LIMITATIONS AND EFFECTIVENESS OF THE COMMITTEE
CHAPTER IV

LIMITATIONS AND EFFECTIVENESS OF THE COMMITTEE

The Committee operates with some weaknesses, inherent and otherwise, which adversely affect its effectiveness. This chapter attempts an analysis of the Committee's weaknesses and an evaluation of its effectiveness.

I. LIMITATIONS

Broadly, there are five operational limitations of the Committee. These are: the limited scope, the restriction clauses of the Covenant, emergency powers of States, reservations and co-existence of competitive procedures. A detailed account of each follows:

A. Limited Scope

As noted in the previous Chapter, the Committee monitors the implementation of civil and political rights. It has no role to play in the implementation of economic, social and cultural rights. In order to understand this limitation of the Committee, it is desirable to go through the travaux préparatoires.

At its tenth session, the Human Rights Commission discussed at length the applicability of the Committee's procedure to the Draft Covenant on Economic, Social and Cultural Rights. As usual, the members of the Commission were divided.

1 It was discussed during 431st to 433rd meetings. See, Report of the Tenth Session of the Commission on Human Rights (1954), E/2573, paras 215-25 (hereinafter referred to as the Report of the Tenth Session of the Commission).
Some members of the Commission favoured the use of the Committee's procedure in certain circumstances. They thought that certain rights, such as those relating to trade union activities and rights relating to primary education, could be subjected to the Human Rights Committee procedure and that, in time, the need for progressive implementation would diminish and many rights might become enforceable. Accordingly, it was pleaded, a provision should be included to afford States an opportunity to accept the jurisdiction of the Committee for at least those articles to which its application was feasible, on an optional basis and, in the view of some other members, on the basis of reciprocity. The acceptance of such a provision, it was argued, would in no way impair the work of the specialized agencies. A State member of a specialized agency which had established procedures concerning complaints in respect of any of the rights laid down in the Draft Covenant would be bound by that procedure. Not all the rights in the Covenant, however, came within the purview of the agencies, and not all States would be members of the agencies, in which case recourse to the Committee procedure might be desired.

2 Ibid., para 222.
Leading the group of supporters, the representative of France proposed the following draft article:

The States Parties to this Covenant (on Economic, Social and Cultural Rights) may, at the time of ratification or at any subsequent time, indicate in respect of which rights laid down in the present Covenant they agree, or will agree subject to reciprocity, that complaints of violations lodged by another State Party shall be submitted to the procedure for bringing complaints before the Human Rights Committee... 3

The proposal was expressly qualified so that it would apply only to those provisions of the Covenant which were not already governed by the procedures and machinery established by the UN specialized agencies and would thus not impinge on their domain. Moreover, it had two advantages: first, the reports would have been examined by experts with a degree of independence rather than by the government representatives who comprise the ECOSOC; second, the

Similarly a draft article proposed by the representatives of Chile and Uruguay suggested that "(t)he States Parties to this Covenant (on Economic, Social and Cultural Rights) undertake to accept the jurisdiction of the Human Rights Committee with regard to the progressive implementation of the rights set forth herein". In order to achieve this goal, the same article provided that "(t)he Secretary-General of the United Nations may, upon the recommendation of the Commission on Human Rights, convene a conference or conferences of the States Parties to this Covenant to determine the possibility of adapting all the procedures provided in ... the Covenant on Civil and Political Rights to the provisions of the Covenant on Economic, Social and Cultural Rights." This text was subsequently revised and certain minor amendments were introduced by the representative of France. Ibid., paras 217-19.
Committee would consist only of individuals drawn from States Parties to the Covenant, whereas ECOSOC may include representatives of non-parties who may nevertheless participate in the examination of reports on observance of the Covenant.

It must be noted that the immediate or unconditional application of the Human Rights Committee procedure to the Draft Covenant on Economic, Social and Cultural Rights was not proposed at all. What was suggested was the possibility, in the future, of conditional application of the Committee procedure.

Even these proposals were not acceptable. Certain members of the Commission referred to them as "extraordinary" and "unrealistic". They pointed out that the system of periodic reports had been evolved in collaboration with the specialized agencies, as the best method of implementing the economic, social and cultural rights, while the Committee had been conceived as the most appropriate way to safeguard civil and political rights. The nature of the rights and the obligations laid down in each Covenant and the fact that civil and political rights were to be applied forthwith while economic, social and cultural rights were to be achieved progressively largely through the assistance of the specialized agencies (emphasis added), justified the distinction between the two methods of implementation.4

4 Ibid., para 222.
They also doubted whether States would be willing to submit to examination of complaints concerning, for example, national distribution of expenditures or priority given to various programmes, and, generally speaking, the whole basis of their economic, social and cultural life. Some other members said that the Committee would be composed largely of jurists with quasi-judicial functions and in the case of the Draft Covenant on Economic, Social and Cultural Rights, there was no criteria capable of providing the basis for a semi-judicial decision. If the Committee were to be invested with the contemplated powers, its membership would have to be changed in order to include experts in the economic, social and cultural fields and so also the representation of the specialized agencies concerned.

Needless to say that the conflicting views of members of the Commission created an atmosphere of confusion. In such a situation, the Commission heard the representatives of two leading UN Specialized Agencies - ILO and UNESCO. The ILO representative pointed out that the constitution of the ILO included procedures for the handling of complaints; and referral of matters coming within its purview to the Committee would only lead to "duplication and overlapping", which might affect the authority and efficiency of the

5 Ibid.
6 Ibid., para 223.
7 Ibid., para 221.
It was clear from this statement that the ILO was unwilling to accept the jurisdiction of the Committee in respect of economic, social and cultural rights.

The representative of UNESCO pointed out that examination of complaints by the Committee implied a thorough knowledge of the technical conditions of implementation, which the agency already possessed. Therefore, suitable guarantees should be provided, and UNESCO should be invited to submit to the Committee written statements on any matter affecting the violation of any human rights in respect of which it was particularly competent.8

It was again clear that, unlike the ILO, UNESCO did not totally oppose the applicability of the Committee procedure to the Covenant on Economic, Social and Cultural Rights. On the contrary, it advocated certain suitable guarantees. While the ILO was seeking to protect its flexibility in the adoption of future international labour standards, the UNESCO and the WHO, were more anxious to obtain an affirmation of their mandate in a human rights context, from the Covenant's provisions.9

8 Ibid.

In the light of the divergent opinions of the members of the Commission and the opposition of specialized agencies, the proposals to apply the Committee's complaints procedures to the Draft International Covenant on Economic, Social and Cultural Rights, were withdrawn before a vote was taken. As a result, the Committee could not acquire any express mandate to monitor the implementation of economic, social and cultural rights. And, under the existing arrangements, its mandate includes civil and political rights only.

In the present submission, there is no fundamental difference between the two categories of rights, since both are necessary for human beings. Therefore, the alleged difference that economic, social and cultural rights will be implemented "progressively", whereas the civil and political rights will be implemented "immediately" does not seem to be valid. Schwelb also holds the view that Article 8 of the Covenant on Economic, Social and Cultural Rights which deals with the right of everyone to form and to join trade unions and with the rights of trade unions is of immediate application. The words used

10 As early as in 1950, the General Assembly recognized that civil and political rights, and economic, social and cultural rights, are "interconnected and interdependent". See, General Assembly Res. 421 (V)E of 4 December 1950, in UN Yearbook (1950), p.531.
are that States Parties "undertake to ensure" the right of everyone, etc. The Covenant on Civil and Political Rights contains in Article 22 a parallel and very similar provision on freedom of association, including the right to form and join trade unions.\textsuperscript{11} It shows that there is a close affinity between the two categories of rights. Thus, by excluding the economic, social and cultural rights from the purview of the Committee, an obviously serious limitation, has been imposed on the functioning of the Committee.\textsuperscript{12}


\textsuperscript{12} However, according to several members of the Committee, the consideration of State's reports would have its full meaning only if legislative and administrative measures were viewed in the context of the economic, social and cultural conditions prevailing in each country. See, Report of the Human Rights Committee (1977), para 108.

Thus, interestingly, on a number of occasions the Committee has come across the economic, social and cultural rights. For instance, when the report of Venezuela was being considered by the Committee, the right of work (Article 6 of the International Covenant on Economic, Social and Cultural Rights deals with right to work) was discussed. Members of the Committee asked the Government what provisions were made by the law to ensure equal pay for equal work? Similarly, when the report of Denmark was being discussed, the Members of the Committee raised some questions about the freedom of association in that country. Again, at the time of discussing the report of Italy, the members of the Committee asked a series of questions concerning employment conditions in Italy, especially those of children. What measures had been taken to put an end to the exploitation of child labour, was certainly a vital question having close concern with the International Covenant on Economic, Social and Cultural Rights. See, UN Press Release, HR/2012, 24 October 1980, p.3; UN Press Release, HR/2007, 21 October 1980, p.2; and UN Press Release, HR/2013, 29 October 1980, p.3, respectively.
B. Restriction Clauses of the Covenant

A careful study of the Universal Declaration of Human Rights and the Covenant makes it clear that the rights and freedoms guaranteed therein are not absolute but may be regulated by law for the purpose expressly mentioned. In other words, the rights and freedoms set out in the Covenant are subject to certain limitations and restrictions. Consequently, the Committee's competence too, is limited proportionately. In defining the particular rights or freedoms, discussed below, the Covenant also defines the extent of their limitations.

1. Freedom from Forced Labour, etc.

Article 8, paragraph 3(a), of the Covenant states that no one can be "required to perform forced or compulsory labour." Nevertheless, article itself exempts "hard" labour that may be imposed as a punishment for crime by a competent court. Again, according to this article, a State Party may require from a person who is under detention, in consequence of a lawful order of a court, any service of military character, any national service, any service exacted

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13 Para 2 of Article 29 of the UDHR does provide that enjoyment of rights and freedoms "shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." See, Brownlie, ed., Basic Documents in International Law (Oxford, 1975), p. 149.
in cases of emergency or calamity threatening the life or well-being of the community, any service which forms part of normal civil obligations. All these services do not come within the definition of the term "forced or compulsory labour." Thus, by restricting the meaning or definition of the term "forced or compulsory labour", the scope of the freedom from compulsory labour has also been restricted.

2. **Right to Liberty**

Right to liberty and security of person is guaranteed by Article 9, paragraph 1, of the Covenant. It states: "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

This provision contains certain obvious restrictions. 14

14 At the drafting stage, it was generally admitted that the right to liberty and security of person might be subject to restrictions, but the terms in which such restrictions should be drafted gave rise to discussion. Proposals were made listing the possible grounds on which deprivation of liberty might be justified. However, it seemed unlikely that any list proposed could cover all possible cases of legitimate arrest or detention. On the other hand, it was argued that even if such a list could be made complete, its adoption might not be considered desirable: the Covenant should not give the impression of being a catalogue of restrictions to the rights which it set forth. See, Annotations on the Text of the Draft International Covenants on Human Rights as Prepared by UN Secretary-General, GA/6, Tenth Session, UN Doc. A/2929 (1955), p. 99. (hereinafter referred to as Annotations).
It is clear that a person can be arrested or detained in a fashion other than "arbitrary" and he may also be deprived of his liberty in accordance with lawful procedure.

3. Freedom of Movement, etc.

Article 12, paragraphs 1 and 2, of the Covenant enshrine such time-honoured freedoms as to liberty of movement, freedom to choose residence and freedom to leave any country. However, according to paragraph 3 of this article, these rights are subject to those restrictions which are provided by law and which "are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedom of others", and "are consistent with the other rights recognized in the present Covenant."15

15 At the drafting stage, long lists of exceptions to the exercise of the freedom of movement etc. were included in various drafts but later a more general formula was sought, which aimed at giving protection to the individual while safeguarding the interests of States. One view regarding this article was that, since it was not possible to include an exhaustive list of all the restrictions applicable in different States, and since any general wording might be so broad as to render the article of little practical value, the best course would be to delete it from the Covenant. But this view was rejected on the ground that the same right had been included in the UDHR and should find its place in the Covenant too. Among the restrictions which various representatives mentioned as being legitimate or necessary were those which might be imposed in a national emergency, in epidemics, for the control of prostitution, on immigrants as a temporary measure, on migrant workers in certain cases, and on indigenous populations in certain circumstances for their own protection. The limitations might vary greatly from State to State. See, Annotations, Ibid., pp.108-109.
4. **Right to a Public Hearing**

The natural extension of the right to a public hearing by a proper tribunal, as enumeration is listing out defined in Article 14, paragraph 1, of the Covenant, is that the press and public should be allowed to watch the proceedings of trial. However, the press and public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of private lives of parties so requires, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.¹⁶ (emphasis added).

5. **Freedom of Opinion, etc.**

The Covenant recognizes the right to hold opinions and freedom of expression.¹⁷ At the same time, it states that the exercise of these rights carries with it special duties and responsibilities. "It may, therefore, be subject to certain restrictions...."¹⁸ Only limitation on the

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¹⁶ See, second sentence of Article 14, para 1, of the Covenant. The words "in a democratic society" are taken from Article 29, para 2, of the UDHR. The inclusion of words "to the extent strictly necessary in ... the interest of justice" are concerned, was considered desirable particularly to keep the subject matter of litigation secret, for instance where secret industrial processes were involved, and to the special position of legally incapable persons and first offenders. See, Annotations, Ibid., p.120.

¹⁷ See, Article 19, paras 1 and 2, of the Covenant.

¹⁸ Ibid., para 3.
imposition of these restrictions is that they should be provided by law and should be necessary:

(a) for respect of the rights or reputations of others;

(b) for the protection of national security or of public order (ordre public), or of public health or morals. 19

The travaux préparatoire reveals two schools of thought in the Commission on the question of how the limitations or restrictions should be written. One school was of the opinion that the limitation clause should be a brief statement of general limitations. The other school maintained that it should be a full catalogue of specific limitations. Consequently, several texts of a general clause were proposed while at the same time more than 30 specific limitations were suggested. 20 But, they were not adopted because there was no majority in favour of listing specific limitations. 21 And, thus, the existing provision containing general restrictions on the freedom of opinion, etc., was adopted.

19 Ibid.
21 Ibid., p.150.
6. Freedom of Thought, etc.

Everyone, according to the Covenant, can exercise freedom of thought, conscience and religion. Nevertheless, it is also laid down in the Covenant that:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Thus, the freedom of religion is circumscribed by certain express restrictions.

7. Right of Peaceful Assembly

In accordance with Article 21 of the Covenant, certain restrictions may be placed on the exercise of the right of peaceful assembly. Indeed, these restrictions should be imposed in conformity with the law. And, moreover, they should be necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

8. Freedom of Association

The general restrictions on the freedom of association are almost the same as those on the right of peaceful assembly. In addition, lawful restrictions may also be

22 Article 18, para 2, of the Covenant. The same right is enshrined in Article 18 of the UDHR.

23 For the nature, scope and interpretation of these restrictions, see, Annotations, n.14, pp.156-7.

24 Article 22, para 2, of the Covenant.
imposed on members of the armed forces and of the police in the exercise of their right to freedom of association.25

9. Political Rights

Within the terms of the Covenant, every citizen has the right and opportunity to take part in the conduct of public affairs.26 He also has a right to vote and to be elected at genuine public elections. Indeed, he is entitled to have access to public service in his country. Nevertheless, all these political rights may be subjected to reasonable restrictions.27 The Covenant is silent on the nature and scope of these restrictions.

While the formulation of the limitations clauses differs from article to article, it may be said that in general the Covenant provides that the rights and freedoms with which it deals should be subject to any restrictions which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others.28

25 Ibid.
26 Article 25.
27 Ibid.
28 At the top of it, as Humphrey pointed out, the term "Public Order" apparently has no precise legal meaning in common law jurisdictions; in its ordinary English use the term implies simply the "absence of disorder". He adds that "(t)here seems to be little doubt that the civil law concept of ordre public means something more than the absence of disorder, but its precise meaning is elusive." See, John P. Humphrey, "The International Bill of Rights: Scope and Implementation", WM and Mary L. Rev (Virginia), vol. 17, pp. 527 and 535.
In addition to these "particular restrictions", Article 5, paragraph 1, of the Covenant lays down a "general restriction." It states: "Nothing in the present Covenant may be interpreted as implying for any ... group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein..."29

The travaux préparatoires shows that the purpose of this provision, which drew inspiration from Article 30 of the UDHR,30 was to provide protection against misinterpretation of any provision of the Covenant which might be used to justify infringements of any rights and freedoms recognized in the Covenant. It was desired to check the growth of nascent nazi, fascist or totalitarian ideologies; groups with such tendencies could not invoke the Covenant to justify their activities.31

29 The European Convention contains an almost identical provision, i.e., Article 17. For a very striking application of this Article, see, German Communist Party Case (Appl. No.250/70), wherein the European Commission found that the organization and operation of the German Communist Party aimed at the destruction of the rights and freedoms set forth in the European Convention.

30 It runs as follows: "Nothing in this Declaration may be interpreted as implying for any ... group or person any right to engage in any activity or to perform any act, aimed at the destruction of any of the rights and freedoms set forth herein." See, Brownlie, n.13, p.149.

31 Annotations, n.14, p.75.
At the same time, however, the provision was opposed on the ground that it was vague, unnecessary and open to abuse. It was thought that, widely interpreted, the paragraph might permit a State, which so desired to curtail very considerably the exercise of almost every right and freedom of the Covenant. Thus, it might even permit dangerous inroads into the provisions of the Covenant as a whole. Moreover, it would be difficult to know exactly what actions could be considered as being aimed at the destruction of the rights.\(^{32}\)

Yet, the provision was included in a relatively sweeping limitation form; now, the question of its application remains problematic. In the present submission, this limitation is positive in scope and cannot be interpreted as depriving any person of the rights and freedoms guaranteed in the Covenant merely because he sought to destroy the rights and freedoms set forth therein. In fact, it merely precludes such persons from deriving from the Covenant a right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Covenant. Moreover, this limitation applies only to an extent strictly proportionate to the seriousness and duration of such threat.\(^{33}\)

\(^{32}\) Ibid., pp.75-76.

\(^{33}\) These submissions are based on the practice of the European Convention as formulated in the findings and judgements of the European Commission on Human Rights and the European Court on Human Rights.
B. Emergency Powers

Under certain abnormal situations, states acquire certain extraordinary powers. These are called emergency powers, under which a State may derogate from its obligations contained in the Covenant. Popularly, this is known as the right of derogation. Its legal foundation, scope and limitations are analyzed below:

1. **Legal Basis**

   Article 4 of the Covenant provides a legal basis on the right of derogation. It runs as follows:

   In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations...

   Almost all the human rights instruments recognize such emergency powers or the right of derogation. However,

   34 Article 15, para 1, of the European Convention reads: "In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this convention..." Similarly, Article 27, para 1, of the OAS Convention which deals with Suspension of Guarantees, reads as under: "In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention..." But, there is no emergency provision in the International Covenant on Economic, Social and Cultural Rights. Perhaps the most rational reason for that is the stipulated implementation of economic, social and cultural rights "progressively." Therefore, the rights enumerated in that Covenant are subject to legitimate limitations and no exceptions are provided in cases of public emergency.
when the right of derogation was discussed at the draft stage, opinions were sharply divided. In the view of some, an article on emergency powers was unnecessary because a general limitation clause governing all the rights recognized in the Covenant was preferable. It was regarded useless too by those who considered that the contingencies, for which the Article was proposed and the rights to which it might apply, were sufficiently covered by the permissible "particular limitations" set forth in several articles of the Covenant. The concept of "national security" or of "public order" set forth in a number of Articles of the Covenant would take care of the situations which might arise in time of war or national emergency. Moreover, those specific limitations had the advantage of appearing only in the Articles in which they had been considered indispensable, and a general clause might be used to justify more far reaching limitations. 35 It was thought that such an article might produce problems of interpretation and give rise to considerable abuse.

In contrast, some others advocated that it was necessary to envisage possible conditions of emergency in which States would be compelled to impose limitations upon certain human rights. In time of war, for example, States could not

35 Annotations, n. 14, p. 65.
be strictly bound by obligations assumed under a Convention unless the Convention contained provisions to the contrary. There might also be instances of extraordinary peril or crisis, not in time of war, when derogation from obligations assumed under a Convention became essential for the safety of the people and the existence of the nation. These situations would not fall within the scope of the limitations provided for in the various articles of the Covenant, nor could they be adequately covered by a general limitation clause.

Needless to say that first group could not rally enough support and the second group's approach was accepted and crystalized in the form of Article 4 of the Covenant.

2. Conditions to be Fulfilled

In exercise of the right of derogation, States Parties to the Covenant are required to fulfil the following six conditions:

(a) Existence of Emergency

The existence of a public emergency "which threatens the life of the nation" must be proved. In the opinion of the United Nations, a public emergency is not restricted to war, as defined under the Covenant. The United Nations was established with the object of maintaining international peace and security, and the right of derogation is not limited to situations of war. Moreover, in the case of the Covenant, public emergency is a restrictive term which does not cover, for example, natural disaster, which very often justified a State Party in derogating from some of the rights recognized in the Covenant.
of a Greek scholar, two elements should be stressed in this regard, are: (i) the emergency must be nation-wide in its effects so that, however severe the local impact of an emergency may be, it will not, in the absence of that condition, be a "public emergency"; and (ii) the threat must be directed against organized life. In the opinion of this scholar, "the actual existence of an emergency is a condition precedent to the derogation from human rights." But, in the present submission, a proclamation of emergency can be made even in the absence of an actual existence of emergency, provided there is immediate danger.


38 The present author does not agree with this for the reason that under certain municipal legal systems, emergency need not be nation-wide in its effects. For instance, Part XVIII of the Constitution of India which deals with emergency provisions states that a declaration of emergency can be made when "the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened." See, Article 352, para 2, of the Constitution of India. (emphasis added).

39 See, Daes, n.37, para 99.

40 Under the Indian Constitution, a proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made even before the actual occurrence of war or of any such aggression or rebellion. See, Explanation to para 1 of Article 352 (emphasis added).
But who will decide whether there exists an actual emergency or imminent danger thereof? Article 4 of the Covenant does not indicate as to what organ of the State is competent to declare a state of public emergency. The wording of the requirement of official proclamation is vague enough to cover emergency proclamations issued by the legislative or the executive authority or a military officer or anyone else. Nevertheless, it has been argued that it is consistent with the scope of the Covenant and in particular of the meaning of the provisions of Article 4 of the Covenant to exclude, a priori, from consideration the military as well as the judicial authorities. But it is difficult to accept this argument, since a large number of States Parties to the Covenant are military regimes. It must be assumed, however, that a declaration of public emergency is best done by the political organs of the State because they alone are in a position to make the appropriate assessment of facts in the light of general policy and the overall national security, taking into account the dimensions of the extraordinary situation.

As to the issue of whether or not an emergency exists justifying derogation, it is pertinent to refer a decision

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41 Daes, n. 77, paras 120-2.
42 Ibid., para 125.
of the European Court. In *Ireland v. UK*, this Court said:

It falls in the first place to each Contracting State, with its responsibility for "the life of (its) nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the passing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogation necessary to avert it.  

As for the duration of emergency, it is good to remember that national laws of respective States Parties, and not the Covenant, will be applicable. However, an "emergency" is incompatible with a perpetual state of affairs and necessarily limited in time.  

(b) **Official Proclamation**

The state of public emergency must be "officially proclaimed" which means that a public emergency can be declared only under conditions provided by national laws. Perhaps this requirement is essential to prevent States Parties from derogating arbitrarily from their obligations where such an action was not justified by events.  

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43 In Green's view: "It is probably difficult to fault the view of the Court that those on the spot making an immediate determination of the situation and the means required to deal with it are more capable of assessing the situation than is a Court or a Commission sitting some time after the fact and perhaps some hundreds of miles away." See, L.C. Green, "Derogation of Human Rights in Emergency Situations", *The Canadian Yearbook of International Law* (Vancouver, B.C.), vol.16, 1978, pp.99-100.

44 See, Daes, n.37, para 161.

(c) Rule of Proportionality

The measures taken by the government must be proportionate to the exigencies of the situation. But what will happen, if a State Party acts beyond that extent? The Covenant is silent on this issue. In this connexion, it has been argued that when the organs and bodies established by international instruments for the implementation of human rights examine cases relating to public emergencies, and in particular to measures taken by governments derogating from their obligations, they should consider whether a particular restriction or derogation is necessary or strictly required, and should not accept the judgement of the respondent government as conclusive. On the basis of these arguments, it can be suggested that the Committee can and should scrutinize whether a particular derogation is necessary or strictly required.

(d) Test of Consistency

The measures of derogation must not be inconsistent with the State Party’s other “obligations under international law.” It has been argued that this is a purely legal restriction on the right to derogate which is in contrast to the other factual restrictions. But who will decide whether...

46 Ibid., para 108.

47 It is interesting to recall that the European Commission considered in the First Cyprus Case that it was competent to pronounce on the extent strictly required by the exigencies of the situation.
A specific measure of derogation was inconsistent with the treaty or customary obligation of a State Party. Again, the Covenant does not provide any answer. In the absence of an express provision, it can be observed that the Committee is not an adjudicatory body. Moreover, it has been established to look after the implementation of the Covenant on Civil and Political Rights and the Optional Protocol only. It has nothing to do with other international treaty obligations or obligations arising out of customary law. But there is no provision in the Covenant which prohibits the Committee from considering this kind of situation. Prudence, however, will demand that the Committee consider the matter and make observations of non-binding nature.

48 At the drafting stage it was proposed, unsuccessfully, that in order to avoid any possible misinterpretation of the words "obligations under international law," there should be in addition to these words a reference to the "principle of the Charter and the Universal Declaration of Human Rights." In response to this proposal, it was pointed out, however, that the principles of the Charter were part of international law and whereas the provisions of the Universal Declaration might not be considered as such. See, Annotations, p. 68.

49 In the Lawless Case, the European Court considered whether the measures taken by the Irish Government were "inconsistent with other obligations under international law."
(e) **Non-Discriminatory**

The measures of derogation should "not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." Even at the drafting stage this condition met with general approval, although there was some debate on the inclusion of the word "solely". In favour of retention of that word, it was argued that a State might take measures derogating from the rights recognized in the Covenant that could be construed as discriminatory merely because the persons concerned belonged to a certain race, religion, etc., but that the actual reason for the derogation might be otherwise. It was, therefore, important to emphasize that the evil to be avoided was discrimination based solely on the grounds mentioned.

(f) **Notification**

Necessity of notification is yet another condition to be fulfilled by a State exercising its right of derogation. The Covenant provides:

> Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication

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50 See, *The intrinsic proviso to Article 4, para 1, of the Covenant*. Appendix I.

shall be made, through the same intermediary, on the date on which it terminates such derogation. 52

In practice too, the UN Secretary-General has received a number of notifications to this effect. For instance, a notification by Nicaragua, under Article 4 of the Covenant was received by the Secretary-General on 4 June 1980. 53 In this notification, the Government of Nicaragua informed the Committee about its exercise of derogatory powers under emergency. Later, by another notification, the Foreign Minister of Nicaragua informed the Secretary-General that the Governing Junta for National Reconstruction of the Republic of Nicaragua rescinded the National Emergency Act promulgated on 22 July 1979 and revoked the state of emergency extended earlier. 54 Similarly, by a letter, dated 18 July 1980, the Permanent Mission of 

52 Article 4, para 3, of the Covenant. Similarly, Article 15, para 3, of the European Convention states: "Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

Article 27, para 2, of the OAS Convention stipulates that: "Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary-General of the Organization of American States, of the Provisions application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension."


Colombia to the United Nations Office and International
Agencies at Geneva, informed the UN Secretary-General that
- the events leading to the disruption of public peace
and order throughout the territories of Colombia had com-
pelled its government to adopt extraordinary measures per-
missible under its National Constitution.55

The provision concerning notification of derogation
has introduced a set of new procedural principles of
accountability. A careful reading of this provision sugg-
ests that when a State Party avails itself of the right of
derogation in time of public emergency, it is required to
take three steps: It must, in each case, "inform immediately"
the other States Parties, through the Secretary-General first,
the provisions of the Covenant from which it has derogated;
second, the reasons for which it was done; and third, the
date on which it has terminated such derogation.56

Though the Covenant makes it clear that notification
from one State Party to the others shall be transmitted
through the Secretary-General, it does not mention the
Committee in this regard. In view of the role it is entrusted
within the Civil and Political Rights Covenant, the presump-
tion might be legitimate that the Secretary-General would
transmit information to the Committee.

55 See, Notification by Colombia under Article 4 of the
Covenant, UN Ref. U.N. 234, 1980, Treaties-7, 15
September 1980.

56 Article 4, para 3, of the Covenant, and Annotations,
n.14, p.69.
The Covenant does not stipulate any specific time-limit within which a State Party should inform other States Parties. Nevertheless, the phrase "shall immediately inform" denotes two things: first, there is an obligation on the part of the State Party concerned to inform other States Parties; and second, the said information should be given without any unreasonable delay. What constitutes unreasonable delay depends on the facts and circumstances of each case.

But what if a State Party, exercising its derogatory power, does not make a notification, or, if that State does not give reasons which actuated it to exercise its derogatory power, or, the reasons given are so inadequate that they are unable to satisfy other States Parties? How can such a situation be dealt with? The Covenant is silent on this. There is no express provision concerning the manner in which an alleged justification or abuse of such measures may be tested. However, an answer to this problem may be attempted in the light of travaux preparatoires, the practice of other human rights institutions and general norms of international law.

The the outset, it should be made clear that the Covenant is based on the presumption that a State Party shall fulfil its obligation in good faith and will not abuse its sovereign powers. Yet, if that State exercises its emergency powers in a doubtful manner, it might invite
the application of the implementation provisions of the Covenant, unless, of course, it has derogated from these provisions itself. To be precise, the travaux préparatoires suggests that the implementation provisions of the Covenant would apply to Article 4. Thus, the derogatory powers of the States Parties are subject to international supervision and control in the framework of the Covenant.

Accordingly, if a State Party to the Covenant considers that another State Party has abused the right of derogation, it may invoke the inter-state communication procedure, provided both of them were parties to this procedure.

57 See, Annotations, n.14, p.69. Practice of regional institutions affirms this view. The European Commission and the European Court on Human Rights have, in a series of cases, heard during the past 20 years, interpreted the requirements of the derogatory clause of the European Convention with considerable rigour. As early as 1956, in the first Cyprus Case, the Commission considered that it was competent to decide whether a public emergency existed and whether the measures covered by Articles 15 had been taken to the extent strictly required by the exigencies of the situation. The Commission reiterated this opinion in the Lawless Case, and the Court confirmed it in substance in its ruling handed down on this case in 1961. See, Dass, n.37, paras 82-84.


59 It goes without saying that the burden of proof regarding the alleged abuse of the right of derogation shall be on the complainant.
Even when the State concerned is not a party to the communication procedures, the right of derogation will not preclude the Committee from scrutinizing the exercise of this right. In other words, the right of derogation and its implications may be reviewed by the Committee through the reporting procedures. It may ask the State Party to furnish information on the circumstances which led to the exercise of the abnormal right of derogation; the exact nature of the State of emergency, and the likely duration of the measure. The Committee may seek information on the specific rights that are derogated from, the extent of such derogations and their justifications; the law and regulations which were applied in such a case and the manner in which the state of emergency affected the judiciary.

The Committee exercised this kind of supervisory powers in numerous instances. For instance, commenting on the impact of a state of emergency on the independence of the Syrian judiciary, some of the members of the Committee sought detailed information on the extent to, and the manner in which, judicial institutions were functioning in the Syrian Republic with reference to paragraph 1 of Article 4 of the Covenant which requires a State Party to use its right of derogation to the extent strictly required by the exigencies of the situation and to the fact that the provisions of Article 14 were not included among the Articles from which no derogation was permitted under Article 4 of
the Covenant. Information was also asked on the security Courts that had replaced the military Courts; on the difference between the jurisdiction and procedures applicable to the security Courts and the military Courts; and on the guarantees enjoyed by accused persons brought before them.\textsuperscript{60}

Similarly, when the Committee considered the initial report of the United Kingdom of Great Britain and North Ireland, the representative of the United Kingdom explained the reasons which led to the exercise of the right of derogation. He stated that, because of the situation in North Ireland, which threatened the life of the nation, the United Kingdom availed itself of the right of derogation provided for in Article 4. He explained in detail the reasons why his Government felt it necessary to reserve the right to derogate from the provisions of Articles 9, 10, 12, 17, 19, 21 and 22 of the Covenant.\textsuperscript{61}

Having gone through the analysis of various conditions to be fulfilled by State Party in the exercise of its right of derogation, it can be observed that these conditions of the Covenant are somewhat stricter than those of the European Convention. The latter does not prohibit, as does the Covenant, emergency measures which involve discrimination

\textsuperscript{60} See, Report of the Human Rights Committee (1979), paras 293 and 194.

solely on the ground of race, colour, sex, language, etc. The European Convention speaks of war or other public emergency and consequently while, as in the Covenant, it prohibits derogation from the right-to-life article, it makes an exception in respect of deaths resulting from lawful acts of war. 62 The Covenant, on the other hand, does not mention war as a ground of derogation, nor does it permit derogation from the right to life provision in any circumstances. No exception, not even lawful acts of war should be considered justification for derogation from the right to life, is the Covenant's stand. It is idealistic, and to that extent, the European Convention is realistic. 63

3. Limitation on Derogations

As the human rights and fundamental freedoms are not absolute, the right of derogation, too, is not absolute. Thus, the Covenant does not enshrine a sweeping derogatory clause. There are some provisions of the Covenant which are beyond the exercise of the right of derogation.

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62 Schwelb, n.11, p.116.

63 It seems to be the stand of Rahmatullah Khan and Schwelb who refer to a statement of Parteh without refuting in this regard. In the present submission, however, this is not the important question whether the Covenant is idealistic or the European Convention is realistic. The important question is which one of them sets better norms for the international community. By permitting derogation from the right to life in case of "lawful acts of war"(?) the framers of the European Convention have not served the interests of humanity.
In accordance with paragraph 2 of Article 4 of the Covenant, no derogation is permitted from the following seven rights and freedoms:

Right to life (Article 6):

Freedom from Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Article 7);

Freedom from Slavery and Servitude (Article 8, paragraphs 1 and 2);

Prohibition of Imprisonment on the ground of inability to fulfil a contractual obligation (Article 11);

Prohibition of Ex-Post-Facto Criminal Liability (Article 15);

Right to recognition as a person before the law (Article 16);

Freedom of thought, conscience and religion (Article 18). 64

These rights and freedoms are considered more "inalienable" 65 than others.

The catalogue of the rights from which derogation is impossible, i.e., which are "emergency-proof" or "notstandsfast", as Schweb labelled, is somewhat longer in the Covenant than in the European Convention. 66

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64 It is worth recalling that at the time of drafting the Covenant there was a consensus of opinion that certain provisions could not be derogated from even in time of public emergency. But there was much discussion on what those provisions should be. More or less satisfaction was expressed over the present specification. See, Annotations, n.14, p.68.

65 The term "inalienable" has been used in the first preambular paragraph of the Covenant.

66 See, Schweb, n.11, pp.116-17.
The Covenant contains seven "emergency-proof" provisions, whereas the European Convention contains only four. 67 Nevertheless, the fact remains that the remaining "emergency-prone" provisions may be subjected to police powers.

C. Reservations

By virtue of the reservation-making power of States, the supervisory role of the Committee is virtually denied in respect of those provisions of the Covenant which became subject of reservations. Neither the Draft Covenant nor the Covenant contain any provision on reservations. 68 However, the travaux préparatoires indicate an acute controversy over the question of reservations.

67 These are: right to life (Article 2); freedom from torture, etc. (Article 3); freedom from slavery or servitude (Article 4), para 1; and freedom from ex-post facto laws (Article 7). Interestingly, the OAS Convention contains twelve "emergency-proof" provisions. These are: right to juridical personality (Article 3); right to life (Article 4); right to humane treatment (Article 5); freedom from slavery (Article 6); freedom from ex-post facto laws (Article 9); freedom of conscience and religion (Article 12); rights of the family (Article 17); right to name (Article 18); rights of the child (Article 19); right to nationality (Article 20); and right to participate in Government (Article 23) or of judicial guarantees essential for the protection of such rights.

68 The European Convention which is similar to the Covenant on Civil and Political Rights in content, explicitly provides for the making of reservations to allow participating countries to make their international commitments by treaty consistent with their domestic legal systems. See, Article 64, para 1, of the Convention. At least five nations have availed themselves of this opportunity.
The question of reservations was discussed at various sessions of the Commission. In 1950, at the sixth session of the Commission, proposals for a new article on reservations by States in respect of the provision of the Draft Covenant were submitted by the representatives of Belgium, the United Kingdom and Denmark. Later, the representative of Denmark withdrew his proposal in favour of that of the United Kingdom. All these proposals were rejected by the Commission. Perhaps that decision of the Commission was a reflection of the widespread apathy of International Law Commission towards reservations.

Yet, the rejection of these proposals did not set the problem of reservations at rest. It was almost continuously discussed by the Third Committee of the General Assembly. Ultimately, in February 1952, the General Assembly took a policy decision. Accordingly, the Commission was instructed "to prepare, for inclusion in the two Draft International Covenants on Human Rights, one or more clauses relating to the admissibility or non-admissibility of reservations and to the effect to be attributed to them."  

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70 Ibid.

71 General Assembly Resolution 546 (VI). It was adopted on the recommendation of Third Committee. See, UN Yearbook (1951), pp. 487-8.
In response to this instruction, the Commission, at its tenth session, dealt with the question of reservations in detail. 72

Proposals

The Commission had before it the following four proposals:

(a) a draft article submitted by the representative of the United Kingdom, to which amendments were proposed by the representatives of the USSR and France;

(b) a draft article proposed by the representatives of China, Egypt, Lebanon and the Philippines, to which an amendment was submitted by the USSR;

(c) a draft proposed by the representatives of Chile and Uruguay; and

(d) a draft article submitted by the representative of Belgium.

Except those of Chile and Uruguay, all the proposals supported the idea of reservations. The Belgium proposal was merely concerned with the territorial application clause.

72 It was discussed from 442nd to 449th meetings. See, Report of the Tenth Session of the Commission (1954), paras 262-305. The discussion centred on the question of reservations to the Draft Covenant on Civil and Political Rights and proposals thereon. The question of reservations to the Draft Covenant on Economic, Social and Cultural Rights was not considered by the Commission. Ibid., para 265.
The proposal of the United Kingdom limited reservations to Part III of the Covenant. At the same time it added a proviso that reservations must be accepted by two-thirds of the States Parties. The Soviet amendment sought to include all provisions of the Covenant within the purview of reservations. The joint proposal of China, Egypt, Lebanon and the Philippines authorized "any reservation compatible with the object and purpose of the Covenant." Again, the Soviet Union introduced an amendment to replace these words by the words "reservations with regard to any of the provisions."

Issues

Broadly, the debates on these proposals centred on three issues, viz. admissibility or non-admissibility of reservations, nature and extent of admissible reservations, and the legal effect to be attributed to reservations. These issues are discussed below:

(a) Admissibility Vs. Non-Admissibility

Certain members held the view that no reservations to the Covenant should be admitted. They maintained that by the very nature of the Covenant no reservations could be made to any of its provisions without destroying the two fundamental principles on which it was based, namely, the

principle of universality and that of the immediate application of its provisions.\textsuperscript{74} It was also pointed out that it was unacceptable that the United Nations itself, after proclaiming that human rights were inherent in the personality of every member of the human race and were therefore inalienable, should at the same time admit that any one of these rights could be legitimately disregarded, since the reservations procedure could have no other moral and legal effect.\textsuperscript{75} This view got the best expression in the joint Draft proposal of Chile and Uruguay, which provided that "(n)o State Party to this Covenant may make reservations in respect of its provisions."\textsuperscript{76}

On the other hand, some members took the position that the right of States to make reservations to treaties was an accepted principle of international law.\textsuperscript{77} Others contended that reservations should be admitted as a practical necessity. While in principle any dilution of the Covenant, which dealt with fundamental human rights, should be opposed, it was pointed out that the Covenant was attempting to codify and amend the existing municipal law over the whole of this field.\textsuperscript{78} It was maintained that

\textsuperscript{74} Ibid.
\textsuperscript{75} Ibid.
\textsuperscript{76} E/CN.3/L.354. cf. Ibid., para 273.
\textsuperscript{77} Report of the Tenth Session of the Commission (1954), para 275.
\textsuperscript{78} Ibid., para 276.
because of the diversity of the existing judicial systems, the provisions of the Covenant could not be expected to fit exactly to the laws and legal institutions of all countries, even of those which had achieved a high level of respect for human rights. Changes in domestic legislation to bring it into harmony with the provisions of the Covenant would have to be made, and such process required time. Furthermore, since many of the articles of the Draft Covenant had been adopted by a majority vote, a provision has to be made for the admissibility of reservations, if the Draft Covenant was to be ratified by a large number of States.

The opponents to reservations based their arguments on the sacrosanct integrity of the rights enumerated in the Covenant, whereas the supporters of reservations were concerned with the wider ratification of the same. Indeed, a majority of members supported the right of States to make reservations.

(b) Nature and Extent of Admissible Reservations

There were three views concerning the extent and nature of the reservations to be admitted. One view, which was reflected in the USSR amendments to the United Kingdom's proposal and the joint proposal of China, Egypt, Lebanon and

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79 Ibid.
80 Ibid.
the Philippines (hereinafter mentioned as joint proposal of four States) was to the effect that every State had the sovereign right to make such reservations as it deemed necessary, and that right should be unlimited.81 The other view was that the right to make reservations should not be unlimited. It was feared that to permit reservations to be made to the Covenant without any restrictions would result in a multiplicity of texts which would be different for various parties, each State being bound only by the clauses which suited it, and the Covenant would thus be deprived of its effectiveness.82 Various ways of limiting the scope of reservations were proposed. The Commission had two proposals in this regard. These were: the United Kingdom proposal, and the joint proposal of four States.

The United Kingdom Proposal

The United Kingdom proposed to limit the range and effect of reservations by providing that reservations might be made to the extent that the domestic law of a State was in conflict with, or did not give effect to, a particular provision of Part III of the Draft Covenant,83 which dealt with various rights and freedoms. Reservations

81 Ibid., para 227.
82 Ibid.
83 Para 1 of the British proposal. Ibid., para 266.
to other parts of the Covenant were inadmissible, thus ensuring that the implementation provisions might be regarded as sacrosanct. 84

This proposal was objected on the ground that it permitted reservations to Part III of the Covenant only. Certain members considered this contrary to the principle of international law, since it was for the States signatories themselves to determine to which provisions they ought to make reservations. 85 It was also opposed on the ground that Part III of the Covenant constituted the most important part and that to allow reservations to it would run counter to the aims of the Covenant. 86 The proposal was criticized as in effect introducing an element of progressive implementation into the Covenant on Civil and Political Rights contrary to the principle that the Covenant should be of immediately application. 87

**The Joint Proposal of Four Countries**

This proposal was based on the principles laid down in the advisory opinion of the International Court of Justice. 88 It proposed reservation to any provisions of

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84 Ibid., para 278.
85 Ibid., para 279.
86 Ibid.
87 Ibid., para 280.
the Covenant provided that reservations were compatible with the object and purpose of the Covenant. Any difficulties caused by the criterion of compatibility were expected to be resolved by special agreement between the States concerned or as a last resort, by reference to the ICJ.

Some members felt that the criterion of compatibility on which the Court relied in its advisory opinion was not suitable for application to the Draft Covenant. In their view, it was difficult to define the objects and purposes of such far-reaching and detailed multilateral Conventions as the Covenants on Human Rights, and therefore, to make the admissibility of reservations contingent on such a criterion was undesirable. As for the idea of reference to the ICJ, they contended that neither the Court nor any other international organ could be asked to decide on a matter which came within the prerogative of sovereign States.

89 In support they referred to the International Law Commission which, at its third session, had expressed the view that the criterion of compatibility of a reservation with the object and purpose of a Convention was not suitable for application to multilateral Conventions in general. See, Report of the Tenth Session of the Commission (1954), para 286.

90 Ibid.

91 Ibid., para 288.
(c) Legal Effect of Reservations

The legal effect of a reservation as between the reserving State and the other States Parties to the Covenant, in cases of objections or otherwise, was yet another controversial issue. At least three views emerged in this regard. One was based on the rule of unanimity. Another was based on the Pan-American practice. And the last one was inspired by the advisory opinion of the ICJ.

Under the rule of unanimity, which was claimed to be followed by the League of Nations and the Secretary-General of the United Nations, if any State Party objected to a reservation made by another State Party, the instrument of ratification of the reserving State would fall. The rule was criticized, however, on the ground that the right to object might be used as a form of veto which would result in the complete exclusion of a given State from the Covenant.92

In accordance with the Pan-American practice, on the other hand, when a State made a reservation and another State Party objected, the treaty would not enter into force as between the objecting and the reserving States but the reserving State would be deemed a party

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92 Ibid., paras 290-1.
to the treaty with respect to the other States Parties which did not object to the reservation. In opposition, however, it was argued that the principle behind the Pan-American practice was only suited to ordinary treaty-making, where agreements involved some degree of *quid pro quo.* The Covenant on Human Rights, on the contrary, was prompted by purely humanitarian considerations and the Contracting Parties would derive no material advantages therefrom. It was argued that the adoption of the Pan-American practice would also tend to convert the Covenant from an instrument of universal character to a series of bilateral agreements.

Interestingly, no one voiced opposition to the rule laid down in the advisory opinion of ICJ.

As mentioned earlier, on this issue too, there were two proposals before the Commission. Under the proposal of the United Kingdom, the reservations had to be accepted by two-thirds of the States Parties, whereas under the joint four-Power draft proposal, it was proposed that unless a statement was reached concerning the compatibility or otherwise of a reservation with the object and purpose of the Covenant, any State Party objecting to the reservation could refuse to consider the reserving State as a party to the Covenant, but a State Party accepting the reservation

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93 Ibid., para 290.
94 Ibid., para 191.
95 Para 4 of the British proposal. Ibid., para 266.
could consider the reserving State as a party to the Covenant.\footnote{Para 4 of the Joint Proposal of Four Countries.} Both proposals were subjected to criticism.\footnote{Particularly, the UK's proposal was characterized as "inconsistent with the principle of national sovereignty" and "an absolute negation of the principle of reservations." See Report of the \textit{Tenth Session of the Commission} (1954), para 282.}

Having discussed all the three issues and proposals, the Commission found itself unable to reach any conclusion. In such a stage, the representative of Chile and Uruguay brought a draft resolution\footnote{It was introduced at the 448th meeting of the Commission. Ibid., para 298.} which asked the Commission to refer the question of reservations to the General Assembly. Accordingly, the Commission, with certain changes,\footnote{The representative of Pakistan submitted an amendment which brought these changes. Ibid., para 301.} adopted the draft resolution and transmitted it to the General Assembly with the summary records of the discussion, along with the proposal of the United Kingdom together with the amendments proposed by the USSR and France, the joint proposal of China, Egypt, Lebanon and the Philippines as well as the amendments proposed by the USSR and the proposal of Chile and Uruguay.\footnote{The amended draft resolution was adopted by 14 votes to 4. See Ibid., paras 304-5.}
For the reasons discussed above, the Draft Covenant did not suggest any provision on reservations on its own.¹⁰¹

When the Draft Covenant came up for discussion before the Third Committee, the UK representative urged the addition of a new article on reservations.¹⁰² Interestingly, the debate on this proposal was not pro-reservation versus anti-reservation. Instead, there was a tacit agreement on the utility of reservations. The controversy revolved only around the advisability of including a reservations clause in the Covenant.

Supporters of an express reservations clause thought that not including an article on the subject and placing reliance on the general principles of international law might lead to the disintegration of the Covenant into a series of bilateral agreements. In that sense, the United Kingdom proposal, in their view, would eliminate this risk.

¹⁰¹ Though the shifting of burden could not be appreciated on any account, the Commission had no other alternative.

¹⁰² For the text of the British proposal (A/C.3/L.1353/Rev.3) see, GAOR, Session 21, Annexes II, Agenda Item 62, para 564. The Third Committee considered this proposal at its 1437th meeting. Also see, statement of Lady Gaitskell (UK) in Summary Records of Third Committee Meetings, 20 September-16 December 1966, GAOR, Session 21, 1437th mtg (un Doc. A/C.3/SR. 1375-1464), 1437th mtg, paras 18 and 27 (hereinafter referred to as Third Committee Records).
and would leave any decision on the issue of compatibility of the contracting States as a collective body.

Opponents to the reservation clause were of the view that the question of reservation to which the British amendment related was governed by the principles of international law and by the law of treaties, and it was, therefore, unnecessary to refer to it in the body of the Covenant itself.\(^{103}\) It was also recalled that an express reservation clause was already discussed and rejected by the Third Committee in the context of the Covenant on Economic, Social and Cultural Rights.\(^{104}\)

In reply, the British delegation stated that its amendment had been revised since the earlier discussion (on the Economic, Social and Cultural Rights Covenant) and was, therefore, different from the one it had submitted in connexion with the first Covenant. It was also pointed out that UK had already announced its intention of reintroducing it in connexion with the second Covenant.

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103 Mr Komyenko (Ukrainian Soviet Socialist Republic), Ibid., 1437th mtg, para 9.

104 At the 1410th meeting of the Third Committee, the United Kingdom introduced a proposal (A/3.3/2.1353/Rev.1) for a new article relating to the question of reservations to the International Covenant on Civil and Political Rights. Later, it was withdrawn. For details, see, Annexes, n.102, paras 139-46.
for which instrument a reservation clause was even more desirable than in the case of the first Covenant.\textsuperscript{105}

However, irrespective of their opposition, supporters of an express reservations clause had to admit lack of majority support. Thus, in the light of the discussion and taking into consideration the prevailing views, as well as with a view to facilitating the Committee's work, the UK delegation withdrew its proposal. As a result, the Covenant was adopted without an express provision on reservations.\textsuperscript{106}

Thus, reservations to the Covenant are neither expressly permitted nor prohibited. However, the absence of an express provision on reservation does not mean that reservations to the Covenant are not admissible, but that the question is governed by the general rules of international law.\textsuperscript{107}

\textsuperscript{105} Lady Gaitzkell, \textit{Third Committee Records} (1966), 1437th mtg, para 27.

\textsuperscript{106} Interestingly, the French delegate made it clear that like all the governments represented on the Third Committee, his government was compelled to reserve the right to make, upon subsequently signing the instrument, such declarations or reservations it deemed necessary. See, Statement of Mr Paolini, Ibid., 1455th mtg, para 51.

\textsuperscript{107} Similar views were expressed by Schwelb. See, n.11, p.114.
The most authoritative expression of the law concerning reservations was given by the International Court of Justice in its advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. The Court concluded that reservations are permissible even in the absence of a treaty article specifically permitting them. Later, this authoritative pronouncement was codified by the International Law Commission in the Vienna Convention on the Law of Treaties (hereinafter referred to as the Vienna Convention). It states:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the Treaty;

(b) the treaty provides that only specified reservations, which do not include the reservations in question, may be made; or

(c) ... the reservation is incompatible with the object and purpose of the treaty.

108 See, ICJ Reports (1951), p.19ff. Although the Court stated that its opinion was "necessarily and strictly limited" to the Genocide Convention, there is a consensus that the same considerations would appear applicable to the Human Rights Covenants. See, David Weissbrodt, "United States Ratification of the Human Rights Covenants", Minnesota Law Review (vol.65, no.1, November 1978, p.202.

Reading together the Covenant and the Vienna Convention, it can be said that reservations to various provisions of the Covenant are permitted, provided they are not incompatible with the object and purpose of the Covenant. Who has the authority to decide whether a particular reservation is incompatible with the objects and purposes of the Covenant? What are the essential objects and purposes of the Covenant? If a State makes reservations with respect to Article 40, i.e., the reporting procedure, is it compatible with the objects and purposes of the Covenant? The Covenant does not answer all these questions. However, in the present submission, the Committee has an implied power to express its opinion on the incompatibility of any reservation. 110

110 In order to strengthen this observation, an instance is taken from the working of the Committee.

At the time of considering Finland's report some members of the Committee expressed the view that the reservations made by Finland were fully in accordance with international law as elaborated in the Vienna Convention. Others held the view that some of the reservations made by Finland were not really necessary and feared that too many reservations or reservations on certain grounds or relating to certain clauses may distort the meaning of the Covenant. They stressed that under the Vienna Convention a State may not make reservations incompatible with the essential object and purpose of a treaty. Some members raised questions concerning the ground for Finland's reservation to Article 20, para 1, of the Covenant on the prohibition of war propaganda. Clarification was further requested as to why para 2 of this Article, prohibiting the advocacy of national, racial or religious hatred, was acceptable to the government, while para 1 on war propaganda, had been rejected. In addition, members of the Committee expressed the wish that the Government of Finland send a supplementary report. And lastly, while appreciating the fact that Finland had made the declaration under Article 41 of the Covenant and had also accepted the Optional Protocol, the members of the Committee expressed some concern over the continuing scale of the reservations of Finland and the hope was expressed that these could be diminished as soon as possible. See, Report of the Human Rights Committee (1977), paras 125-6; and Report of the Human Rights Committee (1979), para 394.
Whether this power acts as a "check and balance" on the reservation-making power of the States is a matter to be seen in future. At this juncture, it is sufficient to mention that States Parties to the Covenant and the Optional Protocol thereto, have attached a variety of reservations, declarations and understandings. The rationale, the *modus vivendi* and the operational ramifications of these reservations, are some questions discussed below.

**Rationale of Reservations**

Speaking on the proposed reservations to the Covenants, Roberts B. Owen, the Legal Adviser of the US Department of State, said: "The rationale behind the reservations is, rather, that we take our international legal obligations seriously, and therefore will commit ourselves to do by

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111 As of 31 December 1979, sixty-one States had ratified or acceded to the Covenant on Civil and Political Rights of which thirty-three had expressed reservations, declarations and understandings. The respective total number of reservations, etc., of some of these States are summarized as under: Austria (6), Barbados (1), Bulgaria (1), Byelorussian Soviet Socialist Republic (1), Czechooslovakia (1), Denmark (3), Finland (7), Gambia (1), German Democratic Republic (1), Federal Republic of Germany (4), Guinea (1), Guyana (2), Hungary (2), Iceland (5), India (4), Iraq (1), Italy (6), Japan (1), Libya (1), Mongolia (1), Netherlands (10), New Zealand (4), Norway (1), Romania (2), Sweden (3), Syria (1), Trinidad and Tobago (8), Ukrainian Soviet Socialist Republic (1), Soviet Union (1), UK (13), and Venezuela (1). See, *Multilateral Treaties in respect of which the Secretary-General Performs Depository Functions: List of Signatures, Ratifications, Accessions, etc.* as at 31 December 1979 (United Nations Publications, Sales No. E.80.V.10), UN Doc. ST/LEG/SER.D/13, pp.111-19.
treaty only that which is constitutionally and legally permissible within our domestic law."¹¹²

Indeed, the right to make reservations seems to be based on the premise that countries often lack the legislative infrastructure needed to carry out the obligations under the Covenant, if they were to be guaranteed. Thus, where the existing legislation is at variance with the provisions of the Covenant, reservations are usually made. In other words, States make reservations in those cases where they find discrepancy between domestic legal rules considered sacrosanct by them and the provisions of the Covenant.¹¹³ At the time of considering Finland's report, some members of the Committee rightly remarked that the making of reservations may usefully clarify the legal situation wherever there was an obvious discrepancy between the Covenant and existing domestic legislation.¹¹⁴

¹¹² See, International Human Rights Treaties: Hearings before the Committee on Foreign Relations, United States Senate, Ninety-Sixth Congress, First Session on November 14, 15, 16 and 19, 1979. (Washington, 1980), p. 31 (hereinafter referred to as the US Senate Hearings).

¹¹³ In transmitting the Covenants along with other Conventions for ratification by the US Senate, the US President Carter said: "Whenever a provision is in conflict with US law, a reservation, understanding or declaration has been recommended." Quoted from the prepared statement of Schachter, Ibid., p. 87.

At times, however, States make reservations with the intention of recording a note of dissent to a particular provision of the Covenant. For instance, the most widely made reservation is to Article 48, paragraphs 1 and 3, of the Covenant. All the Socialist countries, along with some others, have made reservations, inter alia, to this provision on the ground that it is of "discriminatory nature", "contrary to the basic principles of international law", and "incompatible with the objectives and purposes of the Covenant."\textsuperscript{115}

In certain cases, States make reservations or declarations for the simple reason of pursuing their foreign policy goals. Some States have made reservations with the Covenant's application to other countries. For example, most of the Arab States which are parties to the Covenant have made the reservations in which they have refused to recognize Israel's participation in the Covenant.

Yet, in some other cases, States Parties attach reservations or declarations in order to safeguard what they seriously consider their national interests.

\textsuperscript{115} Article 48 is considered discriminatory because the Socialist countries believe that the Covenant should be open to signatures by all States, instead of those excluded by implication in paragraphs 1 and 3 of this Article. See, n.111.
For instance, India has made a declaration with reference to Article 1 of the Covenant which deals with the right of self-determination. In the declaration it is laid down that the words "the rights of self-determination" appearing in Article 1 apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation which is the essence of national integrity. It is well-known that India made this declaration keeping in view the problem of Kashmir and Nagaland.\(^{116}\)

**Acceptability of Reservations**

Each State Party to the Covenant is supposed to be officially apprised of at the reservations. Hence, a reservation-making State communicates to the UN Secretary-General the reservations and declarations. The Secretary-General, in turn, through the office of Legal Counsel in charge of the Office of Legal Affairs of UN, communicates these reservations to all the States Parties to the Covenant and the Optional Protocol as the case may be. As a result, the States Parties get an opportunity to make their views known with respect to those reservations. If they, in effect, acquiesce and accept them, then those reservations become part of their obligations.

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On the other hand, if a reservation is not accepted by other States Parties to the Covenant, there arise no mutual obligations. In the US Senate Hearings on the ratification of the Covenant, a general impression was given that States do not reject or object to reservations. It was contended that it is difficult to recall, in recent years, any reservation to a multilateral treaty which has caused another State Party to reject treaty relationships between them because of the particular reservation. In a overwhelming number of cases, other States Parties simply remain silent. For instance, a number of West European countries have made extensive reservations to the Covenant, and no objections have yet been registered thereto.

But there are a few instances where some reservations have been opposed. For instance, on 12 January 1981, the Secretary-General received from the Government of the Netherlands the following objection to the declaration made by India in respect of Article 1 of each of the Covenants:

The Government of the Kingdom of the Netherlands objects to the declaration made by the Government of the Republic of India in relation to Article 1 of the International Covenant on Civil and Political Rights ... since the right of self-determination as embodied in the Covenant is conferred upon all peoples. This follows not only from the very language of Article 1 common to the two Covenants but as well from the most authoritative statement of the law concerned, i.e., the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of
the United Nations. Any attempt to limit the scope of this right or to attach conditions not provided for in the relevant instruments would undermine the concept of self-determination itself and would thereby seriously weaken its universally acceptable character. 117

Similarly, the Netherlands objected to the reservations made by Trinidad and Tobago.118

Barring these isolated instances of objections to reservations, States Parties usually accept reservations. There could be three reasons for this attitude: first, to encourage greater participation; second, to receive the benefits of reciprocal restraints; and third, because Article 20 of the Vienna Convention gives a relatively short twelve months period in which objections may be made to reservations.

Whatever the additional reasons for the unwillingness of the States Parties to object to reservations more frequently, the fact remains that reservations to treaties like the Covenant that establish an international

117 Objection by the Netherlands to a Declaration made by India, UN Ref. C.N. 5, 1981, Treaties-2 (Depository Notification), 9 February 1981.

118 See, Objection by the Netherlands to a Reservation made by Trinidad and Tobago, UN Ref. C.N. 178, 1980, Treaties-3, 8 July 1980.
enforcement machinery raise difficult problems. On the one hand, by expressing a reservation, a State seeks special treatment which contradicts the principle of sovereign equality among nations. On the other, by making reservations, States Parties encourage each other - directly or through reciprocal effects - to feel free to do so and to interpret the Covenant to suit their own interests. As Wilfred Jenks observed that "the effect on the obligations resulting from the Covenants of any reservation or objection thereto remains somewhat indeterminate; there is, therefore, a real danger that the Covenants may disintegrate into (a) series of bilateral agreements expressed in two common instruments but binding in different degrees between different parties."

119 Reacting to the rule that acceptance of even a single Contracting State of reservation constitutes the reserving State a party to the treaty in relation to that State, Schwelb expressed doubts whether it fits into the scheme of the human rights Convention. To give an admittedly extreme illustration: If South Africa were to decide to ratify the Covenant subject to reservation that it does not accept those of their provisions which prohibit discrimination and if one single other State Party were to accept this reservation, South Africa would become a Party to the Covenants with all the prestige and status this might imply. See, Schwelb, n.11, p.114.


Furthermore, reservations might make uniform interpretation of the Covenant's obligation very difficult.\textsuperscript{122} In essence, reservations "detract significantly from the obligations" embodied in the Covenant.\textsuperscript{123}

D. Co-existence of Competitive Procedures

The Committee adopts one of the various international procedures for the implementation of human rights. Moreover, though the Committee is a universal body; but it does not have the status of being the supreme one. Therefore, its existence and operations are bound to be affected by other international procedures. In order to make it more clear, Article 44 of the Covenant states:

> The provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialized agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

\textsuperscript{122} See, David Weisbrodt, n.108, p.201. (footnote 117).
\textsuperscript{123} See, Jenks, n.121, p.247.
Taking advantage of this provision, some States especially the Scandinavian countries, ratified the Optional Protocol with the reservation that the same matter must not have been examined by another international institution. This reservation is not intended to rule out the concurrent consideration of a complaint, as is provided for by Article 5, paragraph 2(a), of the Optional Protocol, but to prevent subsequent review, of a decision taken within the framework of the European Convention. The party concerned has to decide in advance whether it prefers to have its case examined by the Committee or by the European Commission. Though only practice will show the whole range and ramifications of the reservations clause, it goes without saying that it will certainly affect the scope of the Committee's operation.

124 For instance, the Government of Denmark makes a reservation "with respect to the competence of the Committee to consider a communication from an individual if the matter has already been considered under other procedures of international investigation." Almost similar reservations are appended by Iceland, Italy, Norway and Sweden. See, Multilateral Treaties in respect of which the Secretary-General Performs Depository Functions, n.111, pp.121-2.

125 Article 62 of the European Convention states: "The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in the Convention". See, Brownlie, n.13, p.221.

These are five major limitations. The Committee faces several other limitations too. For instance it does not have the services of full-time members. It has a heavy load of work. It holds meetings for hardly fifty days a year. Its finances and facilities are inadequate. It lacks independent sources of information. It does not have the right to take the initiative. Its decisions

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127 Mr Tarnopolsky, a member of the Committee, feels that the obligations towards the Committee set out under Article 36 of the Covenant have never been properly complied with. However, he does not believe that the fault lies with the Division of Human Rights. According to him, it is due to the fault of the overall administration under the Secretary-General that the Committee has never received either adequate staff or adequate facilities for its work. What Tarnopolsky has in mind is not the capacities or abilities of the individuals concerned but those of the members as a group. There has never been adequate staff to handle communications. There is, for instance, no one to deal with the Spanish-speaking areas of the world, and this situation has lasted for several years. There is a similar problem in other respects. The facilities available to the members of the Committee are totally inadequate. There is no reason why offices and secretarial services should not be made available to them. See, CCPB/C/SR.174/Add. 1, 20 August 1979, para 34.

128 Even where there is a gross violation of human rights the Committee cannot take action on its own unless the matter comes before it either through the reports sent by the States or through a communication transmitted by either a State or an individual. At the 362nd meeting, the Commission rejected, by 8 votes to 7 with 3 abstentions, an amendment proposed by Chile and India seeking to empower the Committee to take the initiative in any case where it recognizes that non-observance of any of the provisions of the Covenant is serious enough. See, Report of the Ninth Session of the Commission (1953), Annex.III B, para 132.
do not have legally binding force. There is no enforcement machinery at its disposal. All these are limitations that the Committee has inherited from its parent instrument, viz the Covenant. The task of the Committee is only to monitor the process of implementation of this imperfect Covenant. How far has the Committee been effective in this regard is now a matter of inquiry.

II. EFFECTIVENESS

If one considers the cumulative effect of the limited character of the mandate of the Committee, the widespread exercise of derogation and reservation clauses of the Covenant, the co-existence of competitive procedures, and several other limitations, one can see that the Committee has very little under its docket to prove its effectiveness. Allegations of ineffectiveness, therefore, data back to the very birth of the Committee under the Covenant.

One may recall how, during the debates of the Third Committee, the representative of Venezuela once went so far as to comment that the Third Committee had succeeded only in drafting an instrument doomed to ineffectiveness. He even feared that the end result would be the exact opposite of the one that was being sought and that mankind would be offered only a scrap of paper instead of the effective guarantees it had a right to expect. 129

129 Mr Kumbos, Third Committee records (1966), 1430th mtg, para 24.
Even contemporary scholars are sceptical about the effectiveness of the Committee. It is true, they say, that the Human Rights Committee was "unexpectedly assertive" in its initial years of practice, but it was "not so much a sign of effectiveness as a reflection on our extremely low expectations". The main concern of these critics is the apparent inability of the Committee to get its findings enforced. They doubt the effectiveness of the Committee's procedures because its views, general comments, and reports do not have binding force.

These critics seem to forget that lack of enforcement machinery is not a problem peculiar to the Committee. It is a general problem inherent in international law, which is based on the sophisticated notion of decentralization of coercive powers. So far as the binding nature of the views, general comments and reports of the Committee is concerned, it is true that they do not have binding force in the strict legal sense; nor can they be put on

130 See prepared statement by Oscar Garibaldi in US Senate Hearings, n.112, p.324.
131 Jenks remarks: "The world community has no greater structural weakness than that which arises from the difficulty of making its decisions effective". See, Jenks, n.11, p.233.
an equal footing with the General Assembly's Resolutions or the judgements of the World Court. However, to regard them as useless would be to oversimplify the matter. Being authoritative observations by highly qualified persons of "recognized competence in the field of human rights", they have as much importance as "the teachings of the most highly qualified publicists of the various nations" under Article 38, paragraph 1(d), of the Statute of the World Court. They are fine examples of creative jurisprudence in the field of human rights. In view of the fact that there is no other competent international organ to lay down norms in the field of human rights, they should be regarded as the most authoritative pronouncements on the relationship of the domestic laws of the States Parties and the international standards of the Covenant. Indeed they are a new form of case law. Even in the practical terms they have an importance of their own; for they give publicity to the grievances of the victims of the attempts made at deprivation of human rights, establish international accountability of the offenders, build up world public opinion in favour of the promoting of human rights, and inspire and sustain the enthusiasm of human rights activists.132 The contribution

132 For instance, when the Committee found Uruguay guilty of violation of several specific guaranteed rights of its nationals, it brought an "enormous moral and legal weight to efforts for the release of these prisoners". Amnesty International approached
of the Committee, though it may not fulfil in full measure the high expectations entertained by enlightened public opinion, is still very valuable and substantial, especially in view of the present imperfect international legal order. As McDougal and others have remarked, "Given the realities of effective power allocation, the fundamental and ultimate importance of mobilizing world public opinion in the defence and fulfilment of human rights is worthy of reiteration."\(^{133}\)

In estimating the effectiveness of the Committee it is important to remember that the Committee itself does not implement the Covenant. All that it does is to supervise the process of implementation. It does not have the authority to order release of prisoners illegally held. This type of function is supposed to be performed by the national institutions concerned and their executives. The Committee only seeks to influence the behaviour of these national institutions of sovereign States. The records show that the Committee has succeeded to some extent in influencing, improving, or changing the

\[\text{several countries, including the United States, to press for the release of the victims on the basis of the Human Rights Committee's findings. See, statement by David Hinckley, Chairman, Board of Directors, Amnesty International, USA, New York, N.Y., US Senate Hearings, n.112, p.422.}\]

behaviour of the alleged defaulters in the field of human rights.\textsuperscript{134} For instance, in the Passport case, the Committee was able to influence the behaviour of the Government of Uruguay and afford relief to the alleged victim.\textsuperscript{135}

Of course, examples of this kind are not too many. But, then, the Committee has been in existence for hardly five years. And surely it is too early to expect a lot more from it.\textsuperscript{136} To entertain high hopes of achievement within a short period is to invite disappointment. Whatever the Committee has so far achieved is certainly "quite encouraging".\textsuperscript{137} Indeed it has established a "remarkable record".\textsuperscript{138} The following additional achievements lend support to the claim we have made.

\textsuperscript{134} William Butler expressed the view that the Committee's procedures did have a very definite influence on States Parties in that it made them or compelled them in some degree to conform their domestic law to the international Covenants. See, \textit{US Senate Hearings}, n.112, p.450.

\textsuperscript{135} For details, see section entitled "The Individual Communication Procedure" in the preceding chapter. One may also recall that at the time of considering the report submitted by Finland, some members of the Committee made certain observations on the ground of Finland's reservations in respect of Article 20, para 1, of the Covenant relating to the prohibition of war propaganda. In view of these comments the representative of Finland personally recommended to his Government that it withdraw reservations regarding Article 20, para 1, of the Covenant. See, \textit{Report of the Committee} (1977), para 125(d).

\textsuperscript{136} Louis Henkin also expresses same view. See, \textit{US Senate Hearings}, n.112, p.224.

\textsuperscript{137} David Hinkley, \textit{Ibid.}, p.424.

\textsuperscript{138} Justice Newman, \textit{Ibid.}, p.244.
First, ever since the Committee started working, the pace of ratification of the Covenant and the Optional Protocol has accelerated remarkably. From 1966 to 1976, over a period of ten years, just thirty-five States ratified or acceded to the Covenant. However, since the Committee came into existence, i.e., since 1976, more than thirty States have become parties to the Covenant. This, among other things, is an encouraging evidence of the way of functioning of the Committee and of the desire of States to participate in its work. 139

Secondly, within a couple of years of its inception, the Committee succeeded in establishing its international credibility. This success was due clearly to the remarkable services of its distinguished expert members. The enhanced credibility provided enormous strength to the procedures of the Committee. Judging a system of implementation like

139 Jay Long, the representative of the Secretary-General to the Committee, remarked: "The growing number of States Parties to the Covenant itself and to its Optional Protocol is not only proof of the spreading recognition by Member States of the United Nations of the substantive validity and practical relevance of the principles and standards embodied in these instruments but it also reflects the wider belief on their part that international co-operation through the voluntary and genuine acceptance of legally binding instruments is among the most effective ways and means of achieving real progress in the promotion of respect for and observance of human rights and fundamental freedoms". UN Press Release, HRI, 1999, 12 September 1980, p. 2.
that of the Committee is like judging the strength of a fortress. The strength of a fortress depends not only on how well it is designed, but also on how well it is manned. \(^{140}\) Happily, the Committee's composition is fairly reasonable so far as the expertise of its members is concerned. There are of course certain other aspects of the composition of the Committee which need improvement.

Thirdly, the principal implementation procedure of the Committee, viz, the reporting procedure, has already proved to be a useful and efficient procedure. It generally promotes what is often called constructive dialogue between the Committee and the Governments concerned. This dialogue enables the States Parties to learn from the experience of others and to change or improve legislations, and practices, if necessary, without having been condemned. \(^{142}\) That such dialogue has developed between the Committee, which is composed of

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141 Garibaldi thinks, on the contrary, that the composition of the Human Rights Committee follows the ubiquitous principle of equitable distribution, which ensures the presence of members from totalitarian and authoritarian countries. As a result, the practice of the Committee already shows attempts to redefine the language of the Covenant, dilute its standards, and enforce it selectively. Ibid.

142 Graefrath, n.126, p.23.
independent experts of different nationalities, and
the States Parties, which have differing social systems,
is a fact of tremendous significance.143

It, therefore, seems to be safe to state that although
the Committee's monitoring system is not perfect and
effective one hundred per cent, it is by no means worth-
less. If the yardstick for evaluating the effectiveness
of the Committee is a national institution like the
Ombudsman, the Committee is not satisfactory at all. If,
however, the yardstick is perseverance in the face of the
harsh realities of today's international life, the
Committee's performance is second to none. Of course,
there is still much scope for improvement.

The foregoing study demonstrates that although the
Committee is yet to prove its effectiveness beyond doubt,
it has a great potential to achieve that goal. How should
the Committee act in order to achieve that goal is a big
question. One fact, however, is clear: In order to
establish and enhance the effectiveness of the Committee
it is necessary to strengthen its role. How to strengthen
its role within the existing as well as projected parametres
is a theme of the next chapter.

143 Ibid.