

**THE COMING OF AGE OF THE INTERNATIONAL  
COVENANT ON ECONOMIC,  
SOCIAL AND CULTURAL RIGHTS:  
NORMATIVE CLARIFICATION OF COVENANT RIGHTS  
THROUGH THE WORK OF THE INTERNATIONAL  
COMMITTEE ON ECONOMIC,  
SOCIAL AND CULTURAL RIGHTS\***

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## I. INTRODUCTION

In contrast with the International Covenant on Civil and Political Rights,<sup>1</sup> state reporting is the sole supervisory procedure provided for with respect to the International Covenant on Economic, Social

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1 "International Covenant on Civil and Political Rights", Annex to G.A. Res. 2200 (XXI), Dec. 16, 1966, 999 U.N.T.S. 171, 6 *I.L.M.* 368 (1967).

and Cultural Rights.<sup>2</sup> From 1979 to 1986 these reports were reviewed by the United Nations Economic and Social Council (ECOSOC), in fact by an ECOSOC Working Group to that effect. The Working Group was initially composed of government representatives and subsequently of governmental experts.<sup>3</sup> In contrast to other United Nations human rights treaties, no new body was created to monitor compliance with the Covenant on Economic, Social and Cultural Rights (hereinafter the Covenant). This changed in May 1986 when dissatisfaction with the work of the ECOSOC Working Group led to the creation of a new expert Committee on Economic, Social and Cultural Rights (hereinafter the Committee).<sup>4</sup> Unlike the ECOSOC Working Group, the Committee's 18 members serve in their personal capacities.<sup>5</sup>

At the beginning of the Committee's activities, Australian member and current Chair, Philip Alston, identified six measures to be taken by the new Committee to remedy the shortcomings that prevented its predecessors from effective performance: (1) norm clarification, (2) encouraging more meaningful reporting, (3) improved cooperation with relevant U.N. bodies, (4) facilitation of input from non-governmental organizations, (5) streamlining work-

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- 2 "International Covenant on Economic, Social and Cultural Rights", Annex to G.A. Res. 2200 (XXI), Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967).
  - 3 From 1979 to 1982 this was the Sessional Working Group and from 1983 to 1986 the Sessional Working Group of Governmental Experts. See "UN Committee on Economic, Social and Cultural Rights", 42 *Review of the International Commission of Jurists* 33 (1989); "UN Working Group on Economic, Social and Cultural Rights", 27 *Review of the International Commission of Jurists* 26 (1981). In total, the Working Group examined 138 initial reports and 44 second periodic reports.
  - 4 For background information on the Committee's establishment, see Philip Alston, *The Committee on Economic, Social and Cultural Rights*, in Philip Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal* (1992), at 473, 475-487. For a discussion of the ECOSOC working groups and the reasons of dissatisfaction with their performance, see Philip Alston, "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights", 9 *Human Rights Quarterly* 332 (1987).
  - 5 The importance of this should be emphasized and is discussed in Habib Gherari, "Le Comité des droits économiques, sociaux et culturels", 96 *Revue générale de droit international public* 75, 79-86 (1992).

ing methods, and (6) more effective follow-up.<sup>6</sup> Because the Committee has focused on these steps, the new Committee has already made tremendous progress in their implementation after 11 sessions, with the exception of NGO participation which remains at a lamentable low.<sup>7</sup> The Committee has, of course, been able to profit from the experience of the Human Rights Committee. One of the most eminent contributions of the Committee is the normative clarification of the Covenant rights. It has done so through various channels.<sup>8</sup>

## II. NORMATIVE CLARIFICATION OF THE COVENANT: STATE REPORTING

The vagueness of the Covenant rights has tended to encourage the relative neglect of economic, social and cultural rights.<sup>9</sup> With the exception of labor rights, this vagueness is due to a large extent to the absence of national judicial experience with the rights and concepts contained in the Covenant.<sup>10</sup> The second main reason is the failure of the international community to develop jurisprudence on the Covenant rights.<sup>11</sup> According to Alston:

[S]ome of the relevant United Nations reports have served principally to demonstrate that in the field of economic rights it is easy to generate a large amount of heat (by detailing the statistics of infant mortality, death by starvation, adult illiteracy,

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6 Philip Alston, "Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights", 9 *Human Rights Quarterly* 332, 350-379 (1987).

7 Alston, *supra* note 4, at 501-502.

8 See also Scott Leckie, "An Overview and Appraisal of the Fifth Session of the UN Committee on Economic, Social and Cultural Rights", 13 *Human Rights Quarterly* 545, 547-548 (1991).

9 Asbjorn Eide, "Realization of Social and Economic Rights: The Minimum Threshold Approach", 43 *Review of the International Commission of Jurists* 40 (1989); 10 *Human Rights Law Journal* 35 (1989).

10 Alston, *supra* note 4, at 490.

11 *Id.*

and general homelessness) but infinitely more difficult to generate even a small amount of light (by identifying the core requirements stemming from recognition of particular rights).<sup>12</sup>

Norm clarification had to be a high priority for the Committee if it wanted to succeed in making the Covenant a meaningful and thus an enforceable instrument. The traditional method for achieving norm clarification is the examination of state reports. In theory, the approaches adopted in national legislation should shed some light on the content of specific rights and on the obstacles for their implementation.

State reporting before the Committee is a six step process: (1) after receipt of a report, it is studied by the Committee's five-member pre-session working group which subsequently submits a list of detailed questions to the state concerned, (2) at the session, the state party provides an oral introduction to the report, (3) the state replies (or should reply) to the written questions, (4) the Committee offers oral questions, (5) the state party replies to the oral questions at the next meeting, and (6) the Committee provides its concluding observations.<sup>13</sup>

The concluding observations contain the Committee's assessment of the quality of the report, the willingness of the state delegate to engage in a "constructive dialogue," the extent to which rights are in place or are violated.<sup>14</sup> Due to the weakness of most reports, the Committee regularly requests additional information for review at its next session.<sup>15</sup> The overall evasiveness of reports and the reluctance of state representatives to engage in a constructive dialogue with the Committee has deprived the mechanism, so far, of any normative meaning.

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12 *Id.*

13 *Id.* at 548-549; Gherari, *supra* note 5, at 92-95.

14 Leckie, *supra* note 8, at 547.

15 See *id.* at 549-560.

To encourage more meaningful reporting, the Committee devoted its first General Comment to the issue of state reporting.<sup>16</sup> In General Comment No. 1, the Committee disapproved of the assumption that reporting is merely a procedural matter to satisfy the formal obligations a state party has under the treaty. On the contrary, the preparation and submission of reports should serve various objectives, as outlined by the Committee. First of all, the review process must ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules, procedures and practices in an effort to ensure the fullest possible conformity with the Covenant.

Secondly, the review process must ensure that states monitor the actual situation on a regular basis and are aware of the extent to which the various rights are enjoyed by all. This requires that special attention be given to any worse-off regions and to any specific groups appearing to be particularly vulnerable or disadvantaged. Reports should also demonstrate that principled policy-making has in fact been undertaken.

The reporting process should be used to facilitate public scrutiny of government policies and governments should encourage input from non-governmental organizations (NGOs) in the preparation of the reports and thus also in the formulation, implementation and review of the relevant policies. This does not mean, however, that NGOs should not submit their own materials and reports to the Committee.

On May 31, 1994, the Committee presented its concluding observations on the report submitted by Belgium.<sup>17</sup> Many NGOs involved

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16 Report on the Third Session, U.N. Doc. E/1989/22, Annex III, reprinted in Bruno Simma, "The Implementation of the International Covenant on Economic, Social and Cultural Rights", in Franz Matscher (ed.), *The Implementation of Economic and Social Rights: National, International and Comparative Aspects* (1991), at 83, 88-89; and in "UN Committee on Economic, Social and Cultural Rights", *supra* note 3, at 35.

17 Concluding observations of the Committee on Economic, Social and Cultural Rights: Belgium, U.N. Doc. E/C.12/1994/7, 31 May 1994.

in housing rights submitted materials to the Committee. As a result, the Committee had a very good view of the problems in this area and issued a long paragraph of recommendations on this subject in which it referred to information received from NGOs.

State reports should provide a basis on which states and the Committee can evaluate the extent of progress made. This requires states to identify specific benchmarks and goals against which their performance can be assessed. This in turn should enable states to identify the factors and difficulties inhibiting the realization of the Covenant. Finally, the state reporting mechanism should facilitate the exchange of information among states to allow the development of a better understanding of the common problems and solutions.

This goes to show that the Committee sees the reporting process essentially different from the way governments have seen it, and continue to see it. Reporting is much more, Alston writes, than "a gesture requiring a flurry of diplomatic activity for a short time every five years."<sup>18</sup> In addition, the Committee elaborated new detailed reporting guidelines which were formally adopted at the Committee's fifth session in 1990.<sup>19</sup> If followed, the new guidelines ensure that the issues of principal concern to the Committee are addressed in the reports in a methodical and informative manner. The twenty-page guidelines list detailed questions under each right, delineating the practical aspects of each right and providing states with a solid basis on which to base their reports.<sup>20</sup>

Nevertheless, governments have largely ignored the implications of General Comment No. 1 and continue to see the reporting process as a diplomatic chore thus depriving the exercise of the substantive meaning it should enjoy. It should be as much an exercise in national self-scrutiny as international monitoring, which it is not. Too little resources are made available for preparation of the state

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18 Alston, *supra* note 4, at 492.

19 Simma, *supra* note 16, at 84-87.

20 Leckie, *supra* note 8, at 562.

reports, no dialogue is sought with the social forces within the society. Significantly, reports are usually prepared by the ministry of foreign affairs. For one thing, economic, social and cultural rights are not a "foreign affair." The effects of the monitoring process and of the Covenant itself should be very domestic. The only "foreign" aspect is the monitoring process itself, the substance of the rights has nothing foreign. It should be doubted whether foreign ministries have the skills to prepare the reports, bearing in mind their other tasks.

As a result, the Committee had to devise other and new methods to achieve some normative clarification of the Covenant rights, to give some meaning to the wording of the treaty. The Committee has done so through the adoption of general comments, a procedure that has proven its usefulness in other committees, and through the scheduling of a day of general discussion.

### III. NORMATIVE CLARIFICATION OF THE COVENANT: GENERAL COMMENTS

The Committee started at its third session with the preparation of general comments on the provisions of the Covenant in order to assist the State Parties in their reporting obligations. Although the Committee did not originally have authority to adopt such comments, it has subsequently sought and received authorization of ECOSOC to make use of the technique. As pointed out above, the first General Comment deals with the nature and meaning of state reporting. The second General Comment deals with international technical assistance measures referred to in Article 22 of the Covenant.<sup>21</sup> The Committee also set out to adopt such comments on particular rights, especially the right to food and the right to housing.

But before preparing any comment on a specific right, the Committee felt it appropriate to clearly define how the Committee con-

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21 Report on the Fourth Session, E/1990/23, Annex III; see *The Committee on Economic, Social and Cultural Rights* (UN Human Rights Fact Sheet No. 16, 1991), at 7-8.

ceives the basic obligations imposed by the Covenant under Article 2(1). This was the subject of *General Comment No. 3 concerning "The Nature of States Parties Obligations,"* adopted at the fifth session.<sup>22</sup> According to Comment No. 3, the Covenant *does* impose obligations which have immediate effect, especially the non-discrimination provisions and the undertaking "to take steps." This view rebuts the contention that the Covenant would be a wholly aspirational policy statement. Furthermore, the concept of *progressive realization* imposes an obligation to move as expeditiously and effectively as possible towards full realization of the rights contained in the Covenant. Deliberately retrogressive measures would require the most careful consideration.

But most importantly, the Committee has stated that a *minimum core obligation* to ensure satisfaction of, at the very least, minimum essential levels of each of the Covenant rights is incumbent on every party.<sup>23</sup> Hence, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. The only possible mitigating factor are resource constraints. But if such predicament is invoked, the State Party has the burden of proof to demonstrate that resource constraints make it impossible to discharge this minimum duty. Yet even if available resources are demonstrably inadequate, the obligation remains to strive for the widest possible enjoyment of rights. Available resources also include international cooperation.

Another important point General Comment No. 3 makes is that to give effect to Covenant rights, the adoption of legislation may be desirable. But legislation alone is by no means exhaustive of the obligations of parties. The phrase "*by all appropriate means*" must be

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22 Report on the Fifth Session, U.N. Doc. E/1991/23, Annex III; see generally Matthew Craven & Caroline Dommen, "Making Room for Substance: Fifth Session of the Committee on Economic, Social and Cultural Rights", 9 *Netherlands Quarterly on Human Rights* 83 (1991).

23 See Eide, *supra* note 9, at 40 et seq.



given its full and natural meaning. Furthermore, the "appropriateness" of means chosen is not self-evident and reports should indicate on which basis the means chosen are considered the most appropriate.

There is nothing inherently non-self-executing about the Covenant rights.<sup>24</sup> Covenant rights may be considered *justiciable* more frequently than appears, and judicial or other effective remedies should be provided wherever possible. Especially the non-discrimination clauses and the rights contained in Articles 7(a)(i) (equal pay for equal work), 8 (freedom to form and join trade unions), 10(3) (protection of children), 13(2)(a) (compulsory and free primary education), 13(3) and (4) (freedom of education), and 15(3) (freedom of scientific research and creativity) are *per se* self-executing. The Committee further reiterates that the Covenant is neutral. It does neither require nor preclude any particular form of government or economic system, provided it is democratic and human rights are respected.

After the adoption of General Comment No. 3, the Committee started elaborating General Comments on specific rights. At the sixth session in 1991, for example, *General Comment No. 4 concerning "The Right to Adequate Housing"* was adopted.<sup>25</sup> This comment clarifies the criteria that define a right to adequate housing and what the concrete state obligations are in this area. In essence, this General Comment, is thus prescriptive rather than descriptive. It indicates several enforceable or justiciable elements of the right to housing, such as the prevention of planned evictions or demolitions through the issuance of court-ordered injunctions and complaints based on discrimination and inequality of access. Such enumeration of constituent elements helps to advance the Committee's goal of encouraging more meaningful reporting.

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24 See Matthew Craven, "The Domestic Application of the International Covenant on Economic, Social and Cultural Rights", 40 *Netherlands International Law Review* 367 (1993).

25 General Comment No. 4 on the Right to Adequate Housing, U.N. Doc. E/1992/23.

The perception that certain economic, social and cultural rights are enforceable led the Committee to formally declare some countries in violation of the Covenant. At the Committee's fifth session, the Dominican Republic was declared in violation of Article 11 on the right to adequate housing. Such an outright assertion that the Covenant had been violated represented an "historic step forward in the Committee's work."<sup>26</sup> The economic, social and cultural rights contained in the Covenant were no longer devoid of all practical relevance. The Committee has since been less reticent to take similar actions. At its sixth session, Panama was said to have infringed upon the right to adequate housing. According to Craven, "[t]he Committee appears to have come to the realization that there are occasions on which it is appropriate and indeed necessary for it to make determinations of non-compliance."<sup>27</sup>

It should, of course, not be lost out of sight that these *General Comments* are merely "soft law," not as such binding. According to Simma, however, "the Covenant, if taken seriously, is a treaty so difficult to handle that domestic decision-makers will need, and hopefully seek, the Committee's guidance in order to grant economic, social and cultural rights the place they deserve."<sup>28</sup> Any government that takes human rights seriously, will take the General Comments seriously. A nation that fundamentally disregards human rights, will do so irrespective of whether rules are soft law or formally binding.

#### IV. NORMATIVE CLARIFICATION OF THE COVENANT: GENERAL DISCUSSIONS

In order to flesh out the contents of specific rights the Committee also schedules a day of General Discussion at each session. The stated

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26 Leckie, *supra* note 8, at 560.

27 Matthew Craven, "Towards an Unofficial Petition Procedure: A Review of the Role of the UN Committee on Economic, Social and Cultural Rights", in Krzysztof Drzewicki, Catarina Krause & Allan Rosas (eds.), *Social Rights as Human Rights: A European Challenge* (1994), at 91, 102.

28 Simma, *supra* note 16, at 94.

purpose of these meetings is to discuss "one specific right or a particular aspect of the Covenant in order to develop in greater depth [the Committee's] understanding of the relevant issues."<sup>29</sup> Most importantly the Committee will invite experts to present their views and to participate in the discussion. This enables the Committee to enjoy a wide range of views and enables NGO experts and experts of specialized agencies to plug into the normative process. Discussions will, of course, have a great impact upon the content of General Comments. Past discussions have dealt, for example, with the right to food and the right to housing.<sup>30</sup> The latest general day of discussion was devoted to human rights education and public information activities relating to the International Covenant on Economic, Social and Cultural Rights.<sup>31</sup>

## V. NORMATIVE CLARIFICATION OF THE COVENANT: INDIVIDUAL PETITIONS

The Committee does not, however, consider the current reporting mechanism as the only appropriate method to monitor compliance with the Covenant. It has discussed the desirability and feasibility of introducing a procedure for the consideration of individual complaints.<sup>32</sup> No Committee member opposes the idea as such.<sup>33</sup> Alston and Simma reckon that work in this direction will intensify.<sup>34</sup>

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29 Report on the Fifth Session, U.N. Doc. E/1991/23, paras. 37-41.

30 *The Committee on Economic, Social and Cultural Rights* (UN Human Rights Fact Sheet No. 16, 1991), at 6; Gherari, *supra* note 5, at 97; Scott Leckie, "The Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach", 11 *Human Rights Quarterly* 522 (1989).

31 U.N. Doc. E/C.12/1994/SR.48, 9 December 1994.

32 See Philip Alston, "No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Rights Covenant", in Asbjorn Eide & Jan Helgesen (eds.), *The Future of Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address - Essays in Honour of Torkel Opsahl* (1991), at 79.

33 Leckie, *supra* note 8, at 565-566.

34 Alston, *supra* note 32; Simma, *supra* note 16, at 90.

The protection of Economic, Social and Cultural Rights has also been studied by the United Nations "think tank" in the field of human rights, namely the Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>35</sup> In his Final Report on the Realization of Economic, Social and Cultural Rights, Sub-Commission rapporteur Danilo Türk calls on the Committee to discuss the need for an optional protocol to the Covenant which would afford individuals and groups the right to submit communications alleging non-compliance by States Parties, whether by act of omission, with the provisions of the Covenant.<sup>36</sup> The Committee effectively followed up on this recommendation. At the World Conference on Human Rights in June 1993, the Committee submitted an extensive report on this subject which had been discussed and elaborated during the sixth and seventh sessions.<sup>37</sup> In its report the Committee defends a comprehensive approach which implies that all rights contained in the Covenant should be covered by the complaint procedure. This is the same approach as taken with respect to the International Covenant on Civil and Political Rights.

The introduction of an individual petition procedure would, of course, constitute the greatest, still untouched, source of norm creation. If one compares the normative clarity brought to the International Covenant on Civil and Political Rights by the jurisprudence of the Human Rights Committee,<sup>38</sup> one can only hope that a similar evolution will continue to be sought and finally achieved with respect to the Covenant on Economic, Social and Cultural Rights.

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- 35 Cees Flinterman, "The Protection of Economic, Social and Cultural Rights and the European Convention on Human Rights", in Lawson, Rick & de Blois, Matthijs, *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers* Volume III, at 168 (1994)
- 36 Danilo Türk, *Final Report on the Realization of Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/Sub.2/1992, paras. 210-211, at 24-25.
- 37 *Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. A/Conf.157/PC/52/Add.5, at 7-28.
- 38 See Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Oxford University Press, 1991).

At the Eleventh Session, on November 9, 1994, Committee Chairperson Philip Alston submitted a Report on a Draft optional protocol providing for the consideration of communications.<sup>39</sup> Recently, on 26-28 January 1995 the Netherlands Institute of Human Rights convened an expert meeting in Utrecht which examined the justiciable elements of the right to education, housing, food, and health care and adopted a draft optional protocol similar to the one proposed by Alston.<sup>40</sup> Both documents should serve as the starting point of a promising development with respect to the Covenant. The road to this optional protocol is probably still "long and winding" but it is important that the introduction of a complaint procedure in the field of economic, social and cultural rights is now firm on the human rights agenda of the world community.<sup>41</sup>

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39 *Draft optional protocol providing for the consideration of communications*, Report submitted by Mr. Philip Alston, U.N. Doc. E/C.12/1994/12, 9 November 1994.

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