Under ECOSOC resolution 1985/17 paragraph (c) members of the Committee are elected by ECOSOC by secret ballot from a list of nominees submitted by States Parties.⁹⁴ The first elections took place in 1986 where 18 members were elected for a term beginning on 1st January 1987. Whereas the regular term of office

⁹² This has been a problem for larger Committees such as CEDAW.

⁹³ Dormenval, *supra*, note 10, at 33.

⁹⁴ ECOSOC Resn.1985/17, *supra*, note 89.

is four years,⁹⁵ the necessity of instituting a staggered membership meant that the President of the Council chose by lot the names of nine members whose term was to expire at the end of two years.⁹⁶ Accordingly half the membership is renewed every second year.⁹⁷ At the elections in 1988 ECOSOC elected nine members whose term of office runs until December 1992, and in 1990 another nine members were elected whose tenure continues until December 1994.⁹⁸ Due to the resignation of two members (Mr Sviridov and Mr Daoudy) in 1988, ECOSOC elected two members to fill those vacancies for the remainder of their terms of office, expiring in December 1990. The present and past state of membership may be found in the Appendices to this work.⁹⁹

The fact that members of the Committee are elected for four-year terms allows the Committee an element of continuity.¹⁰⁰ It is apparent, particularly in light of the experience of the original Working Group, that changes in membership can be disruptive in terms of the Committee's efficient functioning.¹⁰¹ Long terms of membership promote stability through allowing the development of inter-personal relationships which can help to avoid unnecessary friction. More importantly, it assists consistency and promotes the development of expertise by the individual Committee members so essential to the effective analysis of State reports.

The staggered membership of the Committee and the eligibility of existing members for re-election, has done much to ensure this vital continuity in the Committee's working methods.¹⁰² Indeed, 14 members of the original Committee are still members as of 1992 and only three members have not been re-

⁹⁵ *Ibid*, para.(c)(i).

⁹⁶ *Ibid*, para.(c)(iii).

⁹⁷ *Ibid.*, para.(c)(ii).

⁹⁸ *See generally*, Report of the Committee's Fifth Session, UN Doc.E/1991/23, at 2, paras 4-5, UN ESCOR, Supp.(No.3), (1991).

⁹⁹ Appendix III.

¹⁰⁰ Members of the HRC, CEDAW, CAT are all elected for four years.

¹⁰¹ *See above*, text accompanying note 81.

¹⁰² The ILO Committee of Experts is 20 members strong each of whom is elected for three years. "...their term of office is generally renewed since continuity makes it possible to acquire more thorough knowledge of matters dealt with by the Committee and also ensures the greater independence of its members." Valticos N., "The International Labour Organisation", in Vasak K. and Alston P.(eds), The International Dimensions of Human Rights, 363, at 369 (1982).

elected.¹⁰³ However, the desirability of maintaining continuity has to be balanced against the current need for new specific expertise in the Committee as intimated below.¹⁰⁴ It is perhaps possible that such expertise could be brought to the Committee on a limited scale in appointments following "natural wastage" such as resignations or retirements.

3) Representation and Distribution of Membership

Paragraph (b) of ECOSOC resolution 1985/17 stipulates that in the election of the experts "due consideration" should be given to "equitable geographical distribution and to the representation of different forms of social and legal systems". Although the Committee members are undoubtedly appointed as independent experts,¹⁰⁵ this provision appears to ensure that the interests of States are represented in a general manner through social and cultural affiliation.

However, from the point of view of the Committee, it is entirely suitable that membership should span geographical areas, legal and social forms in that its expertise would be seriously diminished if one aspect went unrepresented. The formula devised for the Committee stipulates that 15 seats shall be distributed equally among the five regional groups (Africa, Asia, Eastern Europe, Latin America and Western Europe) and that the additional three seats be allocated according to the increase in the total number of States parties per regional group. It has been argued that this formula is unduly inflexible.¹⁰⁶ Its emphasis on ideological groupings not only means that valid and relevant criteria for membership are ignored (such as ensuring a spread of expertise across the relevant disciplines), it places an unwarranted significance on the representation of States parties.

It must be admitted that the composition of the Committee does seem to fulfil, to a large extent, the three criteria of representation (geographical, legal and social distribution). As far as the regional distribution is concerned, it has three members from each of the regional groups with the extra members going to

¹⁰³ In comparison, the Human Rights Committee has experienced some problems of continuity, *see*, Nowak M., "UN Human Rights Committee: Comment", 11 H.R.L.J., 139 (1990).

¹⁰⁴ *See below*, text accompanying note 119.

¹⁰⁵ *See below*, text accompanying note 122.

¹⁰⁶ Alston (Abyss), *supra*, note 30, at 349.

Africa, Asia and Latin America.¹⁰⁷ The weakest unit is perhaps that of Asia which only has three representatives, one of whom is from Cyprus.¹⁰⁸

The variety of legal systems found on the international plane are generally well represented with a mixture of common-law and civil systems and a variety of constitutional forms with different philosophies. Similarly, there is a fairly wide representation of differing social structures, although stronger Asian representation would be beneficial.

Nevertheless, from the point of view of expertise, it is important that the Committee is composed of experts spanning the areas of concern within the Covenant. It is certainly true that there is a need for people with local knowledge of the various geographical areas and of the different social and legal systems of States parties, but the demands of knowledge and expertise within the Committee are considerably wider. Given that the Committee is in the best position to determine its needs as regards the expertise of its members, a more flexible arrangement would be appropriate in which the Committee could have greater control over membership.

The existing arrangement, especially in so far as it refers to ensuring the representation of States parties, reflects the misplaced idea that the experts are still representatives of States. The fact that members are elected from nominees of the States parties, despite leaving open the faint possibility of experts being elected from nationals of non-States parties,¹⁰⁹ similarly re-emphasises the unwillingness of States parties to abandon the control previously held over membership of the Working Group.¹¹⁰

¹⁰⁷ For a list of the different groupings for the purposes of elections *see*, Hovet T. and Hovet E., A Chronology and Fact Book of the United Nations 1941-1985, 310 (7th Ed, 1986).

¹⁰⁸ Cyprus of course is a member of the Council of Europe. On political groupings generally *see*, Petersen M., The General Assembly in World Politics, 290-297 (1986); Bailey S., The General Assembly of the United Nations. A Study of Procedure and Practice, 21-40 (1960). It is assumed that the Eastern European group will disappear at some stage which will alter all the terms of election.

¹⁰⁹ As Alston comments, "although there appears to be nothing to prevent the nomination of an individual who is not a national of a State party, there have been no precedents and the chances of election would probably be slight". Alston (Abyss), *supra*, note 30, at 349.

¹¹⁰ Whereas the Western States considered that the Working Group should consist of members of ECOSOC, the East European States argued that membership of the Working Group should be limited to States Parties to the

4) The Expert Nature of the Committee

ECOSOC resolution 1985/17 requires that the Committee be composed of "experts with recognised competence in the field of human rights". The expertise of the membership is of importance not only in as far as it relates to the ability of the Committee to assess the State reports¹¹¹ but also in that it lends to the credibility of the Committee in the eyes of States parties.¹¹² The willingness of States parties to produce high quality reports is directly related to the quality of the supervision undertaken by the Committee.¹¹³

Although the Working Group was supposedly composed of competent members or experts, the quality of analysis shown in the consideration of State reports was manifestly poor.¹¹⁴ The Committee, on the other hand, has demonstrated an ability to draw

Covenant. *See generally*, Ramcharan, *supra*, note 63, at 165-167. UN Docs. E/1978/SR.5, 9 and 12, UN ESCOR, (Ag.Item 5), (1978).

The final solution was presented as a compromise: the Working Group should consist of 15 members elected from those States that were parties to the Covenant and members of ECOSOC (of whom there were only 20), other members of the Council and States Parties were invited to participate in the proceedings of the Working Group as observers. ECOSOC Decn.E/1978/10, paras.(a) and (c), *supra*, note 66.

At the creation of the Sessional Working Group of Governmental Experts under ECOSOC Resolution 1982/33 paragraph (b), the requirement for membership of the Council was dropped; the 15 members would be elected from the States Parties to the Covenant alone. ECOSOC Resn.1982/33, (May 6 1983), *in*, UN Doc.E/C.12/1989/4, at 11 (1988).

¹¹¹ As Mower said with respect to the HRC:

"Since a body like this is an aggregate of individuals, the attitudes and competence of individual members become matters of not little significance for the Covenant's effectiveness."

Mower G., "Organizing to Implement the UN Civil/Political Rights Covenant: First Steps by the Committee", 3 *Hum.Rts.Rev.*, 122, at 123 (1978). The point is equally relevant with respect to the CESCR.

¹¹² The Netherlands representative commented in ECOSOC:

"The requirement that members of the Group should be experts in the matter to which the State reports related was of great importance. If reporting States hesitated to submit reports or did not submit reports at all because they believed that they would be discussed by a less than competent group of individuals, the monitoring function of the Council would be undermined."

Mr Walkate (Netherlands), E/1981/SR.15, para.92 (1981).

¹¹³ *See e.g.* Dormenval, *supra*, note 10, at 32.

¹¹⁴ *See above*, text accompanying note 77. One commentator has pointed out that with the exception of Norway and USSR, States were represented by members of the permanent missions whose "technical preparation was poor", with the result that the questions asked were generally superficial. Fischer, *supra*, note 22, at 175.

out and evaluate some of the finer issues in the reports and has made a certain amount of progress in further defining the substance of the guarantee.¹¹⁵ Individual members have occasionally fallen short in their legal analysis,¹¹⁶ but there is demonstrably a core of expertise within the Committee that maintains a high standard of work.

Nevertheless, it is apparent that the Committee does not possess expertise in all the subject areas encompassed within the Covenant. It was noted by one Committee member that "the Covenant's scope was so broad that the Committee could not hope to find among its members experts in housing, discrimination, nutrition and all the other subjects involved in economic, social and cultural rights".¹¹⁷ Although it clearly would not be possible for the Committee to have members with expertise in every conceivable area, the fact that the vast majority of current members have a predominantly legal background may be criticised.¹¹⁸ As a legal entity, the Covenant certainly requires a supervisory body with legal expertise, but it is doubted, given the need for wider knowledge particularly as regards the rights to food, housing, clothing and health, that the current emphasis on legal expertise is appropriate. Indeed, in so far as the strictly "legal" functions of the Committee are limited, there is scope for the inclusion of more non-lawyers within its ranks without prejudicing its ability to function effectively.

It might be concluded that, given the nature of the Covenant, the requirement that the experts be limited to those of recognised competence in human rights is not necessarily suitable.¹¹⁹ The recent appointment of Mrs Bonoan-Dandan, however, whose expertise lies in the area of art and culture, would seem to suggest that the term "competence in human rights" will be interpreted broadly to cover the needs of the Committee as a supervisory body. To further extend this process, it is submitted that the

¹¹⁵ The discussion undertaken on article 11 illustrates both of these points. *See*, E/C.12/1990/SR.22-23.

¹¹⁶ For example, a curious argument was used by one member who argued that France was in violation of its obligations under the Covenant with respect to article 9 notwithstanding an explicit reservation on the question. Alvarez Vita, E/C.12/1989/SR.12, at 12, para.61.

¹¹⁷ Alston, E/C.12/1990/SR.22, at 3, para.12.

¹¹⁸ At least fourteen of the eighteen members have a specifically legal background. Only one member has clear expertise in other fields. *See generally*, UN Docs.E/1990/46 and E/1988/46.

¹¹⁹ *See generally* the suggestion of Westerveen, *supra*, note 68, at 128.

Committee should undertake to advise ECOSOC of the nature of the experts it wishes to be appointed at the next election in 1992.

Nevertheless, as pointed out, the Committee could not hope to have a membership of experts covering all the subjects involved in the Covenant. It is, and always will be, dependent upon the use of external advice and technical expertise in its consideration of reports. Ideally this would be the type of support provided to the Committee by the Secretariat.¹²⁰ In absence of such a role being played by the Secretariat, the Committee will have to look towards greater participation by the specialised agencies,¹²¹ and through the use of consultants on an *ad hoc* basis during the consideration of the reports. Such consultants, if used, would deal with issues of a specific nature that may arise in the occasional report.

5) The Independence of the Committee

ECOSOC resolution 1985/17 stipulates in paragraph (b) that the members should serve "in their personal capacity".¹²² Moreover, rule 13 of the Rules of Procedure provide that members of the Committee make a solemn declaration to undertake their duties "impartially and conscientiously".¹²³ It is clear from the experience of the Working Group that such independence is crucial to the effective functioning of the Committee. It might be argued that since the reporting system is primarily intended not for making judicial determinations of compliance, but rather for assisting States in the implementation of the rights within the Covenant, that an insistence on the independence and impartiality of the Committee members is largely misplaced.¹²⁴ However, even if the form of judicial impartiality that is essential to those bodies that operate a petition

¹²⁰ See below, text accompanying notes 456-468.

¹²¹ See below, text accompanying notes 338-363.

¹²² ECOSOC Resolution 1985/17, *supra*, note 89, para.(c).

¹²³ Rules of Procedure as approved by ECOSOC, in UN Doc.E/C.12/1990/4.

¹²⁴ Capotorti, speaking solely from a textual analysis of the ICESCR, noted that although in theory an independent committee of experts was most suitable for human rights treaty supervision, "as the States reports on economic, social and cultural questions must also help to promote international cooperation, especially in the field of technical assistance, the Economic and Social Council is still the best qualified organ for this kind of 'implementation' of the Covenant." Capotorti, *supra*, note 15, at 136.

system¹²⁵ is not strictly necessary, it is nevertheless debilitating for the Committee to be subjected to the political pressures that attend those organs composed of State representatives.

As the terminology used in the ECOSOC resolution is the same as that in article 28(3) ICCPR, it is to be assumed that the Committee should operate in the same independent manner as the Human Rights Committee, whatever the differences in role. However, the fact that members should act in their personal capacities does not mean in itself that they are entirely free from State control. As noted above, State parties retain significant influence over the election of the members of the Committee both by the fact that they nominate the candidates and by the necessary political "trade-offs" that accompany the distribution of seats. Indeed the decision by the Eastern Bloc countries to withdraw their nominee for the Committee at its first session illustrates the political bargaining that enters into the election process.¹²⁶ In addition, an attempt was made, albeit unsuccessful, to enforce an "understanding" made during the election process that the rapporteur for the second session should be an expert from an Eastern European Country.¹²⁷

Moreover it is clear that many members of the Committee have been, and continue to be, government officials and civil servants.¹²⁸ Robertson comments in relation to the Human Rights Committee, that such a situation:

"contradicts the intent of the Covenant: it not only makes it difficult for the members to devote the necessary time and attention, but also makes it less likely that they can perform their functions 'impartially'. The task of the Committee is difficult and delicate and is not aided by subjecting any of its members to political pressures that are inevitable if

¹²⁵ For example, members of the ILO Committee of Experts on the Application of Conventions and Recommendations are required to work "in a spirit of complete independence and entire objectivity". Valticos, *supra*, note 102, at 369.

¹²⁶ *See*, the comment of Sviridov, E/C.12/1987/SR.2, at 3, para.15.

¹²⁷ *See*, Sviridov, E/C.12/1987/SR.25, at 2, para.6.

¹²⁸ *See e.g.*, Mr Rattray is the Secretary-General of Jamaica; Mr Alvarez Vita is a Minister in the Diplomatic Staff of Peru; Mr Fofana is the Advocat Général of Guinea; Mrs Ider is the head of the department of Legal Affairs of Mongolia; Mr Konate is a Councillor to the Permanent Mission of Senegal to the UN in Geneva; Mr Marchan Romero is an Ambassador for Ecuador; Mr Mratchkov is the Attorney-General of Bulgaria. Other members hold various government or civil service posts. *See above*, note 118.

Committee members are, or are seen as, representing governments."¹²⁹

Robertson goes on to argue that this should be established as a matter of principle¹³⁰ and that the Committee members should be permanent salaried staff of the UN.¹³¹ Although it is certainly necessary that members be free from government control, it is doubtful that such a proposition is realistic, especially given the financial constraints under which the UN is currently operating. Indeed it is arguable that Committee members in fact benefit from the knowledge that derives from links with their State.¹³² A more modest proposal would be to prohibit Committee members from being in the direct employment of their State.¹³³ However, even this would present problems for certain developing states which would clearly have difficulties in providing persons with the necessary technical expertise who are not upon the State payroll.

In fact, members of the Committee have consistently stressed their independence before State representatives¹³⁴ and there is little evidence of members allowing political affiliations to compromise their role in examining State reports. There is an unofficial agreement, self-imposed on the whole, that an expert from the State whose report is being considered should not participate in the discussion. Interventions in such cases have occurred only when that expert considered that the Committee

¹²⁹ Robertson, *supra*, note 22, at 338; Galey comments that the fact that members of CEDAW often hold official posts gave rise to "serious questions as to the extent they can or do serve in their personal capacity independent of governments", Galey M., "International Enforcement of Women's Rights", 6 *Hum.Rts.Q.*, 463, at 478 (1984). Such a consideration has also been noted in the Committee itself, *see*, Texier, E/C.12/1988/SR.23, at 7, para.60.

¹³⁰ Robertson, *supra*, note 22, at 350.

¹³¹ *Ibid.* at 339.

¹³² McGoldrick, *supra*, note 23, at 43.

¹³³ This would exclude in particular the participation of ambassadors and other civil servants. However, it would raise certain problems of interpretation, for example, where a university professor was employed in a public institution financed directly by the State.

¹³⁴ For example, following the Chilean representative's reference to the "Australian representative", it was pointed out that members of the Committee were experts acting in an individual capacity and should be referred to by name or by any other neutral expression. *See*, Alston, E/C.12/1988/SR.16, at 3, para.6.

would benefit from his or her specialist knowledge.¹³⁵ More often than not, any conflict within the Committee has related to regional rather than State affiliations, reflecting not so much the interference of States parties, but rather the personal views of the members concerned.

The one area of concern, however, has been the degree of absenteeism experienced by the Committee that may be directly related to the responsibilities of the members. At four of its past five sessions, one member of the Committee has been entirely absent, and at two of those sessions an additional two members attended only part of the session.¹³⁶ In addition to the casual absences from particular sessions this represents quite a significant problem. Although average attendance must be about twelve or thirteen members, on a number of occasions attendance falls well below this level. Indeed it was commented at the Committee's third session that much of the Committee's work would have been impossible if it had enforced the quorum rule of 12 members (Rule 32 of the Rules of Procedure).¹³⁷ How far such absences are due to official State business is unclear,¹³⁸ but it is notable that those members who are clearly independent have good records of attendance.¹³⁹ It is clearly of importance to the Committee that it maintains the quality of its work which may well be prejudiced by the continuing shortage of members.¹⁴⁰ This is especially the case

¹³⁵ See e.g. the intervention of Rattray in the consideration of the Jamaican report, E/C.12/1990/SR.21, at 5, para.21.

¹³⁶ The attendance over the first six sessions is as follows:
 1987 (First Session): All members attended;
 1988 (Second Session): Mr Sviridov was absent; Mr Daoudi, Mr Rattray attended only part of the session.
 1989 (Third Session): Mr Kouznetsov, Mr Marchan Romero, Mr Rattray and Mr Mrachkov attended only part of the session.
 1990 (Fourth Session): Mr Mrachkov was absent.
 1990 (Fifth Session): Mr Badawi El Sheikh was absent; Mr Alvarez Vita and Mr Rattray attended only part of the session.
 1991 (Sixth Session): Mr Texier was absent; Mr Rattray attended only part of the session.

¹³⁷ See, Alston, E/C.12/1989/SR.23, at 6, para.41.

¹³⁸ The absences of Mrachkov was cited however as being due to State business.

¹³⁹ One may cite in particular Mr Alston and Mr Simma.

¹⁴⁰ Dormenval considers that "[o]ne's agreement to serve as an expert entails the moral duty not to undermine the authority of the Committee one serves on." Dormenval, *supra*, note 10, at 34.

if the Committee is forced to take decisions that are technically *ultra vires* for not fulfilling the quorum rule.

B) THE STATUS OF THE COMMITTEE

On a theoretical level, the sovereign equality of States dictates that the supervision of any treaty obligations should be undertaken exclusively by those States that are party to the agreement. On the other hand the effective supervision of human rights demands that the body mandated with its implementation should be independent of the States parties. The Covenant, by placing ECOSOC as the primary organ responsible for the implementation of the Covenant, appears to reflect the latter position.¹⁴¹ However, such a decision seems to have been taken on the assumption that the supervisory role should merely be one of providing technical assistance and that the Council would be the most appropriate body for assuming such a function.

The debate over the control of the States parties reemerged in determining the membership of the Working Group. It was argued on the one hand that members of the Group could be elected from any member of ECOSOC whether or not they were Party to the Covenant,¹⁴² on the other hand it was contended that members had to be elected from those members of ECOSOC who were also States Parties.¹⁴³ As noted above, the position is no clearer in respect to the Committee itself.¹⁴⁴

Although States parties are responsible for the nomination of members of the Committee, it is clear that the Committee as a whole is primarily a United Nations organ. The Committee was established as a subsidiary organ of ECOSOC and as such derives all its authority from, and is responsible to that body. The interests of the States parties are represented here only in so far as they are represented by ECOSOC. To this extent the Committee differs quite significantly from other human rights committees.

The obvious benefit of such a position is that the Committee maintains a significant degree of autonomy from the States parties. As such, it is not subject to the financial problems faced by other

¹⁴¹ Although a number of States in ECOSOC are parties to the Covenant, there are also a significant number which are not.

¹⁴² Ramcharan, *supra*, note 63, at 157.

¹⁴³ Yugoslavia, E/SR.1999, at 5, 60 UN ESCOR, (Ag.Item 4), (1976); USSR, *ibid*, at 6.

¹⁴⁴ *See above*, text accompanying note 109.

Committees that are sponsored by the States parties.¹⁴⁵ Rather, the Committee is financed exclusively by the United Nations.¹⁴⁶ Additionally the Committee could be said to be more flexible in its operation in that changes merely need the authorisation of ECOSOC rather than the amendment of the text of the Covenant itself. The Committee, whilst operating within the broad parameters of the ECOSOC resolutions that created it, has undergone an unprecedented evolution particularly in its working methods. This can be attributed to a large extent to the absence of formal textual constraints experienced by other Committees.

On the other hand, the mandate of the Committee is essentially an indirect one. It operates "to assist the Council" in the consideration of State reports, rather than being directly responsible itself.¹⁴⁷ There is potential here, for a conflict of competence to arise, similar to that experienced by the Committee of Independent Experts to the European Social Charter *vis a vis* the Governmental Committee.¹⁴⁸ In practice, however, the work of the Committee has drawn little interest from ECOSOC, and only in a few cases has the Committee sought the approval of ECOSOC for the adoption of its working methods.¹⁴⁹

The Committee is also somewhat more vulnerable than other committees to the extent that it is permanently subject to sea-

¹⁴⁵ For comment on the financial position of CERD *see*, Bernard-Maugiron N., "20 Years After: 38th Session of the Committee on the Elimination of Racial Discrimination", 8 N.O.H.R., 395 (1990). With respect to CAT *see*, Dormenval, *supra*, note 10, at 28. For arguments in favour of central funding for all human rights committees *see*, Note by the Secretary General, Effective Implementation of International Instruments on Human Rights, Including Reporting Obligations under International Instruments on Human Rights, UN Doc.A/44/668, at 30-40, 44 UN GAOR, (Ag.Item 109), (1989).

¹⁴⁶ Although the Committee on Economic, Social and Cultural Rights developed late in the day, it was somewhat fortunate that the earlier proposals for a Committee submitted by the USA and Italy did not come to fruition. Both of those proposals envisaged the States Parties taking primary responsibility for financing the Committee which would be set up independently of ECOSOC. UN Doc.A/6546, at 10-13, 21 UN GAOR, Annexes, (Ag.Item 62), (1966).

¹⁴⁷ *See*, Alston, *supra*, note 30, at 488-489.

¹⁴⁸ The recent Amending Protocol has sought to address the overlap in roles between the two bodies, *see*, Harris D., "A Fresh Impetus for the European Social Charter", 41 I.C.L.Q., 659, at 662-664 (1992).

¹⁴⁹ These include: the adoption of the Committee's Rules of Procedure E/1989/22, at 74, paras 333-4 (1989); the ability of NGO's to submit information to the Committee, E/1987/28, at 49, paras.312-3 (1987); and the creation of a "blacklist" of non-reporting States, E/1991/23, at 68, para.264 (1991).

changes within ECOSOC upon which the Committee is entirely dependent for its existence. The fragility of the whole implementation system was in fact apparent when it was made clear during the drafting of the Covenant that it was legally impossible for the treaty to impose any obligations on the UN with regard to implementation.¹⁵⁰ However this vulnerability does not seem to have manifest itself in any way as yet. During the recent financial crisis in the United Nations for example, the Committee was one of the few institutions that was left unaffected.

C) WORKING METHODS OF THE COMMITTEE

1) Rules of Procedure

Draft provisional rules of procedure, prepared by the Secretary-General taking into account the relevant resolutions and decisions of ECOSOC and the practice and procedure of other human rights treaty bodies, and amended by members of the Committee were accepted on a provisional basis at the Committee's third session.¹⁵¹ An amendment was made to the rules at the Committee's fourth session and they were finally approved by ECOSOC in decision 1990/251 prior to the Committee's fifth session.¹⁵²

Although the Committee is nominally a subsidiary of ECOSOC and therefore subject to the rules of procedure of that body, by adopting its own set of rules of procedure it has asserted some form of independence that is entirely appropriate with its role in the supervision of the Covenant. However, in looking to ECOSOC to endorse the procedures, the Committee effectively tied its own hands as regards effecting future changes to the rules, and has left itself at the mercy of ECOSOC. As Alston concludes, it would be highly desirable for the Committee to regain control over its Rules of Procedure as soon as practicable.¹⁵³

¹⁵⁰ UN Doc.A/2929, *supra*, note 33, at 119, para.16. This is the reason why the Covenant does not instruct ECOSOC but rather uses the term "may", as in articles 18 and 19.

¹⁵¹ E/C.12/1989/SR.22, at 5, para.24.

¹⁵² ECOSOC Decn.1990/251, (Oct.10 1990), UN ESCOR, Resns, Supp.(No.) (1990).

¹⁵³ Alston, *supra*, note 30, at 489.

2) Frequency and duration of sessions.

ECOSOC Resolution 1985/17 paragraph (d) provides that the Committee should meet annually for a period of up to three weeks.¹⁵⁴ That the phrase "up to" might be interpreted as precluding the possibility of longer sessions has been explicitly negated by rule 1 of the Rules of Procedure which includes the phrase "or as may be decided by the Economic and Social Council... taking into account the number of reports to be examined by the Committee".¹⁵⁵ It is specifically open for the Committee, when it has a sufficient backlog of reports, to request either an extra session or longer sessions.

There is no doubt that the Committee is in principle disadvantaged in comparison to the Human Rights Committee which meets for nine weeks per year (three, three-week sessions) and has an additional three weeks for working groups. Even including the one week meeting for its pre-sessional working group, the Committee on Economic, Social and Cultural Rights meets for only a third of that time.¹⁵⁶ However, the Human Rights Committee has additional tasks to undertake with the Optional Protocol and the amount of time spent on considering equivalent reports is almost the same.¹⁵⁷ Generally, the Committee spends about eight days considering 12 reports (or four global reports), which gives it an average of one global report every two days.¹⁵⁸

¹⁵⁴ The Sessional Working Group initially only had a two week session per annum. It was clear *ab initio* that this would be inadequate for the effective supervision of the reporting mechanism. See e.g. Mr Pastinen (Finland), UN Doc.E/1979/SR.14, para.61, ESCOR, (Ag.Item 4), (1979).

¹⁵⁵ *Supra*, note 123, at 1.

¹⁵⁶ However it is worth noting that CEDAW, under article 20 of the Discrimination against Women Convention, only has two weeks per annum.

¹⁵⁷ *Contra*, Note by the Secretary-General, *supra*, note , at 41, para.101. However the Secretary-General's report, in comparing the amount of time spent on the consideration of each report by different Committees did not take into consideration the fact that the Committee on Economic, Social and Cultural Rights used to consider three state reports in place of a single "global report".

¹⁵⁸ NUMBER OF REPORTS CONSIDERED/SESSION:
 First session= 11 reports; 18/28 meetings. 0.6 reports/meeting.
 Second session=15 reports; 18/24 meetings. 0.8 reports/meeting.
 Third session= 14 reports; 15/25 meetings. 0.9 reports/meeting.
 Fourth session= 9 reports; 19/26 meetings. 0.4 reports/meeting.
 Fifth session= 13 reports; 18/23 meetings. 0.7 reports/meeting.
 Sixth session= 14 reports; 19/26 meetings. 0.7 reports/meeting.
 Appx Average = 12 reports; 18/25 meetings. 0.7 reports/meeting.
 At a rate of 0.7 reports/meeting it will take 4.2 meetings to complete a global

In comparison to CERD or CEDAW this is an inordinate amount of time.¹⁵⁹

Two competing concerns are apparent here: on the one hand the recent financial crisis within the UN has stressed the need for efficient and productive reporting systems; on the other hand it is necessary for the Committees concerned to maintain a high standard of evaluation that inevitably takes time. Thus, it has been noted that the unduly short examinations of reports undertaken by CERD for example, are "simply pointless".¹⁶⁰ The Committee has in fact taken a number of innovative procedural steps such as the imposition of time limits, in order to expedite the consideration of reports.¹⁶¹ It is unlikely, given the breadth and sheer volume of information that is presented before the Committee, that it will be able to shorten the time required for each report in any significant manner. It has been correctly noted that the only way forward for the Committee in the long run, is for its sessions to be extended when a significant backlog of reports builds up.¹⁶²

So far, requests by the Committee for extra or longer sessions have met with limited success. At its first session, after a debate when it was considered quite widely that it would need two three-week sessions per annum,¹⁶³ it was proposed that its sessions should be extended to four weeks given the financial problems facing the UN.¹⁶⁴ ECOSOC, however, did not respond favourably.

The Committee has managed to gain authorisation to hold a pre-sessional working group meeting prior to its plenary sessions, which has relieved some of the work load. In addition, following

report.

Under the present time limits it should take 8.5 hours to consider a report: approximately 3 meetings (It is a saving of 30 minutes from the previous schedule, but in terms of meetings it would still be about the same).

¹⁵⁹ CERD for example, considered 26 reports in 14 working days.

¹⁶⁰ Higgins R., "The United Nations: Still a Force for Peace", 52 *M.L.R.*, 1, at 19 (1989).

¹⁶¹ *See below*, text accompanying note 282.

¹⁶² *See*, Alston, E/C.12/1990/SR.7, at 7, para.31.

¹⁶³ *See e.g.* Rattray, E/C.12/1987/SR.23, at 5, para.21.

¹⁶⁴ Report of the Committee's First Session, UN Doc.E/1987/28, at 50, para.314, UN ESCOR, Supp.(No.17), (1987).

the Committee's request at its second session,¹⁶⁵ ECOSOC allowed the Committee to hold an extraordinary session in 1990. The fact that this was merely a temporary expedient that did little to resolve the fundamental problem is evidenced by the Committee's repeated request for another extraordinary session in 1993. In the Committee's draft decision, it spoke of the "long standing backlog" of reports many of which had been pending for over two years,¹⁶⁶ and that the "abnormal situation seriously undermines the effectiveness and threatens the credibility of the system for monitoring the implementation" of the Covenant.¹⁶⁷

It is clear that if the Committee is granted an extra session, it will temporarily help with the backlog of reports. However, the fact that the States parties have, at present, a poor record on reporting suggests that in future when this situation improves, a three-week session *per annum* will be far from adequate even with the occasional extraordinary session.

3) Timing of the Sessions

Problems were encountered, particularly with the participation and attendance of members, State representatives, representatives of the Specialised Agencies¹⁶⁸ and Non-Governmental Organisations¹⁶⁹ by the co-incidence of the Committee's meeting with that of the Commission on Human Rights.¹⁷⁰ It was also noted that the fact that the Committee met at the same time as the Commission on Human Rights not only made participation difficult, but detracted from the publicity given to the Committee.¹⁷¹ In addition the timing of the session coincided with that of the ILO Committee of Experts which hindered the attendance or the presentation of a report by the ILO.¹⁷²

¹⁶⁵ Report of the Committee's Second Session, UN Doc.E/1988/14, at 59, para.346 and 61 para.356, UN ESCOR, Supp.(No.4), (1988).

¹⁶⁶ Draft Decision I, Report of the Committee's Sixth Session, UN Doc.E/1992/23, at 1, UN ESCOR, Supp.(No.3), (1992).

¹⁶⁷ *Ibid.*

¹⁶⁸ *See*, Mr Raffray (UNESCO), E/C.12/1987/SR.3, at 6, para.30.

¹⁶⁹ This became apparent at the meeting with NGOs at the Committee's third session. Chairman, E/C.12/1989/SR.19, at 8, para.47.

¹⁷⁰ Report of the Committee's Third Session, UN Doc.E/1989/22, at 77, para.346, UN ESCOR, Supp.(No.4), (1989).

¹⁷¹ *See*, Konate, E/C.12/1988/SR.22, at 7, para.53.

¹⁷² *See*, Samson (ILO), E/C.12/1987/SR.3, at 4, para.18.

Much as the rescheduling of the Committee's session to early December should have enabled it to avoid the problems of attendance, the experience of the fifth and sixth sessions suggest that this is not the case. Comparatively, the attendance of the Specialised Agencies, NGOs and members of the Committee has been no better at the Committee's later sessions than at its earlier ones. To some degree this is because a number of NGOs attending the Commission would previously have attended the Committee, albeit briefly. On the other hand, there is no doubt that the Committee's work at the earlier sessions was largely overshadowed by that of the Commission. It is unlikely that the Committee will find the "perfect" time to hold its sessions. The Committee has rightly concentrated on the primary concern, that interested parties do not feel that they are prevented from attending the Committee by the timing of the session.

4) Consensus Decision-Making

Rule 46 of the Committee's Rules of Procedure states that: "Decisions of the Committee shall be made by a majority of the members present. However, the Committee shall endeavour to work of the basis of the principle of consensus."¹⁷³

In principle, with its present quorum standing at 12,¹⁷⁴ the Committee may make a decision with the concurring votes of seven members. It is clear from the phrase "of the members present" (as opposed to those voting), that abstentions are not sufficient to endorse a decision.¹⁷⁵ However, as with many other human rights committees the emphasis is on working through consensus. On the one hand, it might be argued that an attempt to work by consensus "is liable to water down the moral principles to a lowest common denominator" and restrict the power to make decisions at all.¹⁷⁶ However, the use of consensus is important in maintaining a cohesiveness and a sense of common purpose within the Committee that will be reflected in its work. Moreover, the use of voting in important decisions, not only deprives them of a

¹⁷³ Rule 46, Rules of Procedure, *supra*, note 123, at 10.

¹⁷⁴ Rule 32, *ibid*, at 7.

¹⁷⁵ This contrasts with the position under CERD, *see*, Das K., "United Nations Institutions and Procedures Founded on Conventions on Human Rights and Fundamental Freedoms", in Vasak K. and Alston P.(eds), The International Dimensions of Human Rights, 303, at 309 (1982).

¹⁷⁶ Robertson, *supra*, note 22, at 340.

certain amount of authority, but might encourage political disagreements within the Committee.

In practice the Committee has not resorted to the vote as yet and has maintained a unified approach to all its problems.¹⁷⁷ It is of course important that the Committee retain the ability to take decisions by majority to ensure its power act in the face of a "veto" power (which is implicit in a consensus decision-making process), and to preserve the freedom of conscience and independence of action for each member.¹⁷⁸

5) Publicity

Publicity is of prime importance to the Committee both in assisting it in its work and in the realisation of the rights in general. From the Committee's point of view, publicity of its work would attract the attention of relevant NGOs and Specialised Agencies and stimulate their participation. In addition, it has a promotional effect in generating more international concern for economic, social and cultural rights, thus raising the status of the Committee from that of a poor relation to the HRC.¹⁷⁹ Raising the status of the Committee might in particular induce ECOSOC to allow the Committee an extra session per annum and stimulate interest in an Optional Protocol.

From the point of view of the realisation of the rights generally, it is clear that one of the aims of the reporting process is to stimulate awareness and debate at a national level. Although it has recognised the importance of this aspect of publicity, the Committee is obviously unable to take much action itself to this end. It has merely requested that States should make their reports to the Committee available on the domestic level.¹⁸⁰

In order to effectuate greater publicity of its work, the Committee has undertaken a number of initiatives. On its own part it holds its meetings in public,¹⁸¹ and has held meetings with NGOs and the press. Additionally it has stressed that members of

¹⁷⁷ Ramcharan notes with regard to the Sessional Working Group that it was the clear understanding of delegates that the Working Group should not vote and that decisions should be taken by consensus. Ramcharan, *supra*, note 63, at 169.

¹⁷⁸ See, Mower, *supra*, note 111, at 124.

¹⁷⁹ See e.g., Alston, E/C.12/1990/SR.3, at 10, para.63.

¹⁸⁰ See, Simma, E/C.12/1988/SR.22, at 8, para.56.

¹⁸¹ Rule 28, Rules of Procedure, *supra*, note 123, at 5.

the Committee should attempt to give the Covenant greater publicity in their personal capacity, whether through attending conferences or publishing articles.¹⁸²

The Committee has also pushed for greater efforts to be taken by the UN in this regard. In particular, the Committee has asked for both a bibliography of published materials on the Covenant¹⁸³ and a brochure on the work of the Committee to be published.¹⁸⁴ It has also recommended that the text of its annual report and summary records, available in English, French and Spanish,¹⁸⁵ be distributed as widely as possible by the UN Information Office. Thus far, the Secretariat has not done as much as it could. In response to the Committee's request for a "brochure", the Secretariat produced a brief "fact sheet" outlining the Committee's work in a very general manner. The Committee criticised this rather mediocre effort, commenting in its annual report that:

"in light of the continuing widespread lack of awareness of the Committee's functions, procedures and preoccupations and of the measures it had taken, there remained a pressing need for a detailed and informative analysis to be made widely available."¹⁸⁶

It is considered that the production of such a report would require comparatively few resources and could be drafted with ease in light of the Committee's policy of describing its working methods within the annual report. Nevertheless, it would be appropriate for the Committee should make an effort to describe the exact type of report that it is looking for, which would obviously avoid unnecessary misunderstandings.

In absence of effective Secretariat backing, the efforts of the Committee to increase the awareness and status of the Covenant and its work will be fairly limited. It is worth noting, however, that publicity will develop when the Committee shows itself to be an effective and useful supervisory body. In particular, it is arguable that the most effective method of generating publicity would be the institution of an Optional Protocol allowing the Committee to receive and consider individual complaints.

¹⁸² E/1988/14, *supra*, note 165, at 65, para.372.

¹⁸³ *Ibid*, at 65, para.372.

¹⁸⁴ Report of the Committee's Fourth Session, UN Doc.E/1990/23, at 75, paras 301-2, UN ESCOR, Supp.(No.3), (1990).

¹⁸⁵ Rule 27, Rules of Procedure, *supra*, note 123, at 6.

¹⁸⁶ E/1992/23, *supra*, note 166, at 97, para.375.

D) THE ROLE OF THE COMMITTEE

Primarily, the Committee is merely required to "assist" ECOSOC in the "consideration" of reports under the reporting system. Whilst being posited as an alternative to a petition system overseen by an expert committee, the precise nature of that "consideration" seems to have been assumed by the drafters of the Covenant as being self-evident. No attempt has been made then or since to establish precisely the role of the supervisory body in considering reports under such a system.

It is arguable that the decision of ECOSOC to create a Committee composed of independent experts signifies its intention that the body should assume some form of quasi-judicial role in the supervisory process. If the role of the supervisory organ was principally to aid States in the implementation of their obligations under the Covenant, particularly by stimulating international co-operation and assistance, it would be most effectively performed by ECOSOC as an inter-governmental body.¹⁸⁷ However, the delegation of its authority to a committee of independent experts can only suggest that some independent form of evaluation is intended in the supervision of State reports.¹⁸⁸

¹⁸⁷ Capotorti, speaking solely from a textual analysis of the ICESCR, noted that although in theory an independent committee of experts was most suitable for human rights treaty supervision, "as the States reports on economic, social and cultural questions must also help to promote international cooperation, especially in the field of technical assistance, the Economic and Social Council is still the best qualified organ for this kind of "implementation" of the Covenant": Capotorti, *supra*, note 15, at 136. It has also been suggested that an independent Committee would only be necessary if complaints from individuals or States were contemplated, Mr Dombo (Ghana), UN Doc.A/C.3/SR.1401, at 141, para.15 (1966).

¹⁸⁸ That independence is a crucial factor in the adoption of quasi-judicial functions is confirmed by the rather generalised statement of MacBride: "UN Committees or Sub-Committees are not the ideal bodies to be charged with implementation. They are subject to the prevailing political and ideological controversion: they do not have a judicial approach to the problems with which they are dealing. They regard themselves as the political spokesmen of their governments and often use Committees as a convenient arena in order to gain kudos for themselves or their governments... (They) are necessary and valuable for the purpose of discussing and preparing new Conventions and proposals but not for the purpose of serving as an implementation authority. They have not the necessary time or attributes for such a function."

MacBride S., "The Strengthening of International Machinery for the Protection of Human Rights", in Eide A. and Schou A.(eds), International Protection of Human Rights, 149, at 162 (1968).

However, the Committee has been rather cautious of taking up a "quasi-judicial" role. The Committee has emphasised that it sees itself as entering into a "constructive dialogue" in the reporting process whereby State representatives are asked to appear before the Committee to undertake a mutually-beneficial discussion regarding the degree to which the State concerned has fulfilled its obligations under the Covenant. Members of the Committee have stressed, almost unanimously in the past, that the Committee is not a "court"¹⁸⁹ and therefore should not sit in judgement over States or condemn them for non-compliance with their obligations.¹⁹⁰ Rather, it is thought that the Committee should play a facilitative role in assisting States in their realisation of the rights,¹⁹¹ especially through filtering requests for international co-operation¹⁹² and technical assistance¹⁹³ and providing States with advice. In particular, it has been felt that the Committee should play the role of a "catalyst" in encouraging States to make it possible for national organisations to participate in the implementation of the rights.¹⁹⁴

In fact the Committee has done little to characterise itself as a body capable or willing to facilitate or provide technical assistance and advice. Rather it has developed its role in ways that point more towards the assumption of quasi-judicial functions. In particular, it has undertaken to receive information from NGOs, asserted its authority as the central supervisory body to interpret the Covenant, and has adopted the procedure of making "concluding comments" or "observations" of a State-specific nature on each report considered. In more recent cases this has involved making comments as to whether or not the State concerned was acting in conformity with its obligations under the Covenant.¹⁹⁵

¹⁸⁹ See *e.g.*, Mrachkov, E/C.12/1987/SR.4, at 7, para.26.

¹⁹⁰ See, Alston, E/C.12/1987/SR.4, at 3, para.8; Rattray, E/C.12/1987/SR.4, at 11, para.43; Badawi El Sheikh, E/C.12/1988/SR.2, at 7, para.35.

¹⁹¹ See *e.g.*, Mrachkov, E/C.12/1987/SR.4, at 7, para.26.

¹⁹² See *e.g.*, Taya, E/C.12/1988/SR.20, at 4, para.13.

¹⁹³ See, Alston, E/C.12/1988/SR.20, at 5, para.20.

¹⁹⁴ See, Alston, E/C.12/1987/SR.4, at 3, para.8.

¹⁹⁵ See *below*, text accompanying note 420.

E) THE REPORTING PROGRAMME

1) The Obligation to Report

Article 16(1) of the Covenant reads:

"The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognized herein."

The submission of reports by the States parties is clearly central to the integrity of the reporting system and that failure to report constitutes a violation of a State's obligations under the Covenant. However it has often been recognised that compliance with reporting obligations is generally poor.¹⁹⁶

The current experience of the Committee on Economic, Social and Cultural Rights is that 16 States have not submitted a single report in ten years and 137 reports are overdue from 55 States parties.¹⁹⁷ It is recognised that this is one of the worst records of all the human rights committees.¹⁹⁸ Members of the Committee have identified a number of reasons for such a record. First, it is evident that the production of reports requires a certain amount of internal organisation¹⁹⁹ and expertise on the part of States which presents problems for developing countries.²⁰⁰ Secondly, given the vast quantity and range of information required, in contrast to civil and political rights reporting, developing states may not dispose of sufficient personal and economic resources to provide the necessary data.²⁰¹ This is a particularly acute problem for those States that are party to a number of different human rights treaties

¹⁹⁶ Schoenberg noted with respect to the history of the periodic reporting system that it was one of "limited and shallow participation". Schoenberg, *supra*, note 11, at 25.

¹⁹⁷ E/1992/23, Annex I, *supra*, note 166, at 103-112.

¹⁹⁸ Both CERD and CEDAW have also had particular problems in this regard. One difficulty in establishing the exact position of reporting under the Covenant has been the tendency of the Secretariat to "move the goal-posts". For example in the Committee's Annual Report of its Fifth Session there appear to be 211 overdue reports, *see*, E/1991/23, *supra*, note 98, Annex I, at 74-81, but in the report of its Sixth Session, this number had dropped to 137, *see*, E/1992/23, *supra*, note 166, Annex 1, at 103-112.

¹⁹⁹ *See*, Alvarez Vita, E/C.12/1990/SR.7, at 9, para.52.

²⁰⁰ *See*, Konate, E/C.12/1987/SR.22/Add.1, at 3, para.5; *see also*, Nowak, *supra*, note 103, at 142.

²⁰¹ *See e.g.* Simma, E/C.12/1989/SR.18, at 8, para.45.

in that they may well be overburdened by reporting requirements.²⁰² Thirdly, the original set of guidelines were complicated, general and difficult to apply.²⁰³

It might also be argued that the low quality and inefficiency of the Committee's predecessors may well have alienated a number of States which have yet to be convinced of the value of the supervisory mechanism. Additionally, as was noted with respect to the HRC, some of the problems experienced may well be due to the relative newness of the procedures.²⁰⁴ In that case the Committee is well advised to allow the system time to "settle" and concentrate on providing assistance to those States that experience problems in producing the necessary reports.

The Committee, in response to the poor record of reporting, has approached the matter from two different angles. On the one hand, the Committee has consistently recommended that States that experience problems in drafting reports, should seek the assistance of the Secretary-General and particularly the Centre for Human Rights.²⁰⁵ In light of the poor response it has also suggested that the Under-Secretary-General for Human Rights should approach each State party that has not submitted such a report, and request that they indicate whether assistance is required.²⁰⁶

On the other hand, the Committee has also taken a more adversarial stance. It would be somewhat naïve of the Committee if it were to rely entirely on the good faith of the States parties. As one commentator noted, even Western States are often late in submitting their reports.²⁰⁷ Indeed Belgium stands out as being a relatively wealthy Western State that has not submitted a single report since its ratification in 1983. Thus the Committee has requested that the Secretary-General send reminders to States from which reports are overdue,²⁰⁸ and records the state of compliance with the reporting procedure in its annual report to ECOSOC. Since its fifth session, however, the Committee has drafted a decision each year, for adoption by ECOSOC, specifically naming

²⁰² Report of Meeting of Chairpersons of Human Rights Treaty Bodies, UN Doc.A/39/484, (1984) and UN Doc.A/44/135, paras 46-100, (1989).

²⁰³ See, Rattray, E/C.12/1987/SR.22/Add.1, at 4, para.9; see also, Sohn, *supra*, note 61, at 39.

²⁰⁴ Robertson, *supra*, note 22, at 346.

²⁰⁵ E/1990/23, *supra*, note 98, at 765, para.304.

²⁰⁶ *Ibid*, at 68, para.265. Cf. Konate, E/C.12/1991/SR.24, at 11, para.82.

²⁰⁷ See, Higgins, *supra*, note 160, at 18.

²⁰⁸ E/C.12/1987/SR.23, at 4, para.14.

those States that have failed to submit a single report for over a decade.²⁰⁹ The endorsement of the decision by ECOSOC is notable not only because it shows a concern that the failure to report "threatened to undermine the foundations of the supervisory arrangements",²¹⁰ but also because it specifically names the States concerned.²¹¹

Although both Iceland and Uruguay quickly submitted their reports before the first draft decision was adopted by ECOSOC, members of the Committee have not considered this mechanism to have been entirely successful.²¹² Therefore, at its sixth session, the Committee resolved to take further steps to address the problem of non-reporting. Following the example of CERD,²¹³ the Committee decided that as from its seventh session it would schedule for consideration the reports of those States whose initial reports are 10 or more years overdue (and subsequently in case of all reports that are five or more years overdue) whether or not the report has been received.²¹⁴

There are problems with this approach. First, without the assistance of a State report, it is clearly going to be extremely difficult for the Committee to consider the position of States as regards the implementation of the rights.²¹⁵ Currently the Committee does not receive sufficient alternative information from NGOs or specialised agencies to make such a consideration viable. Secondly, if States perceive that the Committee will continue to undertake its supervisory role without State reports, they might take this as a signal that it is unnecessary to submit reports at all. Thirdly, if the Committee's mandate is read strictly, it is only entitled to assist ECOSOC in the consideration of State reports. This does not give the Committee the right to consider the situation of States in absence of a report any more than it can consider the situation of a State not party to the Covenant. Finally, given the problems that States face in the drafting of reports, the Committee might be considered to be unnecessarily confrontational in its stance.

²⁰⁹ See, Draft Decision I, E/1991/23, *supra*, note 98, at 1, and Draft Decision II, E/1992/23, *supra*, note 166, at 1.

²¹⁰ *Ibid*, Draft Decision II.

²¹¹ It has to be noted that there is nothing in the terms of the Covenant itself that specifically allows the Council to make State-specific recommendations of this kind. The fact that many States parties to the Covenant are also members of ECOSOC, however, gives considerable force to such an interpretation of its powers.

²¹² See *e.g.*, Mratchkov, E/C.12/1991/SR.24, at 11, para.86.

²¹³ *Cf.* Houshmand, E/C.12/1991/SR.24, at 10, para.80.

²¹⁴ E/1992/23, *supra*, note 166, at 99, para.382(b).

²¹⁵ See, Simma, E/C.12/1991/SR.24, at 12, para.89.

It is considered that notwithstanding such difficulties, the Committee is correct in interpreting its powers in a teleological manner so as to ensure the integrity and effectiveness of the supervision system as a whole. It is quite apparent that there is a positive correlation between the effectiveness of the reporting system and the extent to which States parties take their reporting obligations seriously. Thus alternative measures such as considering three or four periodic reports together,²¹⁶ or altering the cycle of submission according to the actual date of submission are effectively counter-productive.²¹⁷ The Committee has to take a strong stance on State reporting which, as is clear, is central to the system as a whole. It should be careful, however, to make clear that notwithstanding its consideration of the situations, the States parties remain in violation of their reporting obligations.

2) Periodicity of Reports

Article 17(1) reads:

"The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialised agencies concerned."

During the drafting of the Covenant a proposal was made that the periodicity of reports should be set in the text itself.²¹⁸ It was fortuitous that the amendment, which provided for the submission of reports every two years, was not adopted, as it is unlikely that such a schedule would have been realistic either for the States concerned or the supervisory body. Such was the position of CERD which, despite the textual requirement of bi-annual reports, has adopted a four-yearly cycle. It is clear that the solution adopted for the Covenant was appreciated for its flexibility and the amount of discretion given to ECOSOC.²¹⁹

Following the requirements of article 17(1) the Secretary General carried out consultations with the States parties and the Specialized Agencies and prepared a note on the implementation of the Covenant. After consultations with the Specialised Agencies and the States Parties, the Secretary General arrived at the proposal that the States Parties would report in the following stages: first year, articles 6-7; second year,

²¹⁶ Bernard-Maugiron, *supra*, note 145, at 396.

²¹⁷ Higgins, *supra*, note 160, at 19.

²¹⁸ Proposed Amendment of Italy, UN Doc.A/C.3/L.1358, para.3.

²¹⁹ UN Doc.A/6546, at 14, para.44, 21 UN GAOR, C.3, Annexes, (Ag.Item 62), (1966).

article 11; third year, articles 13-15; fourth year, article 12; fifth year, articles 9-10; and sixth year, article 8.²²⁰ No specific recommendations, however, were made as to article 1 or the provisions in part II (articles 2-5).²²¹

The initial three-part reporting system was justified on the basis of the interest of the specialised agencies in the area. However, the agencies were never able to perform the role which was initially envisaged for them and there was a growing appreciation of the interrelationships between rights such that it was no longer suitable for the rights to be separated into discrete categories.

The change to a new five-yearly periodicity for the submission of reports had a number of objectives at its heart:

1) To reduce the burden imposed on States parties with respect to reporting.

2) To facilitate the task of both the reporting State and the Committee by working on the basis of a global unified report.²²²

3) To be more consistent with reporting obligations under other international human rights instruments.²²³

4) To make the nature and periodicity of the reporting process more readily understood by all concerned.²²⁴

5) To enhance the effectiveness of the overall monitoring system.²²⁵

It was also noted that a single report would be consistent with the indivisibility of the various rights contained in the Covenant (although the single report should nevertheless be organised into chapters reflecting different clusters of rights).²²⁶ Accordingly, in its resolution 1988/4, ECOSOC approved the recommendation of the Committee that States parties be requested to submit a single report within two years of

²²⁰ UN Doc.E/5764, at 5 para.24, 60 UN ESCOR, Annexes, (Ag.Item 4), (1976).

²²¹ *Ibid*, at 10, paras 25-6. No such provision for reporting for articles 2-5 was proposed as it was considered that such provisions apply to the exercise of all the rights in part III and therefore could be taken into account in those reports.

²²² *See e.g.*, Rattray, E/C.12/1988/SR.21, at 3, para.10.

²²³ *See e.g.*, Simma, E/C.12/1988/SR.21, at 5, para.21.

²²⁴ *See e.g.*, Konate, E/C.12/1988/SR.21, at 4, para.14.

²²⁵ E/1990/23, *supra*, note 184, at 94, para.1.

²²⁶ E/1988/14, *supra*, note 165, at 58, para.339; *See e.g.* Alston, E/C.12/1988/SR.21, at 3, para.7, where it was argued that the right to an adequate standard of living could be linked with the right to social security or with the right to work.

the entry into force of the Covenant and thereafter at five-yearly intervals.²²⁷

The possibility of the reporting period being seven years was discussed at the Committee's second session²²⁸ particularly as it was felt that the situation would not change sufficiently over the five-year interval,²²⁹ but it was considered that the latter was preferable to bring the Committee into line with other supervisory committees.²³⁰ The five-yearly reporting cycle will certainly entail an increase in the work load of the Committee, which considering its existing situation may not be advisable.²³¹ However the benefits of having a system that involves more consistent monitoring on the part of the Committee should outweigh any such problems.

It was considered that a single report still conformed with article 17(1) of the Covenant despite the reference to "stages". Members considered that the term "stages" referred to the periodicity rather than the articles themselves, a matter that seems to have been accepted by States parties.²³² Indeed the Committee invited ECOSOC to seek legal advice on the issue. The fact that it has not done so attests to its general acceptability.²³³

3) The Content of Reports

As indicated above, it is clear from the travaux préparatoires that the term "programme" was to signify a programme for the timing, form and substance of the reports submitted to ECOSOC.²³⁴ Indeed, in the Third Committee, this view prevailed over the idea that the States parties themselves should determine the content of the reports. The latter proposal was rejected, quite rightly, on the basis that wide divergencies in the form and contents of the reports would arise and that the reports would soon "degenerate into vehicles of propaganda".²³⁵

²²⁷ ECOSOC Resn.1988/4, (May 24 1988), *in*, E/C.12/1989/4, at 30 (1988).

²²⁸ See the proposal of Taya, E/C.12/1988/SR.21, at 5, para.20.

²²⁹ *See*, Taya, E/C.12/1988/SR.21, at 3, para.9.

²³⁰ E/1988/14, *supra*, note 165, at 58, para.340.

²³¹ *See*, Taya, E/C.12/1988/SR.21, at 3, para.9.

²³² *See e.g.*, Konate, E/C.12/1988/SR.21, at 4, para.14.

²³³ E/1988/14, *supra*, note 165, at 59, para.341.

²³⁴ UN Doc.A/2929, *supra*, note 33, at 118, para.12.

²³⁵ UN Doc.A/6546, *supra*, note , at 14, para.45. *In particular see*, Mr Richardson (Jamaica), UN Doc.A/C.3/SR.1401, at 143, para.46 (1966).