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## Discourse in Development: Post-Colonial "Agenda" for the United Nations Committee on Economic, Social and Cultural Rights Through the Post-Colonial Lens

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# DISCOURSE IN DEVELOPMENT: A POST-COLONIAL "AGENDA" FOR THE UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

BETH LYON\*

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## I. INTRODUCTION\*\*

Post-colonial theory can provide a meaningful interrogation of the goals and methods of the human rights regime. With its concern for exposing the exploitative and paternalistic legacy of the international community's developing world agenda, the post-colonial inquiry offers an opportunity to the human rights community to revisit its mandate. The international law branch of this theoretical school arose contemporaneously<sup>1</sup> with a late-developing area of human rights known as economic, social and cultural rights.<sup>2</sup> Although economic, social and cultural rights formed a significant part of the original post-war body of human rights doctrine, they were casualties of ideologically based Cold War politics, remaining unenforced and underdeveloped until the creation of the United Nations ("UN") Committee on Economic, Social and Cultural Rights ("ESCRs") (the "Committee") in the late 1980s.

Economic, social and cultural rights in turn pose a challenge to the general post-colonial critique of human rights law. The Committee's primary subject matter - macroeconomic spending priorities and welfare policies, and their effect on poverty alleviation and minorities - falls squarely within southern policy terrain the colonial powers most famously resisted relinquishing. Yet the Committee's recommendations often run counter to the liberal international financial mandates that the south<sup>3</sup> unsuccessfully resisted for decades. Moreover, southern non-governmental organizations ("NGOs") have consistently advocated for including ESCRs in the civil society agenda

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\*\* This Article expands on a presentation delivered at the Postcolonial Law: The Uses of Theory in Law Reform Projects conference. The presentation was solicited as a human rights expert's statement to a panel of theorists considering the post-colonial implications of internationally initiated law reform projects.

1. Post-colonial theory recently expanded from a focus on literature and history to a more detailed exploration of law; the first works cited in a recent compilation date to the mid-1980s. See Peter Fitzpatrick & Eve Darian-Smith, *Laws of the Postcolonial: An Insistent Introduction*, in LAWS OF THE POSTCOLONIAL 1, 15 n. 7 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999) (noting that engagements between law and postcolonialism have been infrequent, astonishing, and understable).

2. "Economic, social and cultural rights" is a term of art in international law referring to the corpus of human rights standards that is distinguished from the standards termed "civil and political rights."

3. Many writers struggle with the appropriate designation for the former colonies and the former colonizers. See, e.g., D.K. FIELDHOUSE, *THE WEST AND THE THIRD WORLD* 1-3 (1999) (describing various terms used in the twentieth century); ROBERT J.C. YOUNG, *POSTCOLONIALISM: AN HISTORICAL INTRODUCTION* 4-5 (2001). It remains to be seen whether Young's choice, "tri-continental," will hold sway as a substitute reference to poor countries ("tricontinentalism" as a substitute for the term postcolonial). In the meantime, the present author will alternate amongst several commonly used terms: South/North, East/West, developing/industrialized.

while most international NGOs are still struggling with the decision to take up these rights.

Many specific aspects of the Committee's jurisprudence respond effectively to the concerns of postcolonial theory, such as its use of equalization paradigms and enforcement language, interpretation of its anti-discrimination mandate, and the audience for its recommendations. In other ways, the Committee's work confirms a traditional north-south critique of the human rights regime, such as the Committee's treatment of culturally based practices. Part IV of this Article reviews these aspects of the Committee's jurisprudence in detail, particularly focusing on the now extensive body of Concluding Observations.

One key north-south sensitive exhortation is that the Committee should expand its efforts to address the financial issues that most concern the countries where economic, social and cultural rights are in deepest crisis. The Committee is a natural partner to former colonies to protest debt loads and to leverage international financial institution ("IFI") and development aid funds in the direction of poverty alleviation. Within its limited resources, the Committee should continue to expand its inquiries into the effects of the debt process, dealings of Member States with the IFIs, and development aid on the economic, social and cultural rights of the poor. The Committee should also consider more explicitly publicizing concerns about private actors that impact ESCRs. To the extent that anti-poverty human rights bodies such as the Committee advocate for a continuation of coercive practices such as conditioning of aid, these recommendations may depart from the post-colonial paradigm, which generally favors the restoration of autonomy to former colonies.

## II. UNIQUE INSTITUTIONAL HISTORY OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Committee monitors the International Covenant on Economic, Social and Cultural Rights, the world's first international treaty to elevate basic welfare needs of the poor to the level of human rights. Political hostility toward this class of rights delayed the Committee's formation for more than a decade after most of the other UN treaty monitoring bodies and limited involvement of the human rights regime in poverty issues. Since 1986, by progressively interpreting its mandate, the Committee has greatly furthered the jurisprudential credibility of economic, social and cultural rights and maintained its status in a difficult political atmosphere. The

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Committee's sixteen years in existence form the most important chapter in the history of economic, social and cultural rights, and to analyze the Committee's work requires an understanding of the particular politics of that subject matter.

A. *East Against West: Which Rights Are Human Rights?*

The Universal Declaration of Human Rights ("UDHR")<sup>4</sup> recorded the immediate post-WWII consensus<sup>5</sup> regarding moral standards for government behavior toward its citizenry. The United States enthusiastically participated in promulgating the UDHR, which was intended to be the UN Charter's Bill of Rights.<sup>6</sup> The UDHR's drafters based it in part on the conception of rights contained in President Franklin Roosevelt's famous 1941 Four Human Freedoms speech.<sup>7</sup> The "four freedoms" were freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear.

The civil and political rights enshrined in the UDHR and the treaties that followed it read like an updated version of the U.S. Bill of Rights. These protections include freedom of expression, right to political participation, freedom from cruel, inhumane and degrading treatment, right to effective remedies, freedom of religion and right to non-discriminatory treatment.<sup>8</sup> In addition to these civil and

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4. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. GAOR, 3d Sess., Pt. I, at 81, U.N. Doc. A/810 (1948) [hereinafter UDHR] (recognizing the inherent dignity and the equal inalienable rights of all members of the human family is essential to freedom, justice, and peace in the world).

5. The term "consensus" is used advisedly, referring only to the very high percentage of endorsements the UDHR received in the 1948 General Assembly. Forty-eight of the then-58 General Assembly members voted in favor of the UDHR, with eight abstentions and two states absent from the vote. See The Universal Declaration of Human Rights: A Magna Carta for all Humanity, United Nations Website, <http://www.unhchr.ch/udhr/miscinfo/carta.htm> (last visited Mar. 1, 2002). As of March 1, 2002, the United Nations included 189 member states. See List of Member States, United Nations Website, <http://www.un.org/Overview/unmember.html> (last visited Mar. 1, 2002) (listing 189 member states of the United Nations with the dates on which they joined the organization). As many commentators have since noted, the founding principles of the international rights regime were established without the direct participation of most of the colonized world leadership.

6. JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING & INTENT 1 (1999) (discussing President Franklin Roosevelt's enunciation of the four freedoms and their influence on the Declaration of the United Nations).

7. *Id.*

8. See UDHR, *supra* note 4, art. 2 (establishing equal protection under the Declaration), art. 5 (forbidding cruel and inhumane treatment or punishment); *id.* art. 8 (establishing due process); *id.* art. 18 (establishing freedom of religion); *id.* art. 19 (creating the right of freedom of expression and opinion); *id.* art. 21 (establishing the right to participate, have access and contribute to government).

political rights, the UDHR also contains economic, social and cultural rights, including the right to social security, work and favorable work conditions, labor union rights, rest and leisure, adequate standard of living, including the right to food, clothing, housing, and medical care, the right to education, the right to participate in culture and the right to property.<sup>9</sup> The Preamble of the UDHR justifies this selection with a broad characterization of the basis for human rights: "Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom . . . ." <sup>10</sup>

The drafters of the UDHR believed that the UDHR was the precursor to a Human Rights Covenant, which would provide a mechanism for making the UDHR binding on individual ratifying states.<sup>11</sup> As the cold war intensified, the Soviet Union championed ESCRs and the United States championed civil and political rights: the Soviet Union urged the promulgation of one Covenant listing all the UDHR rights, and the United States insisted on locating ESCRs in a separate Covenant.<sup>12</sup> The forcefulness of the Soviet Union's advocacy for a unitary regime may have been weakened by its general concern about the interference of the international community in domestic affairs.<sup>13</sup> The result was a 1952 General Assembly Resolution mandating creation of two treaties instead of one.<sup>14</sup>

9. See UDHR, *supra* note 4, art. 17 (establishing the right to own property); *id.* art. 22 (establishing the right to social security and personal development); *id.* art. 23 (establishing the right to work, free choice of employment and just employment conditions); *id.* art. 24 (establishing the right to rest and leisure); *id.* art. 25 (establishing the right to an adequate standard of living); *id.* art. 26 (establishing the right to education); *id.* art. 27 (establishing the right to participate in community cultural life and protection of moral interests).

10. UDHR, *supra* note 4, *preamble*.

11. See KITTY ARAMBULO, STRENGTHENING THE SUPERVISION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THEORETICAL AND PROCEDURAL ASPECTS 15 (1999) (citing U.N. Doc. E/CN.4/53, at 9 (Dec. 10, 1947)); MORSINK, *supra* note 6, at 19 (describing the early intention to produce one Covenant).

12. See ARAMBULO, *supra* note 11, at 15-18.

13. F. Przetacznik, *The Social Concept of Human Rights: Its Philosophical Background and Political Justification*, in REVUE BELGE DROIT INTERNATIONAL 238-52 (1977), noted in Matthew Craven, *The UN Committee on Economic, Social and Cultural Rights*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 455-57 (2d ed. 2001) [hereinafter Craven, *Committee*] (explaining the Soviet states advocated that the implementation of human rights should take place by means of state action and that international involvement should be minimal).

14. See *id.* at 456 (citing U.N.G.A. Resolution 543 (VI) of 5 February 1952) (asserting that the question of whether human rights should be implemented by means of state action or international action that led the states to draft two separate

With the UDHR, the International Covenant on Civil and Political Rights<sup>15</sup> ("ICCPR" or the "Civil and Political Rights Covenant") and the International Covenant on Economic, Social and Cultural Rights<sup>16</sup> ("ICESCR" or the "Covenant") form the International Bill of Rights. Though crafted in the same diplomatic process, the enforcement provisions of the two Covenants are far from identical. The substantive provisions of the Civil and Political Rights Covenant sound, again, like the U.S. bill of rights; the language is unequivocal, clean statements defining unassailable rights. Contrarily, the drafters of the ICESCR saddled it with an enforcement clause that reads "Each State Party . . . undertakes *to take steps*, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources, with a view to achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>17</sup>

This weaker language reflected the continuing opposition of many of the western countries, most prominently the United States.<sup>18</sup> These countries felt deep suspicion about the desirability of elevating economic and social policies to the level of an unalienable right rather than a personal privilege granted or withheld through the political ordering of macroeconomic priorities.<sup>19</sup> This liberal (in the

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human rights covenants).

15. 999 U.N.T.S. 171, 173 (1966) [hereinafter ICCPR].

16. 999 U.N.T.S. 3 (1966) [hereinafter ICESCR].

17. *Id.* art. 2(1) (emphasis added).

18. See Craven, *Committee*, *supra* note 13, at 456-57.

19. See *id.*; see also ARAMBULO, *supra* note 11, at 19. For a comprehensive review of the semi-philosophical debate over the justiciability of economic, social and cultural rights, see *id.*, at 53-169. Compared with the profusion of recent attention to promoting the justiciability of ESCRs, see *id.* at 99-169, there appear to be relatively few new arguments against justiciability, see *id.*, at 53-97. One recent U.S. example arose in the debate between Herman Schwartz and Cass Sunstein during the revision of the Eastern European constitutions. See Cass Sunstein, *Something Old, Something New*, E. EUR. CONST. REV., Spring 1992 at 18 (stating that Soviet-style constitutions set out general social commitments rather than concrete entitlements); Cass Sunstein, *Against Positive Rights*, E. EUR. CONST. REV., Winter 1993, at 35 (asserting Eastern European constitutions should produce only firm liberal rights and the foundation for some kind of market economy). Only the United States continues consistently to advance nonjusticiability as a serious proposition in the international human rights political arena. See Centre on Housing Rights and Evictions, COHRE's Online Newsletter No. 3 (Apr. 2001), available at <http://www.cohre.org/wkframe.htm> (on file with author) (describing "yet another unilateral effort" by the United States to contest the legitimacy of economic, social and cultural rights). For recent statements of the United States to the UN Commission on Human Rights, see Ambassador George Moose: Explanation of Position and call for a vote on OP 8c: L.42, Economic, Social and Cultural Rights (Apr. 20, 2001), available at <http://www.humanrights-usa.net/statements/0420L42.htm> (on file with author) (noting the U.S. government's position that ESCRs "are not rights which create immediate,

Lockian sense)<sup>20</sup> ideology overlay a consensus that, as a practical matter, social conditions are simply too complex to be capable of evaluation or promotion by any adjudicative forum.

### B. *Two Attempts to Create an Effective Monitoring Body*

The Committee's turbulent institutional history demonstrates the controversial nature of the rights it monitors. Like most human rights treaties, including the ICCPR, the ICESCR mandates that the States' Parties to the treaty submit reports about their adherence to the instrument.<sup>21</sup> However, the ICCPR also establishes a free-standing monitoring body, the Human Rights Committee, to receive and consider reports.<sup>22</sup> Each of the four major UN human rights treaties that followed the International Bill of Rights also established freestanding monitoring committees.<sup>23</sup> In contrast, the ICESCR merely orders States' Parties to submit their reports to the UN Economic and Social Council,<sup>24</sup> leaving control of the ICESCR's monitors in the hands of a fully political body without guidance as to their selection and methods. Thus, the Committee is the only one of

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actionable entitlements of a citizen vis-à-vis his or her own government"); Ambassador George Moose, U.S. Delegation, UN Commission of Human Rights, EO/12, The Right to Food (Apr. 20, 2001), available at <http://www.humanrights-usa.net/statements/0420righttofood.htm> (on file with author) (presenting the U.S. government's disagreement with the proposition that "citizens of a State have a human right to receive food directly from the government of that State" as well as with the existence of "a legal remedy at the national and international levels against a State for those individuals who believe their presumed right has been denied").

20. See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 3-32 (1955) (establishing the roots of the term "liberal" in the Lockian philosophy of governmental non-intervention).

21. See, e.g., ICCPR, *supra* note 15, art. 40 (requiring States' Parties to submit reports within one year of entry and upon the request of the Committee thereafter); ICESCR, *supra* note 16, arts. 16-17 (requiring states to furnish reports in stages in accordance with the Economic and Social Council within one year of entry into the covenant).

22. See ICCPR, *supra* note 15, art. 28.

23. See International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, art. 8 [hereinafter ICERD]; Convention on the Elimination of All Forms of Discrimination against Women, art. 17 [hereinafter CEDAW]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, art. 17 [hereinafter CAT]; Convention on the Rights of the Child, 1577 U.N.T.S. 3 [hereinafter CRC].

24. See ICESCR, *supra* note 16, art. 17(1) at 9 (requiring States' Parties to furnish reports during their first year in stages and in accordance with the Council). Interestingly, during the "finishing touches" stage in 1966, the year the ICESCR was promulgated, the United States proposed the establishment of an independent Committee similar to the Human Rights Committee, and the Soviet Union rejected the proposal. See Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 338-339 (1987) [hereinafter Alston, *Challenges*] (presenting arguments in support and in opposition to the creation of the Committee).



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the six major UN human rights treaty bodies that was not created by the terms of the human rights treaty it monitors.

In fact, the Committee is the third entity the General Assembly has created to monitor the International Covenant on Economic, Social and Cultural Rights; it was established in 1985 when the first two bodies, called the Sessional Working Group and the Sessional Working Group of Governmental Experts, were abandoned for ineffectiveness.<sup>25</sup> These bodies' impressive shortcomings included their eight-year long failure to comment substantively on any state's report.<sup>26</sup>

These groups also alienated the specialized agencies, particularly the International Labour Organization (ILO),<sup>27</sup> whose cooperation with the Committee is particularly crucial given the extensive treatment of labor rights in the Covenant.<sup>28</sup>

The Economic and Social Council (ECOSOC) created the Committee by resolution.<sup>29</sup> The Committee consists of 18 "experts with recognized competence in the field of human rights, serving in their personal capacity."<sup>30</sup> ECOSOC elects nine members every two years, for a four year term.<sup>31</sup> The Committee first convened in 1987.<sup>32</sup>

### III. THE COMMITTEE'S RECORD

The Committee has had more than fifteen years to define its priorities and establish its methods. The general consensus is that

25. See, e.g., Alston, *Challenges*, *supra* note 24, at 340-42; International Comm'n of Jurists, *UN Committee on Economic, Social and Cultural Rights*, 42 INT'L COMM'N OF JURISTS REV. 33, 33 (1989) (illustrating the process of evolution from the working group to a committee of independent experts).

26. See Alston, *Challenges*, *supra* note 24, at 341-42 (listing the findings of the Commission of Jurists survey of the Sessional Working Group).

27. *Id.* at 365-67.

28. See MATTHEW CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 36 (1995) [hereinafter CRAVEN, *INTERNATIONAL COVENANT*] (quoting Philip Alston, *The UN Specialised Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 COLUM. J. TRANSNAT'L. L. 79 (1979)).

29. E.S.C. Res. 1985/17, U.N. ESCOR, Supp. No. 1, at 15, U.N. Doc. E/1985/85 (1985).

30. *Id.*

31. *Id.* The Committee members elect their own officers, for two year terms. Rules of Procedure of the Committee: .01/09/93. E/C.12/1990/4/Rev.1 (Basic Reference Document) (1993), at Rule 15.

32. For helpful contemporaneous accounts of the Committee's early operations, see Philip Alston & Bruno Simma, *First Session of the UN Committee on Economic, Social and Cultural Rights*, 81 AM. J. INT'L L. 747 (1987); Philip Alston & Bruno Simma, *Second Session of the UN Committee on Economic, Social and Cultural Rights*, 82 AM. J. INT'L L. 603 (1987); Scott Leckie, *An Overview and Appraisal of the Fifth Session of the UN Committee on Economic, Social and Cultural Rights*, 13 HUM. RTS. Q. 539 (1991).

the Committee has used relatively scant financial and political resources to good effect,<sup>33</sup> rapidly bringing the ICESCR Covenant's monitoring processes up to current treaty body standards, advancing its own political fortunes, and gaining greater general acceptance for the justiciability of economic, social and cultural rights through careful attention to norm development.

#### A. *Improvement and Entrenchment of the Monitoring Processes*

The new Committee stepped into a failed monitoring system, and, relatively free from procedural mandates,<sup>34</sup> set about inventing a process that would engage the States' Parties and revive interest in economic, social and cultural rights.<sup>35</sup> By learning from the experiences of the existing treaty bodies, creatively interpreting its mandate, and consistently undertaking broader normative initiatives, the Committee quietly brought the Covenant's enforcement processes into line with the other UN human rights treaties. In fact, according to a recent report on the methods of the six treaty monitoring bodies, the Committee has moved beyond standard practice in many respects.

##### 1. *Leveraging Slim Resources*

Professor Anne Bayefsky's 2001 in-depth evaluation of the UN human rights monitoring system<sup>36</sup> provides insight into the

33. See, e.g., CRAVEN, INTERNATIONAL COVENANT, *supra* note 28, at 102-3; ARAMBULO, *supra* note 11, at 39; Leckie, *supra* note 32, at 546-47; John Foster, *Meeting the Challenges: Renewing the Progress of Economic, Social and Cultural Rights*, UNIV. N.B. L.REV. 197, 200 (1998); Rajesh Swaminathan, *Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights* 37 COLUM. J. TRANSNAT'L L. 161, 187 (1998).

34. See CRAVEN, INTERNATIONAL COVENANT, *supra* note 28, at 50 (stating that the Committee has had the power to shape its practices "in an unprecedented manner"). For example, the ICESCR requires only that the States' Parties submit reports "in accordance with a programme to be established by the Economic and Social Council," ICESCR, *supra* note 16, art. 17.1. Only the ICCPR affords similar flexibility. ICCPR, *supra* note 15, art. 40. The other four in-force UN human rights treaties specify the periodicity, giving their monitors less autonomy in crafting their own solutions to the difficult problems of overdue reports and backlogs. See ICERD, *supra* note 23, art. 9.1 (requiring reports one year after entry and every two years thereafter); CEDAW, *supra* note 23, art. 18.1 (requiring reports one year after entry into force and at least every four years thereafter); CAT, *supra* note 23, art. 19.1 (requiring reports one year after entry into force and every four years thereafter); CRC, *supra* note 23, art. 44.1 (requiring reports two years after entry into force and every five years thereafter).

35. See Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 356-62 (1987) (discussing contemporaneously the Committee's earliest planning processes).

36. ANNE F. BAYESKY, THE UN HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS 2 (2001).

Committee's procedural achievements and shortcomings. The report reveals that by most indicators the Committee has achieved parity with the other monitoring bodies, despite being one of the lower resourced bodies.<sup>37</sup>

Monitoring economic, social and cultural rights is arguably more resource intensive than monitoring civil and political rights, because ESCRs implicate inter-disciplinary information that is maintained outside the customary "justice" framework.<sup>38</sup> Although the CESCR is not the only UN human rights body that deals with economic, social and cultural rights, it is the only body that deals exclusively with them. The Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Rights of the Child (CRC) and Committee on the Elimination of Discrimination Against Women (CEDAW) deal with ESCRs<sup>39</sup> and thus inter-disciplinary issues, creating greater information gathering and synthesis demands. UNICEF and UNIFEM, which can be considered "parallel" agencies to the CRC and CEDAW, have decided that the human rights implementation work falls within their mandates, and they have undertaken supportive roles with their "counterpart" human rights bodies.<sup>40</sup> UNICEF's support to the CRC is particularly significant.<sup>41</sup> As a result, the CRC has more staff members than other monitoring bodies, and a strong network of NGOs supported by UNICEF, which participates in the CRC's work.<sup>42</sup>

Meanwhile, the UN agency arguably most likely to be cast in the role of a CESCR "counterpart" is the UNDP, and the UNDP has

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37. *Id.* at 99 (mentioning that the Committee is among the three committees that offer no remuneration to its members). This information must be taken in comparative context; however, the three treaty bodies that do compensate their members (the Human Rights Committee (HRC), the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Committee on the Rights of the Child (CRC)) pay only \$3000-\$5000 per year to their members. *Id.*

38. See ICESCR, *supra* note 16, arts. 18-23 (acknowledging the importance of the UN specialized agencies to monitoring and implementing economic, social and cultural rights, and anticipating extensive cooperation between the Committee and the specialized agencies).

39. See, e.g., ICERD, *supra* note 23, art. 2(2) (noting "special measures"/affirmative action); 5(e) (explaining non-discrimination in a range of ESCRs); CRC, *supra* note 23, arts. 24, 26-29, 32; CEDAW, *supra* note 23, art. 3 (noting "all appropriate measures"/affirmative action); *id.* arts. 10-13, 16 (indicating non-discrimination in a range of economic and social services); *id.* art. 14.2 (mandating a range of economic and social services for rural women).

40. BAYEFSKY, *supra* note 36, at 39, 43, 49, 62.

41. See *id.*

42. See *id.* (suggesting that there does not appear to be any literature examining whether and how a close relationship with an agency might compromise a treaty monitoring body's independence).

proven to be much more cautious about becoming involved with human rights monitoring. As a result, the Committee has not enjoyed significant UNDP support.<sup>43</sup> Another example of limited resources is that the CESCER also has a smaller complement of secretariat support staff because of its status as a non-treaty-based body.<sup>44</sup>

## 2. *General Procedures and Progressive Monitoring Methodologies*

In the Bayefsky report, the Committee receives generally favorable marks vis-à-vis the other committees for its reporting practices.<sup>45</sup> The Committee requires that from the time of consideration of a state's first report, reports be submitted every five years, unless the Committee decides to shorten the period based on factors such as the quality of the most recent dialogue.<sup>46</sup> This periodicity is in line with the other bodies, whose spacing reflects a variety of arrangements, including two years<sup>47</sup> and five years.<sup>48</sup> The Human Rights Committee sets no specific period, retaining the ability to set the timing for each member government.<sup>49</sup> Like the Human Rights Committee (HRC), the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Committee Against Torture (CAT), the CESCER has a two-year reporting backlog.<sup>50</sup>

All treaty monitoring regimes suffer from a significant number of overdue reports.<sup>51</sup> As of 2001, the Committee had 164 overdue reports, falling in the middle of the situation of all the treaty bodies, which range from 106-397.<sup>52</sup> Although its numbers are relatively low, the Committee has the highest percentage of States' Parties with overdue reports.<sup>53</sup> CERD routinely considers states' practices in the absence of a report, and CESCER, along with the HRC, is following

43. See *id.* at 49 (noting that "UNDP can be said to have a growing belief – *still largely theoretical* – in the centrality of the treaty standards, and their implementation, to their work.") (emphasis added).

44. Craven, *Committee*, *supra* note 13, at 461.

45. See BAYEFISKY, *supra* note 36, at 223-36.

46. ICESCR, *supra* note 16, art. 17.1; E.S.C. Res. 1988/4, U.N. ESCOR, Supp. No. 1 at Rule 58.2; CESCER Resolution, at III (2000).

47. ICERD, *supra* note 23, art. 9.1.

48. CRC, *supra* note 23, art. 44.1 (noting the period to be 5 years); CEDAW, *supra* note 23, at 18.1(b) (explaining that the period is 4 years).

49. ICCPR, *supra* note 15, art. 40.1(b).

50. BAYEFISKY, *supra* note 36, at 16.

51. See *id.* at 8-11, 469-502.

52. *Id.* at 472.

53. *Id.* at 475.

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suit.<sup>54</sup> The Bayefsky report notes that the Committee is only body that sometimes fails to provide information in its annual reports on the due date of the states' overdue reports.<sup>55</sup>

The Committee's procedures make it open to civil society participation. Beginning in 1987 it accepted written and oral submissions by NGOs.<sup>56</sup> In 1993 it established a formal procedure for NGO participation.<sup>57</sup> Currently it is one of four monitoring bodies that holds a "pre-sessional working group" to generate the list of issues for states to answer and to encourage NGO input.<sup>58</sup> The Committee entertains NGO presentations in open meetings both at its pre-sessional working group sessions and on the first day of the session.<sup>59</sup> The Committee benefits from the significant involvement of international NGOs who dedicate resources to activating and supporting domestic NGOs to participate in Committee processes through "shadow" or "parallel" NGO reports and verbal interventions.<sup>60</sup> The Committee also consults with NGOs in preparation for drafting its General Comments.

54. See *id.* at 12; see, e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: Togo, U.N. ESCOR, 25th Sess., 26th mtg. ¶¶ 3, 17, U.N. Doc. E/C.12/1/Add.61 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of the Congo, U.N. ESCOR, 22d Sess., 22d mtg. ¶¶ 3, 24, U.N. Doc. E/C.12/1/Add.45 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Solomon Islands, U.N. ESCOR, 20th Sess., 24th mtg. ¶ 3, U.N. Doc. E/C.12/1/Add.33 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Saint Vincent and the Grenadines, U.N. ESCOR, 17th Sess., 45th mtg. ¶¶ 3, 5, U.N. Doc. E/C.12/1/Add.21 (1997); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Guinea, U.N. ESCOR, 14th Sess., 22d mtg. ¶ 2, U.N. Doc. E/C.12/1/Add.5 (1996); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mali, U.N. ESCOR, 11th Sess., 44th mtg. ¶ 2, U.N. Doc. E/C.12/1994/17 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mauritius, U.N. ESCOR, 10th Sess., 23d mtg. ¶ 2, U.N. Doc. E/C.12/1994/8 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya, U.N. ESCOR, 8th Sess., 19th mtg. ¶ 2, U.N. Doc. E/C.12/1993/6 (1993). The Bayefsky report endorses consideration in the absence of a report in some instances. See BAYEFISKY, *supra* note 36, at 13.

55. See Bayefsky, *supra* note 36, at 114, 120.

56. Virginia Dandan, *The Committee on Economic, Social and Cultural Rights and Non-Governmental Organizations*, in *THE UN HUMAN RIGHTS SYSTEM IN THE 21ST CENTURY* 227, 228 (Anne Bayefsky ed., 2000).

57. See *id.* at 229.

58. BAYEFISKY, *supra* note 36, at 29.

59. *Id.* at 43.

60. See, e.g., Centre on Housing Rights and Evictions, *Using the UN Committee for Economic, Social and Cultural Rights* (2001), available at <http://www.cohre.org/unframe.htm>; Foodfirst Information Action Network, at <http://www.fian.org> (providing a mission description). Other NGOs that have offered sustained, active support to the Committee include the American Association for the Advancement of Science, the Asian Forum for Human Rights and Development, Habitat International

The Committee has been relatively activist in responding to emergency situations and engaging in follow-up activities. It has undertaken two official missions, as many as CERD and more than the other monitoring bodies.<sup>61</sup> The Committee is one of only two committees that currently publishes information and conducts dialogues with States' Parties between formal sessions,<sup>62</sup> and the only one that has published procedures for solicitation of additional information.<sup>63</sup>

### 3. *Information Sharing Practices*

Concluding Observations are the document in which a monitoring body comments on individual State Party implementation of the relevant treaty. In its Concluding Observations, the Committee is one of three bodies that separate concerns from recommendations, a practice endorsed in the Bayefsky report as strengthening the recommendations.<sup>64</sup> The Committee receives endorsement for being one of three Committees whose annual reports lists the NGOs that participated in its proceedings,<sup>65</sup> one of four that lists reports received from states,<sup>66</sup> and one of three that always provides lists of reports that have been considered.<sup>67</sup> The report also endorses the Committee for being the only monitoring body that directly documents follow-up activities to consideration of states' reports,<sup>68</sup> as well as for being the only body that routinely provides information on its working methods.<sup>69</sup>

The report also critiques some of the Committee's reporting methodologies, noting that the Committee is one of four monitoring

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Coalition, Human Rights Information and Documentation Systems, International, the International Human Rights Internship Program, and the International Commission of Jurists. See, e.g., ALLAN MCCHESENEY, PROMOTING AND DEFENDING ECONOMIC, SOCIAL & CULTURAL RIGHTS: A HANDBOOK 165 (2000); ASIAN FORUM FOR HUMAN RIGHTS AND DEVELOPMENT AND INTERNATIONAL HUMAN RIGHTS INTERNSHIP PROGRAM, CIRCLE OF RIGHTS: ECONOMIC, SOCIAL & CULTURAL RIGHTS ACTIVISM: A TRAINING RESOURCE (2000); Dandan, *supra* note 56, at 229. Recently, the International Women's Rights Action Watch (IWRAP), a group primarily focused on CEDAW, has begun to participate in Committee hearings as well. Dandan, *supra* note 56, at 229.

61. BAYEFISKY, *supra* note 36, at 92-93.

62. See *id.* at 73.

63. *Id.*

64. See *id.* at 63.

65. See *id.* at 113.

66. See *id.*

67. See BAYEFISKY, *supra* note 36, at 113.

68. See *id.* at 113, 119-120.

69. See *id.* at 113, 119.

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bodies that do not reproduce comments received from governments on concluding observations<sup>70</sup> and one of only two that do not refer to the existence of such responses at all.<sup>71</sup> The Committee is one of three bodies that do not provide the names of the country rapporteurs,<sup>72</sup> and one of three that publish no information regarding the activities of the committee members between sessions.<sup>73</sup> The Committee is one of five committees that decided to discontinue publishing a summary of its dialogue with governments.<sup>74</sup> The Committee receives relatively high marks from the report for the quantity of information accessible through the Internet.<sup>75</sup>

#### 4. Bias

The Bayefsky report documents a lack of even treatment of similarly situated states in all the monitoring bodies' concluding observations.<sup>76</sup> Bayefsky negatively refers to the Committee's decision to interact with Israel between sessions.<sup>77</sup>

The Bayefsky report points out many factors contributing to political bias in all the treaty bodies,<sup>78</sup> including the fact that membership on a monitoring body is a part-time occupation,<sup>79</sup> and also that at least of 48% of the members serving on the committees have been "employed in some capacity by their governments."<sup>80</sup> This raises particularly direct and explicit concerns about the politicization of the CERD,<sup>81</sup> but also raise concerns about the CESC as well. The CESC and the other three committees that do not

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70. See *id.* at 113.

71. *Id.*

72. *Id.* at 113, 119.

73. BAYESKY, *supra* note 36, at 113.

74. *Id.* at 113. CEDAW is the only body that provides any record of the oral discussions, and it publishes only a summary of the government's opening statement, which is critiqued as "add[ing] very little to the written record." *Id.*

75. See *id.* at 122-23 (listing documents that should be added to the web; for CESC, the only omission noted is the list of biographical information for candidates to Committee membership).

76. See *id.* at 63 (stating that "political bias is sometimes evident in the differential depth of treatment of some states") (parenthetical omitted).

77. See *id.* at 73 (discussing the first instance of the committee's using new procedures for additional information requests).

78. BAYESKY, *supra* note 36, at 99-102.

79. *Id.* at 99.

80. *Id.* at 100.

81. See *id.* at 63 (stating that "the absence of discernable factual grounds for the differential treatment . . . is most evident in the concluding observations of CERD").

consider individual complaints have the highest percentage of government employee members.<sup>82</sup>

The report notes that other committees are in the forefront in creating mechanisms to ensure equitable geographical distribution in its leadership and subgroupings (such as, for example, membership on pre-sessional working groups),<sup>83</sup> an issue of particular interest in a post-colonial analysis. An analysis of committee memberships reveals that the Committee currently has the highest percentage of "tri-continental" members amongst all the committees. The Committee has had four Chairpersons: Ibrahim Ali Badawi El Sheikh (1987-1990, Egypt), Valeri I. Kouznetsov (1990-1991, Russian Federation), Philip Alston (1991-1998, Australia) and Virginia Bonoan-Dandan (1999-present, Philippines). The CESCR is also one of four committees whose membership includes fewer than twenty percent women.<sup>84</sup>

### *B. Contributions To Justiciability*

The Committee has worked hard to rescue economic, social and cultural rights from historical and political obscurity, and to overcome the non-justiciability critique that bedevils this body of rights. The Committee's efforts include development of the norms contained within the Covenant, elaboration of a draft option protocol for an individual complaints mechanism, promotion of progressive pronouncements by the UN Charter-based bodies, and attention to domestic justiciability.

#### *1. Norm Development*

The Committee focused early efforts on establishing that the Covenant does contain immediately enforceable obligations. Its first General Comment, issued in 1989, discussed the importance of "specific bench-marks" to the evaluation of States' Parties' progress.<sup>85</sup> Its third General Comment was entitled "The Nature of States' Parties' Obligations (Article 2(1), Paragraph I, of the Covenant)."<sup>86</sup>

82. *Id.* at 100.

83. BAYEFSKY, *supra* note 36, at 101.

84. *Id.* The two Committees with higher female representation are the CEDAW and the CRC. *Id.*

85. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 1 – Reporting by States' Parties, *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 3d Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 14, ¶¶ 6-7 (2001).

86. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 3 - The nature of States' Parties' obligations (art. 2, ¶ 1, of the Covenant), *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 5th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at



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In this document the Committee laid out an interpretation of Article 2(1) that made a strong case for the duty to take immediate action on all the Covenant provisions,<sup>87</sup> and the duty to immediately implement several of the Covenant obligations.<sup>88</sup>

The Committee's General Comments are its most important contribution to the elaboration of the substantive provisions of the Covenant.<sup>89</sup> Most of the General Comments contain detailed discussions about the content of particular obligations, including the right to housing,<sup>90</sup> education,<sup>91</sup> food,<sup>92</sup> and health.<sup>93</sup> Two of the General Comments center on vulnerable populations: persons with disabilities<sup>94</sup> and older persons.<sup>95</sup> One General Comment examines the issue of economic sanctions.<sup>96</sup>

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[www1.umn.edu/humanrts/gencomm/epcomm3.htm](http://www1.umn.edu/humanrts/gencomm/epcomm3.htm) (2001) [hereinafter General Comment No. 3].

87. See *id.* at [www1.umn.edu/humanrts/gencomm/epcomm3.htm](http://www1.umn.edu/humanrts/gencomm/epcomm3.htm) ¶¶ 2 & 9. See also CRAVEN, INTERNATIONAL COVENANT, *supra* note 28, at 128 (saying that "states therefore cannot make do with rights 'on the cheap.'").

88. General Comment No. 3, *supra* note 86, at 18 (2001). See also CRAVEN, INTERNATIONAL COVENANT, *supra* note 28, at 135 (suggesting Articles 3, 18, 13(3) and 15(3)).

89. See *generally* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.5 (2001).

90. See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 4 - The right to adequate housing (art. 11 (1) of the Covenant), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 6th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 22 (2001); U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 7 - The right to adequate housing (art. 11 (1) of the Covenant): forced evictions, in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 16th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 49 (2001) [hereinafter General Comment 7].

91. See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 11 - Plans of action for primary education (art. 14), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 20th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 63 (2001); U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 13 - The right to education (art. 13), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 21st Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 74 (2001).

92. See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 - The right to adequate food (art. 11), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 20th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 66 (2001).

93. See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 - The right to the highest attainable standard of health (art. 12), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 22d Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 90 (2001).

94. See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 5 - Persons with disabilities, in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, 11th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 28 (2001).

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DISCOURSE IN DEVELOPMENT

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## 2. *Optional Protocol*

Perhaps the most powerful indicator of justiciability is the opportunity for individuals to vindicate their rights through a complaints process. The Committee has been working to promote the promulgation of an optional protocol to the Covenant to establish such a procedure. Currently amongst the UN monitoring bodies, the HRC, CAT, CERD and CEDAW decide contentious petitions.<sup>97</sup> In 1997, after extensive consultations in Committee sessions and at the Netherlands Institute of Human Rights,<sup>98</sup> the Committee submitted a draft optional protocol to the Commission on Human Rights.<sup>99</sup> However, to date the Commission has used dilatory tactics to stall the measure, repeatedly returning the issue to the Secretariat for further discussions and clarifications despite the fact that relatively few governments have even chosen to comment on the draft.<sup>100</sup> In 2001, the UN High Commissioner for Human Rights held an expert consultation "directed to working through remaining issues and obstacles to the adoption [of the Protocol],"<sup>101</sup> which demonstrates that the Committee remains committed to pressing for this important implementation measure. The Committee has also

95. See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 6 – The economic, social and cultural rights of older persons, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 13th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 38 (2001).

96. See U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 8 – The relationship of economic sanctions and respect for economic, social and cultural rights, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 17th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 54 (2001).

97. See Andrew Byrnes, *An Effective Complaints Procedure in the Context of International Human Rights Law*, in *THE UN HUMAN RIGHTS SYSTEM IN THE 21ST CENTURY* 139, 140 (Anne Bayefsky ed., 2000) (remarking on HRC, CAT & CERD contentious case jurisdiction); Optional Protocol to the Convention on the Elimination of Discrimination against Women, U.N. Doc. G/A Res. A/54/4 (October 6, 1999) (noting CEDAW contentious case jurisdiction).

98. For a detailed description of the reasoning and conclusions reached at Utrecht, see ARAMBULO, *supra* note 11, at 201-357.

99. *Id.* at 160 (citing *Report of the Committee on Economic, Social and Cultural Rights to the Commission on Human Rights on a Draft Optional Protocol for the Consideration of Communications Concerning Non-Compliance with the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/CN.4/1997/105 (18 Dec. 1996), 5 *International Human Rights Reports* (1998)).

100. See *id.* at 161-162.

101. See Workshop on the Justiciability of Economic, Social and Cultural Rights, With Particular Reference to an Optional Protocol to the Covenant on Economic, Social and Cultural Rights (Palais Wilson, 5-6 Feb. 2001), at <http://www.unhchr.ch/html/menu2/escrwkshop.htm> (last visited Apr. 10, 2002).

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consistently used the reporting process to encourage governments to support the optional protocol.<sup>102</sup>

### 3. *Domestic Enforcement*

In addition to its nascent follow-up procedures and missions, the Committee has also worked for domestic enforcement of the Covenant through attention to the legal status of ESCRs at the national level. Its ninth General Comment, "The Domestic Application of the Covenant,"<sup>103</sup> reiterates its earlier justiciability interpretations and sets forth the international law requirements mandating recognition of the Covenant as binding law in the domestic legal order of States' Parties.<sup>104</sup> The Committee tracks this issue in the reporting process as well.<sup>105</sup>

## IV. "POST-COLONIAL" IMPLICATIONS OF THE COMMITTEE'S WORK

Parts II and III above document the Committee's successful attempts to rescue economic, social and cultural rights from obscurity. The more interesting task is to scrutinize the Committee's substantive jurisprudence through the post-colonial lens and suggest priorities based on a post-colonial "agenda." The following analysis of the Committee's work highlights aspects relevant to three themes found in the literature of post-colonial theory and expressed at the conference for which this Article was produced. Post-colonial theorists work to: 1) explore the problematic historical legacy of modern international intervention in the developing world, 2) expose the currently discriminatory aspects of international action

102. See, e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany, U.N. ESCOR, 26th Sess., 58th mtg. at ¶ 4, U.N. Doc. E/C.12/1/Add.68 (2001) (praising change of position vis-à-vis the Optional Protocol); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, 21st Sess., 54th mtg. at ¶ 11, U.N. Doc. E/C.12/1/Add.41 (1999) (praising position on Optional Protocol).

103. U.N. Committee on Economic, Social and Cultural Rights, General Comment 9 – The Domestic Application of the Covenant, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 19th Sess., U.N. Doc. HRI/GEN/1/Rev.5, at 58 (2001).

104. *Id.* at 59 ¶ 4.

105. See, e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: Armenia, 21st Sess., 53d mtg. at ¶ 8, U.N. Doc. E/C.12/1/Add.39 (1999) (reporting a failure to clarify status of the covenant under Armenian law); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iceland, 20th Sess., 20th mtg. at ¶ 11, U.N. Doc. E/C.12/1/Add.32 (1999) (noting a certain complacency with respect to the non-incorporation of the Covenant in domestic legislation); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Bulgaria, 21st Sess., 50th-51st mtg. at ¶¶ 34, 36, U.N. Doc. E/C.12/1/Add.37 (1999) (requesting the State Party to ensure the wide dissemination of Covenant and Concluding Observations).

vis-à-vis southern states, and 3) give voice to the most oppressed people.<sup>106</sup> The Committee's work is responsive to these concerns in that its message to the developing world often contradicts that of the international financial community, and because its reporting procedure jurisprudence has reflected a relatively even-handed treatment of north and south. At the same time, the Committee cannot escape some long-standing criticisms of the human rights regime in that it condemns certain cultural customs, and that it has insufficient resources to ensure the participation and follow-up that would make its work meaningful to the most disenfranchised of the millions of people who are supposed to be affected by its mandate.

#### A. *De-Mining the Social Spending Arena*

One of the primary projects of postcolonial theory is to examine colonialism and show the extent to which modern arrangements remain colonial in origins and effect.<sup>107</sup> Many scholars have also taken up the specific project of exposing the colonial and racist historical roots of contemporary international law,<sup>108</sup> international law reform,<sup>109</sup> international human rights,<sup>110</sup> and international financial institutions.<sup>111</sup> This literature provides a rich source for constructing

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106. These are of necessity imaginarily concrete post-colonial "concerns." As a branch of post-modernism, post-coloniality does not lend itself to the absolutes that drive human rights discourse. "Indeterminacy seems to abide forever. Postcoloniality is, for some, whatever you want to make of it that will allow individual compromises and opportunisms to flourish." E. SAN JUAN, JR., *BEYOND POSTCOLONIAL THEORY* 2 (1998). Similar concerns have been registered by writers attempting to reconcile the "static character" of human rights language with the discourse of international development, in which "[a]ll is up for reconsideration as contexts and possibilities change." Henry J. Steiner, *Social Rights and Economic Development: Converging Discourses?*, 4 *BUFF. H. RTS. L. REV.* 25, 41 (1998). See also UNITED NATIONS DEVELOPMENT PROGRAMME, *HUMAN DEVELOPMENT REPORT 2000* 19 (2000).

107. See LEELA GANDHI, *POSTCOLONIAL THEORY: A CRITICAL INTRODUCTION* 7-8 (1998); YOUNG, *supra* note 3, at 4.

108. See, e.g., Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *HARV. INT'L L.J.* 1, 10-22 (1999). See also Annelise Riles, *The View from the International Plane: Perspective and Scale in the Architecture of Colonial International Law*, in *LAWS OF THE POSTCOLONIAL* 127, 127-38 (Eve Darian-Smith and Peter Fitzpatrick eds., 1999).

109. See, e.g., Antony Anghie, *Civilization and Commerce: The Concept of Governance in Historical Perspective*, 45 *VILL. L. REV.* 887, 904-08 (2000); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 *AM. U.J. INT'L L. & POL'Y* 903, 926-46 (1997); Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 *VILL. L. REV.* 841, 851 (2000); see Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 *VAND. J. TRANSNAT'L L.* 877, 909-29 (2000); see also YOUNG, *supra* note 3, at 59.

110. See Makau Wa Mutua, *The Ideology of Human Rights*, 36 *VA. J. INT'L L.* 589, 597, 617 (1996); Riles, *supra* note 108, at 131; Fitzpatrick & Darian-Smith, *supra* note 1, at 1, 10.

111. See Padideh Ala'i, *A Human Rights Critique of the WTO: Some Preliminary*

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the Committee's colonial "legacy." The Committee's subject matter implies a unique legacy, one that holds lessons for the Committee's future methods and priorities.

Specifically, the work of examining developing countries' macroeconomic and social spending policies places the international Committee squarely in a realm where post-colonial north-on-south intervention and manipulation have been perhaps the most blatant and comprehensive. Colonialism was to a great extent an extractive enterprise dedicated to making the human and raw material resources of the colonized world available to the colonizing economies.<sup>112</sup> The period 1875-1947 was characterized by falling transport costs, "physical integration of world markets"<sup>113</sup> and the expansion of international law.<sup>114</sup> As a result, the period 1913-1947 was an age of economic "multinationalism," involving low trade barriers and "weak government."<sup>115</sup> The colonial powers used their control over southern government functions to achieve international economic integration. Concurrent with relinquishment of direct political control over the African and Asian colonies, the

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*Observations*, 33 GEO. WASH. J. INT'L L. REV. 537, 540 (2001); see also Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. J. INT'L L. POL. 243, 253 (2000) [hereinafter Anghie, *Globalization, IFIs and the Third World*] (noting that World Bank and International Monetary Fund programs sometimes violate social and economic rights); Jeannine Purdy, *Postcolonialism: The Emperor's New Clothes?*, in LAWS OF THE POSTCOLONIAL 212-13 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999); Dianne Otto, *Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference*, in LAWS OF THE POSTCOLONIAL 155 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999) (suggesting that the establishment of the World Bank, International Monetary Fund, and General Agreement on Tariffs and Trade was an effort by western interests to keep economic "questions" away from the control of the United Nations General Assembly).

112. See, e.g., FIELDHOUSE, *supra* note 3, at 75, 77, 81-82 (noting aspects of colonial rule such as low attention to colonial affairs by the larger colonizing governments and belated attention to ameliorative development measures as opposed to resource extraction and corporate interests). Fieldhouse also provides a useful survey of the integrated world economy "optimists," *id.* at 9, and "pessimists," *id.* at 32. Marx termed colonialism as Europe's period of "primitive accumulation." *Id.* at 42-43 (quoting KARL MARX, CAPITAL 751 (1867)). See also Catherine Couquery Vidrovitch, *Les Conditions de la Dépendance: Histoire de Sous-Développement*, in DECOLONISATIONS & NOUVELLES DÉPENDANCES: MODELES ET CONTRE-MODELES IDEOLOGIQUES ET CULTURELS DANS LE TIERS-MONDE 33 (Catherine Couquery Vidrovitch & Alain Forest eds., 1986) (rooting colonialism's legacy in the "économie de pillage").

113. See PANOS MOURDOUKOUTAS, THE GLOBAL CORPORATION: THE DECOLONIZATION OF INTERNATIONAL BUSINESS 19 (1999). This integration included the forced introduction of inappropriate technologies and commodification of national resources. TRAN VAN DINH, INDEPENDENCE, LIBERATION, REVOLUTION: AN APPROACH TO THE UNDERSTANDING OF THE THIRD WORLD 211 (1987).

114. See Riles, *supra* note 108, at 129 (describing a "flurry of activity" to develop international law in the late nineteenth century).

115. MOURDOUKOUTAS, *supra* note 113, at 16.

multinational corporation arose<sup>116</sup> and facilitated continuing action in the global south by northern-controlled business interests, despite the increased trade barriers and diversity of trading partners that characterized the immediate post-colonial period.<sup>117</sup>

The implication is that extraction has continued unabated. Certainly there is little evidence that the colonial powers devoted serious attention or resources to poverty reduction or general welfare measures in the colonies until shortly before decolonization.<sup>118</sup>

The trade and power imbalance the former colonies brought to the new dynamic did not go unremarked. The global south banded together to sponsor a series of initiatives in the United Nations urging that the independence-era vision of trade between equals be made reality. Political battles broke out over the rights of multinationals with respect to their host developing country governments. The New International Economic Order, or N.I.E.O., was formally adopted by the UN in a series of resolutions in 1974 and 1975.<sup>119</sup> It came to represent a bundle of southern government actions that included increased trade barriers and expropriation of multinational assets at the national level, along with the fight for increased north-south trade concessions and aid at the international level.<sup>120</sup>

Another key feature of post-war north-south economic relations was the network of international financial institutions ("IFIs"), most importantly the International Monetary Fund and the World Bank. These institutions have actively sought macroeconomic reform across the global south, reform that facilitates the operations of multinational corporations and international trade.<sup>121</sup> These agencies have also routinely advocated that southern governments reduce their social spending and re-tool production to service international

116. See FIELDHOUSE, *supra* note 3, at 256 (noting "the great leap forwards" in foreign direct investment after the second world war).

117. *Id.* at 35-38. See also YOUNG, *supra* note 3, at 47 (arguing that trade agreements and the western dominated IFIs, *inter alia*, "all [had] the effect of maintaining control").

118. See, e.g., FIELDHOUSE, *supra* note 3, at 86 (noting that the British empire's first attempt to underwrite domestic poverty-reducing expenditures took place in 1940). But see FIELDHOUSE, *supra* note 3, at 317 (stating that Japan made significant investments into Taiwanese and Korean education and health care).

119. See DINH, *supra* note 113, at 203; Philip Alston, *The Basic Working Paper: Development and the Rule of Law: Prevention versus Cure as a Human Rights Strategy*, in DEVELOPMENT, HUMAN RIGHTS AND THE RULE OF LAW 31, 83 (1981) [hereinafter Alston, *Development and the Rule of Law*].

120. See Douglas Williams, *Human Rights and Economic Development*, in HUMAN RIGHTS AND DEVELOPMENT 26, 27 (1978).

121. See Anghie, *Globalization, IFIs, and the Third World*, *supra* note 111, at 257-258.

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markets, policies that have been widely condemned for producing high social costs, particularly in the short term.<sup>122</sup>

Thus the Committee is treading on sensitive historical ground to the extent that it assigns “blame” for poverty on poor governments. If the true value added of any supranational institution is to identify and provide support for replication of best practices, what does it mean for a country to slash its social welfare system by IMF mandate, engage in big development projects at the urging of the World Bank, and lower trade barriers pursuant to the WTO, only be condemned by a UN human rights committee for any resulting intensification of hunger, ill health and displacement? And in this context, how can the international human rights community constructively identify and address the very real contributions to poverty by national governments?

The Committee has found some satisfactory answers to these questions. First, it has been critical of IFI policies and interventions. The Committee has begun to engage the IFIs and to work more closely with its States’ Parties to counter to the liberal international financial mandate enforced throughout the international community. The Committee is urged to continue and expand this mandate, to maximize appropriate attention to poverty alleviation by international financial institutions and corporations, the bodies that have been called the “loci of real power exertion.”<sup>123</sup>

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122. See, e.g., *The IMF Formula: Prescription for Poverty*, in INTERNATIONAL FORUM ON GLOBALIZATION, IFG BULLETIN, Volume 1, Issue 1, 8 (2001) (excerpted from INTERNATIONAL FORUM ON GLOBALIZATION, DOES GLOBALIZATION HELP THE POOR? (2001)). See also Enrique R. Carrasco & M. Ayhan Kose, *Income Distribution and the Bretton Woods Institutions: Promoting an Enabling Environment for Social Development*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 1, 31 & n.177 (1996) (noting that some IMF reports have criticized Structural Adjustment Programs (SSAPs)). The social critique of structural adjustment is by no means uncontroversial. *Id.* Carrasco and Kose argue that claims of worsened income distribution resulting from SSAPs are “only partially borne out,” while also noting the World Bank’s own recent publications on poverty and growing civil society attention to scrutinizing the IFIs. *Id.* at 31-32. Interestingly, when the World Bank issued a comprehensive report on poverty, stories surfaced about last minute revisions to the text owing to struggles over how to portray the impact of market oriented reforms on poverty. See, e.g., James Cox, *Poor Nations Just Getting Poorer: Controversial Poverty Report Urges Growth and Equality*, USA TODAY, Sept. 13, 2000, at 5B; Steven Pearlstein, *World Bank Rethinks Poverty; Report Finds Traditional Approach Fails*, WASH. POST, Sept. 13, 2000, at E1. Reportedly, the chief author of the report resigned after U.S. and European officials reportedly demanded that he put more emphasis on economic growth and free-market policies as ways to alleviate poverty. *Id.*

123. Hans-Otto Sano, *Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development*, 22 HUM. RTS. Q. 734, 752 (2000). Interestingly, the activists who worked to revive the international economic, social and cultural rights enforcement regime began their campaign using the language of the N.I.E.O. See, e.g., Alston, *Development and the Rule of Law*, *supra* note 119, at 97.

### 1. *Committee's Statements on Globalization*

The Committee's limited interventions into the debate on globalization and structural adjustment are, from the point of view of the northern countries, its most controversial work.<sup>124</sup> The northern countries give the institutional rationale that human rights should deal with relationships between governments and individuals, not relationships between governments. Meanwhile, the human rights community is attempting to expose the relationship between the northern governments and people in the countries that are victims of improperly planned and implemented development projects and foreign direct investment.

#### a. *External Debt*

The Committee's jurisprudence reveals some convergence between the Committee's interpretation of the Covenant and the anti-poverty agenda of global southern civil society. The Committee routinely touches on globalization issues in its concluding observations regarding member states' compliance with the Covenant. In most instances, these comments assume a link between debt burdens and structural adjustment and the exacerbation of poverty. For example, the Committee has noted the negative ESCR consequences of external debt servicing for Algeria, Cameroon, the Republic of Congo, Honduras, Jamaica, Kyrgyzstan, Mexico, the Philippines, Paraguay, Senegal, the Solomon Islands, the Sudan, and Syria.<sup>125</sup> The

124. A recent example of north-south split on this issue was the UN Commission on Human Rights vote on a resolution addressing the effects of structural adjustment policies and foreign debt on the full enjoyment of ESCRs. See UN Press Release, 57th Session, Commission on Human Rights Adopts Resolutions on Right to Food, Unilateral Coercive Measures, Foreign Debt, Adequate Housing, Education, and Economic, Social and Cultural Rights (Apr. 20, 2001), found at <http://www.unhchr.ch/huricane/hurricane.nsf/view01/9264BBAA8CD8A618C1256A38002743AE?opendocument> (on file with author).

125. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Algeria, U.N. ESCOR, 13th Sess., 58th mtg. at ¶ 12, U.N. Doc. E/C.12/1995/17 (1995); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cameroon, U.N. ESCOR, 21st Sess., 54th mtg. at ¶ 8, U.N. Doc. E/C.12/1/Add.40 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of the Congo, U.N. ESCOR, 22d Sess., 22d mtg. at ¶ 11, U.N. Doc. E/C.12/1/Add.45 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Honduras, U.N. ESCOR, 25th Sess., 25th mtg. at ¶ 9, U.N. Doc. E/C.12/1/Add.57 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Jamaica, U.N. ESCOR, 27th Sess., 85th mtg. at ¶ 5, U.N. Doc. E/C.12/1/Add.75 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kyrgyzstan, U.N. ESCOR, 23d Sess., 51st mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.49 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, U.N. ESCOR, 21st Sess., 54th mtg. at ¶ 3, U.N. Doc. E/C.12/1/Add.41 (1999) (noting that Mexico's reduction of its



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Committee should build on these observations by polling industrialized governments about their positions on debt relief and urging them to use their influence to bring about meaningful debt relief.

*b. International Financial Institutions*

The UN human rights community is in the process of evaluating and identifying a role for itself vis-à-vis the international financial institutions. In 1999, the Commission on Human Rights created the Open-Ended Working Group on Structural Adjustment Programmes and Economic, Social and Cultural Rights to “elaborate basic policy guidelines on structural adjustment programmes and economic, social and cultural rights which could serve as a basis for a continued dialogue between human rights bodies and the international financial institutions.”<sup>126</sup> As of the working group’s fourth session in February 2001, it had undertaken numerous consultations and no other action had been taken.<sup>127</sup>

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foreign debt had “create[d] an environment conducive to a more effective implementation of the rights under the Covenant”); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, U.N. ESCOR, 9th Sess., 49th mtg. at ¶ 5, U.N. Doc. E/C.12/1993/16 (1994) (listing “considerable foreign indebtedness” among “difficulties severely affect[ing] the most vulnerable segments of society”); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Philippines, U.N. ESCOR, 12th Sess., 14th mtg. at ¶ 7, U.N. Doc. E/C.12/1995/7 (1995); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Paraguay, U.N. ESCOR, 14th Sess., 22d mtg. at ¶ 7, U.N. Doc. E/C.12/1/Add.1 (1996); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Senegal, U.N. ESCOR, 26th Sess., 53d mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.62 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Senegal, U.N. ESCOR, 9th Sess., 48th mtg. at ¶ 5, U.N. Doc. E/C.12/1993/18 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Solomon Islands, U.N. ESCOR, 20th Sess., 24th mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.33 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sudan, U.N. ESCOR, 23d Sess., 53d mtg. at ¶ 15, U.N. Doc. E/C.12/1/Add.48 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Syrian Arab Republic, U.N. ESCOR, 26th Sess., 53d mtg. at ¶ 11, U.N. Doc. E/C.12/1/Add.63 (2001).

126. *Economic, Social and Cultural Rights: Open-ended Working Group on Structural Adjustment Programmes and Economic, Social and Cultural Rights: Note by the Secretariat*, U.N. Commission on Human Rights, 56th Sess., Agenda Item 10, at ¶ 1, U.N. Doc. E/CN.4/2000/53 (2000).

127. See, e.g., *Economic, Social and Cultural Rights: Open-ended Working Group on Structural Adjustment Programmes and Economic, Social and Cultural Rights: Note by the Secretariat*, U.N. Commission on Human Rights, 56th Sess., Agenda Item 10, at 138, ¶¶ 3-4, U.N. Doc. E/CN.4/2000/53 (2000) (stating that at its third session, the working group took action only to elect a Chairperson and agree on holding a further session in spring 2001); *Economic, Social and Cultural Rights: Open-ended working group on structural adjustment programmes and economic, social and cultural rights: Note by the secretariat*, U.N. Commission on Human Rights, 57th Sess., Agenda Item 10, at ¶ 2, U.N. Doc. E/CN.4/2001/57 (2001) (stating that at its fourth session, the Commission decided to postpone the working group session, because of the

The Working Group's recommendations could be an important step toward expanding the Committee's influence on aid spending and structural adjustment. The Committee has taken some preliminary actions as well. In 2000, the Committee Chairperson addressed a letter to the President of the World Bank and the Director-General of the IMF proposing a dialogue to explore the use of human rights and the Covenant in the Poverty Reduction Strategy process.<sup>128</sup> Both institutions responded affirmatively.<sup>129</sup> In a change from the early days of the Committee's work,<sup>130</sup> in recent Committee sessions both the IMF and the World Bank have participated as observers.<sup>131</sup> Because the Committee encourages NGO participation in its information gathering, the Committee's interactions with the IFIs could be an important source of grass-roots information for the lending institutions.<sup>132</sup>

The Committee posted on its website a series of papers presented at a spring 2001 conference on globalization, addressing a range of areas that could inform norm development and practical monitoring strategies by the Committee. The subjects included global economic governance and national autonomy,<sup>133</sup> economics,<sup>134</sup> gender equality

"numerous consultations held").

128. Letter from Virginia Bonoan-Dandan, Chairperson of the Committee on Economic, Social, and Cultural Rights, James D. Wolfensohn, President, World Bank & Horst Köhler, Director-General, International Monetary Fund (Sept. 7, 2000), in U.N. Committee on Economic, Social, and Cultural Rights: Report on the Twenty-Second, Twenty-Third and Twenty-Fourth Sessions, Annex VI, at 162-B, U.N. Doc. E/2001/22, E/C.12/2000/21.

129. See Letter from James D. Wolfensohn, President, World Bank, to Virginia Bonoan-Dandan, Chairperson, Committee, Social, and Cultural Rights (Sept. 26, 2000), in U.N. Committee on Economic, Social and Cultural Rights: Report on the Twenty-Second, Twenty-Third and Twenty-Fourth Sessions, Annex VI, at 164, U.N. Doc. E/2001/22, E/C.12/2000/21 (2001); see also Letter from Horst Köhler, Director-General, International Monetary Fund, to Virginia Bonoan-Dandan, Chairperson, Committee on Economic, Social and Cultural Rights (Nov. 14, 2000), in U.N. Committee on Economic, Social and Cultural Rights: Report on the Twenty-Second, Twenty-Third and Twenty-Fourth Sessions, Annex VI, at 165, U.N. Doc. E/2001/22, E/C.12/2000/21 (2001).

130. See CRAVEN, INTERNATIONAL COVENANT, *supra* note 28, at 79 (noting that only the ILO, UNESCO, WHO and FAO attended any of the first nine sessions of the Committee).

131. Committee on Economic, Social and Cultural Rights: Report on the Twenty-Second, Twenty-Third and Twenty-Fourth Sessions, U.N. ESCOR, at ¶ 8, E/2001/22, U.N. Doc. E/C.12/2000/21 (2001) (stating that regional financial institutions have not participated).

132. See, e.g., Carrasco & Kose, note 122, at 45 (stating that the IMF is "virtually unreachable by civil society").

133. See *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights: International Consultation "Economic, Social and Cultural Rights in the Development Activities of International Institutions" organized in Cooperation with the High Council for International Cooperation (France)*, 25th Sess., Agenda Item 5, U.N. Doc. E/C.12/2001/6 (2001).

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and globalization,<sup>135</sup> trade and human rights,<sup>136</sup> as well as the International Monetary Fund.<sup>137</sup> This is the only posting of its kind on the Committee's website, demonstrating engagement with the issue of globalization.

To date, the UN human rights community has been frankly critical of the IFI's lynchpin programming. The UN Special Rapporteur on the Realization of Economic, Social and Cultural Rights stated in a report that despite some improvements in the design of structural adjustment programs, these programs "continue to have a daunting effect upon the capacities of legal regimes with obligation to fulfill and respect [human] rights," neither fully protect[] the most vulnerable" nor "actually . . . decrease[] levels of impoverishment."<sup>138</sup> A 2000 joint report by the Independent Expert on Structural Adjustment Policies and the Special Rapporteur on the Effects of Foreign Debt on the full enjoyment of Economic, Social and Cultural Rights cited the "tortured history of debt relief for poor countries"<sup>139</sup> forcefully linking poverty and structural adjustment programs and calling for debt relief.<sup>140</sup>

134. See *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: International Consultation "Economic, Social and Cultural Rights in the Development Activities of International Institutions" organized in cooperation with the High Council for International Cooperation (France)*, 25th Sess., Agenda Item 5, U.N. Doc. E/C.12/2001/8 (2001).

135. See *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: International Consultation "Economic, Social and Cultural Rights in the Development Activities of International Institutions" organized in cooperation with the High Council for International Cooperation (France)*, 25th Sess., Agenda Item 5, U.N. Doc. E/C.12/2001/4 (2001).

136. See *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: International Consultation "Economic, Social and Cultural Rights in the Development Activities of International Institutions" organized in cooperation with the High Council for International Cooperation (France)*, 25th Sess., Agenda Item 5, U.N. Doc. E/C.12/2001/WP.2 (2001).

137. *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social Cultural Rights: International Consultation "Economic, Social and Cultural Rights in the Development Activities of International Institutions" organized in cooperation with the High Council for International Cooperation (France)*, 25th Sess., Agenda Item 5, U.N. Doc. E/C.12/2001/WP.5 (2001).

138. *The Realization of Economic, Social and Cultural Rights: Final Report Submitted by Danilo Türk, Special Rapporteur*, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 44th Sess., Agenda Item 8, at 41, U.N. Doc. E/CN.4/Sub.2/1992/16 (1992).

139. *Economic, Social and Cultural Rights: Note by the Secretariat, Submitted by the Independent Expert on Structural Adjustment Policies and the Special Rapporteur on the Effects of Foreign Debt on the Full Enjoyment of Economic, Social and Cultural Rights*, U.N. Commission on Human Rights, 56th Sess., Agenda Item 10, Exec. Summ., U.N. E/CN.4/2000/51 (2000).

140. *Id.* ¶ 1-2, U.N. Doc. E/CN.4/2000/51 (2000); see also *Economic, Social and Cultural Rights: Effects of structural adjustment policies on the full enjoyment of human rights: Report by the Independent Expert, Mr. Fantu Cheru, submitted in accordance with Commission*

The Committee occasionally cites IFI-produced statistics<sup>141</sup> and urges States' Parties to reach out to IFIs for technical assistance.<sup>142</sup> But from the Committee's point of view, perhaps the most significant aspect of the IFIs is their effect, for good or ill, on poverty. The Committee has acknowledged negative consequences of both internally and externally imposed structural adjustment policies, including privatization, in Algeria, Argentina, Bulgaria, Cameroon, Colombia, Egypt, El Salvador, Honduras, Korea, Nepal, the Netherlands, Nicaragua, Romania, Senegal, the Solomon Islands, and Venezuela.<sup>143</sup> In the case of Mauritius, the Committee endorsed

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*decisions 1998/102 and 1997/103*, U.N. Commission on Human Rights, 55th Sess., Agenda Item 10, U.N. Doc. E/CN.4/1999/50 (1999).

141. *E.g.*, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mongolia, U.N. ESCOR, 23d Sess., 49th mtg. at ¶ 11, U.N. Doc. E/C.12/1/Add.47 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nigeria, U.N. ESCOR, 18th Sess., 9th mtg. at ¶ 26, U.N. Doc. E/C.12/1/Add.23 (1998). Both the Committee and commentators point to the importance of the international financial institutions in developing indicators useful to the Committee's work. See CRAVEN, INTERNATIONAL COVENANT, *supra* note 28, at 78 (citing remarks at the Committee's sixth session, U.N. Doc. E/1992/23, Chap. VII, 81-86, ¶¶ 332-51, Supp. (No. 3) (1992)).

142. *E.g.*, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mongolia, U.N. ESCOR, 23d Sess., 49th mtg. at ¶ 21, U.N. Doc. E/C.12/1/Add.47 (2000); Concluding Observations: Report on the Technical Assistance Mission to Panama of the Committee on Economic, Social and Cultural Rights, U.N. ESCOR, 12th Sess., at ¶ 81, U.N. Doc. E/C.12/1995/8 (1995).

143. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Algeria, U.N. ESCOR, 27th Sess., 81st mtg. at ¶ 9, U.N. Doc. E/C.12/1/Add.71 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Argentina, U.N. ESCOR, 21st Sess., 52d mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.38 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Bulgaria, U.N. ESCOR, 21st Sess., 50th-51st mtgs. at ¶ 9, U.N. Doc. E/C.12/1/Add.37 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Cameroon, U.N. ESCOR, 21st Sess., 54th mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.40 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia, U.N. ESCOR, 27th Sess., 85th-86th mtgs. at ¶ 9, U.N. Doc. E/C.12/1/Add.74 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt, U.N. ESCOR, 22d Sess., 26th mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.44 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: El Salvador, U.N. ESCOR, 14th Sess., 26th mtg. at ¶ 16, U.N. Doc. E/C.12/1/Add.4 (1996); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Honduras, U.N. ESCOR, 25th Sess., 25th mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.57 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea, U.N. ESCOR, 25th Sess., 26th mtg. at ¶ 12, U.N. Doc. E/C.12/1/Add.59 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nepal, U.N. ESCOR, 26th Sess., 55th mtg. at ¶ 34, U.N. Doc. E/C.12/1/Add.66 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Netherlands, U.N. ESCOR, 18th Sess., 28th mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.25 (1998); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nicaragua, U.N. ESCOR, 9th Sess., 46th mtg. at ¶ 6, U.N. Doc. E/C.12/1993/14 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Romania, U.N. ESCOR, 10th Sess., 25th-26th mtgs. at ¶ 8, U.N. Doc. E/C.12/1994/4 (1994); Concluding

the structural adjustment as successful and ESCR-protective.<sup>144</sup> The Committee pointed out in its Concluding Observations relating to Azerbaijan the necessity of transparency in the privatization process.<sup>145</sup> When reviewing the record of Belarus, the Committee noted that international aid was being withheld because of the government's failure to introduce certain legal and economic reforms,<sup>146</sup> and at least implicitly endorsed this condition with the statement that "[m]any of the country's present economic and social difficulties show the need to expedite economic reforms and to build up democratic institutions based on the principles of the rule of law."<sup>147</sup>

The Committee interprets the Covenant to require reform measures protective of vulnerable populations who might be negatively impacted by structural adjustment,<sup>148</sup> and has commended the efforts of several States' Parties to supplement structural adjustment programming with mitigative social spending.<sup>149</sup> In some

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observations of the Committee on Economic, Social and Cultural Rights: Senegal, U.N. ESCOR, 26th Sess., 53d mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.62 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Senegal, U.N. ESCOR, 9th Sess., 49th mtg. at ¶¶ 5, 7, U.N. Doc. E/C.12/1993/18 (1993); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Solomon Islands, U.N. ESCOR, 20th Sess., 24th mtg. at ¶¶ 10, 20, U.N. Doc. E/C.12/1/Add.33 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Venezuela, U.N. ESCOR, 25th Sess., 23d mtg. at ¶ 8, U.N. Doc. E/C.12/1/Add.56 (2001).

144. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mauritius, U.N. ESCOR, 10th Sess., 23d mtg. at ¶ 6, U.N. Doc. E/C.12/1994/8 (1994).

145. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Azerbaijan, U.N. ESCOR, 17th Sess., 54th mtg. at ¶ 29, U.N. Doc. E/C.12/1/Add.20 (1997).

146. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Belarus, U.N. ESCOR, 15th Sess., 54th mtg. at ¶ 11, U.N. Doc. E/C.12/1/Add.7/Rev.1 (1996).

147. *Id.*

148. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Guinea, U.N. ESCOR, 14th Sess., 22d mtg. at ¶ 9, U.N. Doc. E/C.12/1/Add.5 (1996); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, U.N. ESCOR, 9th Sess., 49th mtg. at ¶ 16, U.N. Doc. E/C.12/1993/16 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nicaragua, U.N. ESCOR, 9th Sess., 46th mtg. at ¶ 14, U.N. Doc. E/C.12/1993/14 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya, U.N. ESCOR, 8th Sess., 19th mtg. at ¶ 6, U.N. Doc. E/C.12/1993/6 (1993).

149. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Algeria, U.N. ESCOR, 13th Sess., 58th mtg. at ¶ 7, U.N. Doc. E/C.12/1995/17 (1995); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Suriname, U.N. ESCOR, 12th Sess., 27th mtg. at ¶ 6, U.N. Doc. E/C.12/1995/6 (1995); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco, U.N. ESCOR, 10th Sess., 26th-27th mtgs. at ¶ 4, U.N. Doc. E/C.12/1994/5 (1994); Concluding Observations of the

cases the Committee has recommended specific protective reforms.<sup>150</sup> To date, the Committee's concern appears to have been centered on the presence or absence of any type of IFI ameliorative social programming; the Committee has not commented on the extent or effectiveness or publicized existing critiques<sup>151</sup> of these programs.

In recent years, the Committee has begun to urge States' Parties to take their Covenant obligations into account when negotiating with IFIs.<sup>152</sup> The Committee also presses donor countries to use their sway

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Committee on Economic, Social and Cultural Rights: Uruguay, U.N. ESCOR, 10th Sess., 25th mtg. at ¶ 3, U.N. Doc. E/C.12/1994/3 (1994).

150. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco, U.N. ESCOR, 24th Sess., 82d mtg. at ¶ 39, U.N. Doc. E/C.12/1/Add.55 (2000) (recommending adoption of "safety nets"); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Bulgaria, U.N. ESCOR, 21st Sess., 50th-51st mtgs. at ¶ 24, U.N. Doc. E/C.12/1/Add.37 (1999) (recommending socially protective alterations to "economic reform programmes"); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Algeria, U.N. ESCOR, 13th Sess., 58th mtg. at ¶ 23, U.N. Doc. E/C.12/1995/17 (1995) (recommending "continuous assess[ments]" of economic reforms and "special priority" for ameliorative social policies); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco, U.N. ESCOR, 10th Sess., 26th-27th mtgs. at ¶ 19, U.N. Doc. E/C.12/1994/5 (1994) (recommending adoption of "a system of taxation favoring direct and progressive taxes and the extension of the social security system").

151. For examples of such criticisms, see Bharati Sadasivam, *The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda*, 19 HUM. RTS. Q. 630, 646 (1997) (although adjustment lending has increasingly included social spending, the projects tend to be temporary and fail to reform domestic social spending institutions); Sheila Smith, *The Social Dimensions of Structural Adjustment: A Change of Direction or a Figleaf?*, in STRUCTURAL ADJUSTMENT AND CRISIS IN AFRICA: ECONOMIC AND POLITICAL PERSPECTIVES (1992).

152. See, e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nepal, U.N. ESCOR, 26th Sess., 55th mtg. at ¶ 38, U.N. Doc. E/C.12/1/Add.66 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Syrian Arab Republic, U.N. ESCOR, 26th Sess., 53d mtg. at ¶ 29, U.N. Doc. E/C.12/1/Add.63 (2001); Concluding observations of the Committee on Economic, Social and Cultural Rights: Ukraine, U.N. ESCOR, 26th Sess., 54th mtg. at ¶ 20, U.N. Doc. E/C.12/1/Add.65 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Georgia, U.N. ESCOR, 22d Sess., 21st mtg. at ¶ 22, U.N. Doc. E/C.12/1/Add.42 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Jordan, U.N. ESCOR, 23d Sess., 51st mtg. at ¶ 28, U.N. Doc. E/C.12/1/Add.46 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco, U.N. ESCOR, 24th Sess., 82d mtg. at ¶ 38, U.N. Doc. E/C.12/1/Add.55 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, U.N. ESCOR, 21st Sess., 54th mtg. at ¶ 34, U.N. Doc. E/C.12/1/Add.41 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Bulgaria, U.N. ESCOR, 21st Sess., 50th-51st mtgs. at ¶ 24, U.N. Doc. E/C.12/1/Add.37 (1999); see also Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea, U.N. ESCOR, 25th Sess., 26th mtg. at ¶ 12, U.N. Doc. E/C.12/1/Add.59 (2001) (expressing "concern" that Korean government does not negotiate with IFIs in a manner protective of ESCRs); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt, U.N. ESCOR, 22d Sess., 26th mtg. at ¶ 14, U.N. Doc. E/C.12/1/Add.44 (2000) (expressing "regret[]" that Egyptian government does not negotiate with IFIs in a manner protective of

with the IFIs to increase social spending.<sup>153</sup> Reflecting the lack of resources and the general standard in treaty monitoring body concluding observations,<sup>154</sup> the Committee's statement regarding relations with IFIs have the feel of rote language and include no detail suggesting specific priorities or mechanisms to follow in these negotiations. A recent statement urged a State Party to integrate ESCRs into its draft Poverty Reduction Strategy Paper,<sup>155</sup> reflecting growing attention to the IFI negotiation process.

This is a positive direction for the Committee to take. Developing country governments have notoriously weak hands in negotiations with international financial institutions,<sup>156</sup> and need more leverage if they are to move the IFIs toward greater attention to poverty alleviation. As the Committee pursues discussions with the IFIs, its recommendations to member states should become increasingly specific and meaningful. Having taken the all-important decision to refer to structural adjustment programming and negotiations, an additional useful step will be for the Committee to begin to routinely inquire into issues relating to IFI negotiations<sup>157</sup> and even, to the extent possible, time its reporting process to make its actions and

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ESCRs); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Morocco, U.N. ESCOR, 24th Sess., 82d mtg. at ¶ 15, U.N. Doc. E/C.12/1/Add.55 (2000) (expressing "regret[]" that Moroccan government does not negotiate with IFIs in a manner protective of ESCRs). In a recent session with the government of Korea, the first question put to the government in the public session was whether the government had raised its Covenant obligations in its negotiations with the IMF. *Summary record of the second part (public)\* of the 12th meeting : Republic of Korea*, at ¶ 11, U.N. Doc. E/C.12/2001/SR.12 (2002).

153. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany, U.N. ESCOR, 26th Sess., 58th mtg. at ¶ 31, U.N. Doc. E/C.12/1/Add.68 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Italy, U.N. ESCOR, 22d Sess., 23d mtg. at ¶ 20, U.N. Doc. E/C.12/1/Add.43 (2000). Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden, 27th Sess., 75th mtg. at ¶ 24, U.N. Doc. E/C.12/1/Add.70 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland, U.N. ESCOR, 24th Sess., 75th mtg. at ¶ 24, U.N. Doc. E/C.12/1/Add.52 (2000).

154. BAYEFKY, *supra* note 36, at 62.

155. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Senegal, U.N. ESCOR, 26th Sess., 53d mtg. at ¶ 50, U.N. Doc. E/C.12/1/Add.62 (2001).

156. See Anghie, *Globalization, IFIs and the Third World*, *supra* note 111, at 243, 256; Rajesh Swaminathan, Note, *Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights*, 37 COLUM. J. TRANSNAT'L L. 161, 214 (1998).

157. Currently, the Committee's reporting guidelines include no questions about international financial institutions. See *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States' Parties to the International Human Rights Treaties: Report of the Secretary-General*, at 5-25, HRI/GEN/2/Rev.1 (2001). Only the Committee on the Rights of the Child includes an inquiry into international financial institutions and development aid in its reporting guidelines. *Id.* at 57, ¶ 21.

suggestions relevant for immediately upcoming negotiation events. Growing civil society attention to the international financial institutions<sup>158</sup> offers a source of information for the Committee to access specific concerns about financing and projects.

With these recommendations, the author may diverge from the monolithic "postcolonial theory concerns" imagined in this paper. Anghie acknowledges the unrealized potential for the international financial institutions to contribute to poverty reduction, but at the same time cautions that this contribution would form part of "an endless dynamic of intervening in, and reforming, the recalcitrant third world state in all its dimensions."<sup>159</sup> The question might rest on whether the Committee merely assists States' Parties to defend their own economic, social and cultural rights and obligations in their dealings with the IFIs, or whether it attempts to influence IFIs to adopt and expand upon the World Bank's recent practice<sup>160</sup> of conditioning aid on commitments to social spending.<sup>161</sup> The Committee should come down on this issue in the most principled manner available to it: an informed evaluation of the actual impact on ESCR doctrine and implementation of the World Bank's social spending conditioning activities to date.

### c. Overseas Development Aid

The Committee also occasionally urges donor States' Party to increase their development assistance spending,<sup>162</sup> and praises

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158. See Dr. Sabine Schlemmer-Schulte, *The Impact of Civil Society on the World Bank, the International Monetary Fund and the World Trade Organization: The Case of the World Bank*, 7 ILSA J. INT'L & COMP. L. 399, 401 (2001). For example, the author is not aware of an instance in which the Committee has made reference in its Concluding Observations to the World Bank Inspection Panel process. Increased academic attention to the distributional effects of the international financial institutions has expanded accessibility of specific recommendations regarding IFI policies. See, e.g., Carrasco & Kose, *supra* note 122, at 44 (recommending specific types of statistical research needed from the Bank to improve its ability to contribute to redistribution).

159. See Anghie, *Globalization, IFIs and the Third World*, *supra* note 111, at 287-288.

160. See Carrasco & Kose, *supra* note 122, at 44.

161. For an interesting discussion proposing that the international legal responsibilities of the IFIs correspond to the unique body of international treaty obligations undertaken by each country with which the IFI is working, see Daniel Bradlow & Claudio Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 HUM. RTS. Q. 411, 428 n.63 (1995).

162. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland, U.N. ESCOR, 24th Sess., 75th mtg. at ¶¶ 13, 23, U.N. Doc. E/C.12/1/Add.52 (2000); see also Concluding Observations of the Committee on Economic, Social and Cultural Rights: Philippines, U.N. ESCOR, 12th Sess., 29th mtg. at ¶ 24, U.N. Doc. E/C.12/1995/7 (1995) (stating generally the need for more ODA "social adjustment programmes").



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governments that show a high commitment to giving.<sup>163</sup> In a recent “Concluding Observation”, the Committee took the further step of documenting the percentage of the overseas development aid “devoted to areas related to the rights contained in the Covenant.”<sup>164</sup> As another key source of resources for the protection of economic, social and cultural rights, the content and distribution of overseas development aid is worthy of expanded attention.

#### d. Trade Relations

Although the Committee works more closely with the ILO than with any other agency<sup>165</sup> and devotes a good deal of attention to labor issues in its monitoring activities,<sup>166</sup> human rights issues relating to international trade relations and multinational corporations rarely arise in the Committee’s statements. The Committee recommended to Mexico that it take “energetic steps to mitigate any negative impact” of the NAFTA on ESCRs.<sup>167</sup> In its observations to Saint

163. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Japan, U.N. ESCOR, 26th Sess., 56th mtg. at ¶ 4, U.N. Doc. E/C.12/1/Add.67 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden, U.N. ESCOR, 27th Sess., 75th mtg. at ¶ 7, U.N. Doc. E/C.12/1/Add.70 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Denmark, U.N. ESCOR, 20th Sess., 26th mtg. at ¶ 11, U.N. Doc. E/C.12/1/Add.34 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, U.N. ESCOR, 20th Sess., 25th-26th mtgs. at ¶ 4, U.N. Doc. E/C.12/1/Add.35 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland, U.N. ESCOR, 15th Sess., 51st mtg. at ¶ 8, U.N. Doc. E/C.12/1/Add.8 (1996).

164. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Japan, U.N. ESCOR, 26th Sess., 56th mtg. at ¶ 4, U.N. Doc. E/C.12/1/Add.67 (2001).

165. See CRAVEN, INTERNATIONAL COVENANT, *supra* note 28, at 79 (noting that the ILO is the only agency that attended every one of the Committee’s first nine sessions); *id.* at 224 (arguing that the Committee’s appropriate role regarding labor rights protection is to provide supplementary monitoring to countries that have not ratified specific ILO conventions); *id.* at 260 (arguing that the negotiators of the ICESCR contemplated a major role for the ILO in monitoring the Covenant); *id.* at 285 (noting that ILO representatives have provided important assistance and information to the Committee); *but see id.* at 357 (decrying the “minimal level” of the ILO’s cooperation with the Committee).

166. See, e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: Japan, U.N. ESCOR, 26th Sess., 56th mtg. at ¶¶ 18, 45, U.N. Doc. E/C.12/1/Add.67 (2001) (citing various ILO conventions); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany, U.N. ESCOR, 9th Sess., 46th mtg. at ¶ 8, U.N. Doc. E/C.12/1993/17 (1994) (referring to the ILO Committee of Experts and ILO Convention No. 111).

167. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, U.N. ESCOR, 21st Sess., 54th mtg. at ¶ 35, U.N. Doc. E/C.12/1/Add.41 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, U.N. ESCOR, 9th Sess., 49th mtg. at ¶ 11, U.N. Doc. E/C.12/1993/16 (1994). In its 1999 Concluding Observations on Mexico, the Committee commended Mexico for the measures it had taken. Concluding

Vincent and the Grenadines, the Committee predicted that a WTO Dispute Settlement Body decision might "have adverse consequences" for the government's ability to adhere to the Covenant.<sup>168</sup> The Committee also noted the negative effects of the trade embargo imposed on Armenia by neighboring countries.<sup>169</sup> In its Honduran Closing Arguments, the Committee "strongly recommends that the State Party implement existing legislative and administrative measures to avoid violations of environmental and labor laws by transnational companies,"<sup>170</sup> and that the Syrian government take its Covenant obligations into account when negotiating with the World Trade Organization.<sup>171</sup>

The Committee should continue, and significantly enhance, these efforts to expand the scope of its scrutiny. Private companies engaging in significantly deleterious business practices can be named and their activities should be raised with governments most responsible for their existence. The Committee has been pragmatic and activist in its procedural arrangements; it must continue to be as creative as possible to identify the most significant potential sources for protecting economic, social and cultural rights, and working with its own constituency of States' Parties to access them.

## 2. *Military Action*

The harmful effect of military actions on economic, social and cultural rights arises occasionally in Committee statements. The Committee has recognized security concerns,<sup>172</sup> ongoing wars,<sup>173</sup>

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Observations of the Committee on Economic, Social and Cultural Rights: Mexico, U.N. ESCOR, 21st Sess., 54th mtg. at ¶ 6, U.N. Doc. E/C.12/1/Add.41 (1999).

168. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Saint Vincent and the Grenadines, U.N. ESCOR, 17th Sess., 45th mtg. at ¶ 7, U.N. Doc. E/C.12/1/Add.21 (1997).

169. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Armenia, U.N. ESCOR, 21st Sess., 53d mtg. at ¶ 7, U.N. Doc. E/C.12/1/Add.39 (1999).

170. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Honduras, U.N. ESCOR, 25th Sess., 25th mtg. at ¶ 36, U.N. Doc. E/C.12/1/Add.57 (2001).

171. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Syrian Arab Republic, U.N. ESCOR, 26th Sess., 53d mtg. at ¶ 29, U.N. Doc. E/C.12/1/Add.63 (2001).

172. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, U.N. ESCOR, 19th Sess., 53d mtg. at ¶ 7, U.N. Doc. E/C.12/1/Add.27 (1998).

173. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Azerbaijan, U.N. ESCOR, 17th Sess., 54th mtg. at ¶ 12, U.N. Doc. E/C.12/1/Add.20 (1997).

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internal military clashes,<sup>174</sup> concluded transnational and civil wars,<sup>175</sup> and regional conflicts not involving the State Party as obstacles to the proper implementation of the Covenant.<sup>176</sup> The Committee also argued that violence in Colombia is “in part brought about” by maldistribution of wealth.<sup>177</sup>

North-on-south actions have arisen in a few cases. The Committee noted the loss of housing stock when the United States invaded Panama,<sup>178</sup> and has documented the effects of international

174. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kyrgyzstan, U.N. ESCOR, 23d Sess., 51st mtg. at ¶ 11, U.N. Doc. E/C.12/1/Add.49 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of the Congo, U.N. ESCOR, 22d Sess., 22d mtg. at ¶ 8, U.N. Doc. E/C.12/1/Add.45 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Georgia, U.N. ESCOR, 22d Sess., 21st mtg. at ¶ 6, U.N. Doc. E/C.12/1/Add.42 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka, U.N. ESCOR, 18th Sess., 25th mtg. at ¶ 5, U.N. Doc. E/C.12/1/Add.24 (1998); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Peru, U.N. ESCOR, 16th Sess., 26th mtg. at ¶ 12, U.N. Doc. E/C.12/1/Add.14 (1997); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia, U.N. ESCOR, 13th Sess., 54th mtg. at ¶ 179, U.N. Doc. E/C.12/1995/12 (1996); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Algeria, U.N. ESCOR, 13th Sess., 58th mtg. at ¶¶ 3, 14, U.N. Doc. E/C.12/1995/17 (1995); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Philippines, U.N. ESCOR, 12th Sess., 29th mtg. at ¶ 9, U.N. Doc. E/C.12/1995/7, (1995); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya, U.N. ESCOR, 8th Sess., 19th mtg. at ¶ 5, U.N. Doc. E/C.12/1993/6 (1993).

175. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of the Congo, U.N. ESCOR, 22d Sess., 22d mtg. at ¶ 9, U.N. Doc. E/C.12/1/Add.45 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iraq, U.N. ESCOR, 17th Sess., 52d mtg. at ¶ 7, U.N. Doc. E/C.12/1/Add.17 (1997); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Peru, U.N. ESCOR, 16th Sess., 26th mtg. at ¶ 12, U.N. Doc. E/C.12/1/Add.14 (1997); Concluding Observations of the Committee on Economic, Social and Cultural Rights: El Salvador, U.N. ESCOR, 14th Sess., 26th mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.4 (1996); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nicaragua, U.N. ESCOR, 9th Sess., 46th mtg. at ¶ 5, U.N. Doc. E/C.12/1993/14 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Vietnam, U.N. ESCOR, 8th Sess., 19th mtg. at ¶ 8, U.N. Doc. E/C.12/1993/8 (1993).

176. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Bulgaria, U.N. ESCOR, 21st Sess., 50th-50st mtgs. at ¶ 8, U.N. Doc. E/C.12/1/Add.37 (1999).

177. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia, U.N. ESCOR, 13th Sess., 54th mtg. at ¶ 179, U.N. Doc. E/C.12/1995/12 (1996).

178. Concluding Observations: Report on the Technical Assistance Mission to Panama of the Committee on Economic, Social and Cultural Rights, U.N. ESCOR, 12th Sess., at ¶ 21, U.N. Doc. E/C.12/1995/18 (1995) (noting that the United States invasion resulted in the destruction of “hundreds of dwellings”); *id.* at ¶ 62 (discussing financing by USAID and the government for repair of damage due to the “military action”). The Committee also documented an Inter-American Commission on Human Rights complaint by Panamanian civil society regarding the allocation of individual awards for invasion losses. *Id.* at ¶¶ 63-65.

embargoes.<sup>179</sup> However, it appears to have made no recommendations to a State Party regarding its participation in the decision to impose or continue an embargo.

### *B. Differential Treatment of Southern States*

A second relevant aspect of post-colonial theory is its general attentiveness to "a history still in process," or the currently discriminatory aspects of international action, and the differential impact on southern states vis-à-vis the former colonizer states.<sup>180</sup> Fitzpatrick and Darian-Smith call human rights "the 'new' standard replacing civilization as the criterion for dividing and judging the world"<sup>181</sup> as an "instrument of occidental assertion."<sup>182</sup> Elements of the ICESCR regime particularly responsive to this concern include the Committee's equalization paradigms and use of enforcement language, the Committee's attention to its anti-discrimination mandate, and the audience for its recommendations. These aspects of the Committee's work lend themselves favorably to a post-colonial theory review. Another related aspect of the Committee's work tends instead to confirm a classic north-south critique of the human rights regime: the Committee's treatment of culturally based practices.

#### *1. Equalization Paradigms and Enforcement Language*

Apart from the north-south implications of the Committee's attention to factors such as structural adjustment and violent conflicts, acknowledgement of these realities carries particular legal significance. This is because of the "margin of discretion" codified in Covenant Article 2(1), in which each State Party "undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" in the Covenant.<sup>183</sup> Although the Committee has

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179. *E.g.*, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iraq, U.N. ESCOR, 17th Sess., 52d mtg. at ¶ 7, U.N. Doc. E/C.12/1/Add.17 (1997) (oil embargo); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Libyan Arab Jamahiriya, U.N. ESCOR, 16th Sess., 26th mtg. at ¶ 13, U.N. Doc. E/C.12/1/Add.15 (1997) (Security Council aerial embargo).

180. See Gandhi, *supra* note 107, at 18 (quoting David Lloyd, 1993, p. 11); *id.* at 17-18; see also SAN JUAN, *supra* note 106, at 9 (describing post-colonial theory as concerned with "manifestations of 'unevenness'"); see also YOUNG, *supra* note 3, at 11.

181. See Fitzpatrick & Darian-Smith, *supra* note 1, at 5 (citing G.W. GONG, THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY 18 (1984)).

182. *Id.*

183. ICESCR, *supra* note 16, art. 2(1).

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interpreted the obligation as tightly as possible,<sup>184</sup> nonetheless a determination of a State Party's available resources, or lack thereof, becomes relevant to its inquiry into individual states' implementation of the Covenant.<sup>185</sup>

The Committee continues to acknowledge difficulty factors in a "Concluding Observations" section entitled "Factors and Difficulties Impeding the Implementation of the Covenant." The Committee rarely passes explicit judgment on a claimed factor as a valid excuse for failure to implement the Covenant. However, its acknowledgement of particular difficulties ranges in strength from asserting that a problem "ha[s] seriously affected the capacity of the State Party to implement the Covenant,"<sup>186</sup> to "recognizing" that a particular problem is an impediment to the government's "capacity to *enhance* the enjoyment of ESCRs,"<sup>187</sup> to merely "not[ing] the State Party's statement" about the impact of a negative factor.<sup>188</sup> The Committee labeled as "technical" Canada's problem gathering statistics from its constituent federal units,<sup>189</sup> and explicitly dismissed proffered difficulties in a few cases, including Iceland's assertion that it could not implement the right to strike because of its economy's dependence on one industry.<sup>190</sup> The Committee has also made specific findings that several industrialized States' Parties suffer no impediments to implementation at all.<sup>191</sup>

184. See, e.g., The Nature of States' Parties' Obligations (Art. 2, ¶ 1): CESCR General Comment 3, at ¶ 2 (1990) (noting that the obligation "to take steps" is not itself limited); *id.* at ¶ 5 (finding several Covenant Articles to be "capable of immediate application"); *id.* at ¶ 9 (interpreting "progressive realization" to prohibit retrogressive measures) [hereinafter General Comment 3].

185. See CRAVEN, INTERNATIONAL COVENANT, *supra* note 28, at 138-39.

186. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Jamaica, U.N. ESCOR, 27th Sess., 85th mtg. at ¶ 5, U.N. Doc. E/C.12/1/Add.75 (2001) (stating the existence of financial crisis and high debt burden have made it difficult to implement the ICESCR).

187. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Syrian Arab Republic, U.N. ESCOR, 26th Sess., 53d mtg. at ¶ 11, U.N. Doc. E/C.12/1/Add.63 (2001) (emphasis added) (explaining the country's high debt burden as a reason for not fulfilling its obligations under the ICESCR).

188. *Id.* at ¶ 10 (noting the government's statement that the partial foreign occupation of its territory creates a need for higher military spending).

189. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada, U.N. ESCOR, 8th Sess., 18th mtg. at ¶ 11, U.N. Doc. E/C.12/1993/5 (1993).

190. See Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iceland, U.N. ESCOR, 9th Sess., 46th mtg. at ¶ 7, U.N. Doc. E/C.12/1993/15 (1994).

191. Concluding Observations of the Committee on Economic, Social and Cultural Rights: France, U.N. ESCOR, 27th Sess., 77th mtg. at ¶ 12, U.N. Doc. E/C.12/1/Add.72 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden, U.N. ESCOR, 27th Sess., 75th mtg. at ¶ 14, U.N.

Though the Committee has been passing judgment on member governments' implementation of the Covenant for fifteen years, it has classified relatively few situations as actual violations of the Covenant. The only routinely declared violation is the failure to comply with the Covenant reporting obligations.<sup>192</sup> Other examples of state acts found to be violations include: discrimination,<sup>193</sup> travel restrictions,<sup>194</sup> high teen suicide and domestic violence rates,<sup>195</sup> failure to provide maternity benefits,<sup>196</sup> forced evictions,<sup>197</sup> failure to accord economic,

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Doc. E/C.12/1/Add.70 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iceland, U.N. ESCOR, 20th Sess., 20th mtg. at ¶ 10, U.N. Doc. E/C.12/1/Add.32 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland, U.N. ESCOR, 20th Sess., 25th-26th mtgs. at ¶ 8, U.N. Doc. E/C.12/1/Add.35 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, U.N. ESCOR, 11th Sess., 53d mtg. at ¶ 6, U.N. Doc. E/C.12/1994/19 (1994). See also Concluding Observations of the Committee on Economic, Social and Cultural Rights: Austria, U.N. ESCOR, 11th Sess., 52d mtg. *passim*, U.N. Doc. E/C.12/1994/16 (1994) (lacking "factors and difficulties" section); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany, U.N. ESCOR, 9th Sess., 46th mtg. *passim*, U.N. Doc. E/C.12/1993/17 (1994) (lacking "factors and difficulties" section).

192. See, e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: Togo, U.N. ESCOR, 25th Sess., 26th mtg. at ¶¶ 3, 17, U.N. Doc. E/C.12/1/Add.61 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of the Congo, U.N. ESCOR, 22d Sess., 22d mtg. at ¶¶ 3, 24, U.N. Doc. E/C.12/1/Add.45 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Solomon Islands, U.N. ESCOR, 20th Sess., 24th mtg. at ¶ 3, U.N. Doc. E/C.12/1/Add.33 (1999); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Saint Vincent and the Grenadines, U.N. ESCOR, 17th Sess., 45th mtg. at ¶¶ 3, 5, U.N. Doc. E/C.12/1/Add.21 (1997); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Guinea, U.N. ESCOR, 14th Sess., 22d mtg. at ¶ 2, U.N. Doc. E/C.12/1/Add.5 (1996); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mali, U.N. ESCOR, 11th Sess., 44th mtg. at ¶ 2, U.N. Doc. E/C.12/1994/17 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mauritius, U.N. ESCOR, 10th Sess., 43d mtg. at ¶ 2, U.N. Doc. E/C.12/1994/8 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya, U.N. ESCOR, 8th Sess., 19th mtg. at ¶ 2, U.N. Doc. E/C.12/1993/6 (1993).

193. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iran, U.N. ESCOR, 8th Sess., 20th mtg. at ¶ 6, U.N. Doc. E/C.12/1993/7 (1993).

194. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, U.N. ESCOR, 26th Sess., 47th mtg. at ¶ 13, U.N. Doc. E/C.12/1/Add.69 (2001); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, U.N. ESCOR, 19th Sess., 53d mtg. at ¶ 17, U.N. Doc. E/C.12/1/Add.27 (1998).

195. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka, U.N. ESCOR, 18th Sess., 25th mtg. at ¶ 14, U.N. Doc. E/C.12/1/Add.24 (1998).

196. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Switzerland, U.N. ESCOR, 19th Sess., 55th mtg. at ¶ 15, U.N. Doc. E/C.12/1/Add.30 (1998).

197. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Dominican Republic, U.N. ESCOR, 11th Sess., 55th mtg. at ¶ 8, U.N.

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social and cultural rights constitutional status,<sup>198</sup> minimum wage five times below the “officially set basic food basket,”<sup>199</sup> and promulgation of a law asserting close control over NGOs.<sup>200</sup> Interestingly enough, the Committee’s comfort level with using stronger language about failures to report may have a different north-south impact, as states with overdue reports are statistically more likely to be developing countries.<sup>201</sup> At the same time, given the fact that few negative implications attach to neglect of reporting duties, the possibility of escaping notice through non-reporting could be a strong motive for some states.<sup>202</sup> Apart from this aspect, the violations findings focused on both southern and northern countries, and no State Party, even one receiving high praise from the Committee, escapes receiving numerous recommendations about progressive steps to be taken,<sup>203</sup> suggesting that the primary goal of the reporting process is facilitative rather than judgmental.

## 2. Fundamental Nature of the Recommendations

As the Article 2(1) analysis suggests, protection of economic, social and cultural rights is to some extent dependent on available resources. Given this reality, the Committee’s primary task is to identify available areas of discretion, and urge the most rights-protective policy choices on States’ Parties and the inter-governmental agencies amenable to the Committee’s blandishments. With the number of international agencies focused on poverty alleviation, it may seem somewhat surprising at what a fundamental level many of the Committee’s recommendations arise. For example, the Committee frequently advocates that States’ Parties collect and disseminate data on basic poverty issues, including data on

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Doc. E/C.12/1994/15 (1994); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nicaragua, U.N. ESCOR, 9th Sess., 46th mtg. at ¶ 9, U.N. Doc. E/C.12/1993/14 (1994).

198. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel, U.N. ESCOR, 19th Sess., 53d mtg. at ¶ 9, U.N. Doc. E/C.12/1/Add.27 (1998).

199. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Mexico, U.N. ESCOR, 21st Sess., 54th mtg. at ¶ 20, U.N. Doc. E/C.12/1/Add.41 (1999).

200. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Egypt, U.N. ESCOR, 22d Sess., 26th mtg. at ¶ 19, U.N. Doc. E/C.12/1/Add.44 (2000).

201. See BAYEFISKY, *supra* note 36, at 9.

202. See *id.* (noting that the late submission of a state report is generally ignored).

203. See, e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden, U.N. ESCOR, 27th Sess., 75th mtg. at ¶¶ 15-42, U.N. Doc. E/C.12/1/Add.70 (2001).

homelessness and hunger.<sup>204</sup> In the Concluding Observations for industrialized countries, recommendations tend to center on the need for data on more specialized issues, such as AIDS and domestic violence.<sup>205</sup> The Committee urged Finland to establish a legal minimum wage,<sup>206</sup> and Uruguay to make its minimum wage more than "only . . . an indicator."<sup>207</sup> The Concluding Observations for Australia, Canada, Egypt, and Germany reveal that those countries have not established an official poverty line.<sup>208</sup> From a north-south-sensitive perspective, it seems clear that these types of fundamental recommendations are frequently issued to industrialized countries as well as to developing countries.

### 3. *Vulnerable Populations*

To the extent that post-colonial theory particularly works to highlight concerns about race,<sup>209</sup> the Committee's interpretation of its Article 2(2) anti-discrimination mandate is worth mentioning.

204. See, e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden, U.N. ESCOR, 27th Sess., 75th mtg. at ¶ 40, U.N. Doc. E/C.12/1/Add.70 (2001) (privatization of health care); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Suriname, U.N. ESCOR, 12th Sess., 27th mtg. at ¶¶ 9, 18, U.N. Doc. E/C.12/1995/6 (1995) (vulnerable populations, working and abandoned children, and the informal sector); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Iraq, U.N. ESCOR, 10th Sess., 26th-27th mtgs. at ¶ 10, U.N. Doc. E/C.12/1994/6 (1994) (educational opportunities); Concluding Observations of the Committee on Economic, Social and Cultural Rights: New Zealand, U.N. ESCOR, 9th Sess., 40th mtg. at ¶¶ 15, 21, U.N. Doc. E/C.12/1993/13 (1994) (malnutrition, hunger and homelessness).

205. See Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland, U.N. ESCOR, 24th Sess., 75th mtg. at ¶ 17, U.N. Doc. E/C.12/1/Add.52 (2000) (domestic violence); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany, U.N. ESCOR, 19th Sess., 54th mtg. at ¶ 23, U.N. Doc. E/C.12/1/Add.29 (1998) (AIDS); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden, U.N. ESCOR, 12th Sess., 27th mtg. at ¶ 10, U.N. Doc. E/C.12/1995/5 (1995) (domestic violence).

206. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Finland, U.N. ESCOR, 15th Sess., 51st mtg. at ¶¶ 13, 23, U.N. Doc. E/C.12/1/Add.8 (1996).

207. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uruguay, U.N. ESCOR, 17th Sess., 54th mtg. ¶¶ 9, 18, U.N. Doc. E/C.12/1/Add.18 (1997).

208. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, U.N. ESCOR, 23d Sess., 55th mtg. ¶ 33, U.N. Doc. E/C.12/1/Add.50 (2000); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada, U.N. ESCOR, 19th Sess., 58th mtg. ¶ 13, U.N. Doc. E/C.12/1/Add.31 (1998); Concluding Observations of the Committee on Economic, Social and Cultural Rights: Germany, U.N. ESCOR, 19th Sess., 54th mtg. ¶ 15, U.N. Doc. E/C.12/1/Add.29 (1998).

209. See, e.g., PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992); Gordon, *supra* note 109, at 967.



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Article 2(2) guarantees equal enjoyment of ESCRs regardless of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>210</sup> The Committee has interpreted 2(2) as one of the Covenant articles that is fully justiciable and capable of immediate application.<sup>211</sup>

Many of the General Comments include a non-discrimination analysis on the protection of indigenous and other minority groups,<sup>212</sup> as do most of the Concluding Observations. For example, the recent Concluding Observation on Sweden included comments and recommendations concerning “discrimination against immigrants and refugees in the workplace, ratification of the Indigenous and Tribal Peoples Convention, and provision of education in minority and immigrant languages.”<sup>213</sup> Similarly, the Committee consistently raises concerns regarding gender.<sup>214</sup>

#### 4. Treatment of Cultural and Religious Practices

210. ICESCR, *supra* note 16, art. 2(2).

211. *Twenty-first session (1999): General Comment No. 13 The right to education (art. 13)*, in English Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 74, 81-82 ¶¶ 31-37 HRI/GEN/1/Rev.5 (2001).

212. See *Sixth Session (1991): Committee on Economic, Social and Cultural Rights General Comment No. 4, The right to adequate housing (art. 11 (1) of the Covenant)* in English Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 22, 25 ¶ 9, 27 ¶ 17, HRI/GEN/1/Rev.5 (2001); *Thirteenth session (1995): General Comment No. 6 The economic, social and cultural rights of older persons*, in English Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 38, 39 ¶ 5, HRI/GEN/1/Rev.5 (2001); *Sixteenth session (1997): General Comment No. 7 The right to adequate housing (art. 11(1) of the Covenant): forced evictions*, in English Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 49, 51 ¶ 10, HRI/GEN/1/Rev.5 (2001); *Nineteenth session (1998): General Comment No. 9 The domestic application of the Covenant*, in English Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 58, 60 ¶ 9, HRI/GEN/1/Rev.5 (2001); *Twenty-first session (1999): General Comment No. 13 The right to education (art. 13)*, in English Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 74, 75 ¶ 4 HRI/GEN/1/Rev.5 (2001); see also *id.* at 81-82 ¶¶ 31-37; *Twenty-second session (2000): General Comment No. 14 The right to the highest attainable standard of health (art. 12)*, in English Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 90, 90 ¶ 2, HRI/GEN/1/Rev.5 (2001).

213. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Sweden, U.N. ESCOR, 27th Sess., 75th mtg. ¶¶ 18, U.N. Doc. E/C.12/1/Add.70 (2001) (“discrimination on ethnic grounds in the workplace”); *id.* ¶ 28 (Sami land rights); *id.* ¶ 29 (discrimination against immigrants and refugees); *id.* ¶ 17 (ratification of the Indigenous and Tribal Peoples Convention); *id.* ¶ 30 (gender participation in the labor market); *id.* ¶ 38 (instruction in minority/immigrant languages); *id.* ¶¶ 23, 39 (exploitation of minors and women abroad).

214. See *id.* ¶ 30 (expressing concern with the issue of gender participation in the labor market); see also *id.* ¶ 39 (remarking on the exploitation of women abroad).

Postcolonial theory flags the difficult issue of cultural relativism. Rolando Gaete poses cultural relativism as one of "two opposite dangers . . . to be avoided: the absolutism of certain appeals to culture and the absolutism of a humanist secular fundamentalism."<sup>215</sup> Leela Ghandi describes the dilemma this way: "Caught between the harsh extremes of ethnic cleansing, on the one hand, and the militaristic American purification of the un-American world on the other, post-colonialism ponders a ceasefire."<sup>216</sup>

The Committee has not, of course, escaped grappling with questions about cultural and religious practices that clash with human rights norms. To date, it has taken a universalist stance on many customary practices, commending prosecution of practitioners of female genital mutilation,<sup>217</sup> and condemning customary practices such as low legal age of marriage for girls,<sup>218</sup> forced marriage of widows to brothers-in-law,<sup>219</sup> sexual servitude to religious leaders,<sup>220</sup> polygamy,<sup>221</sup> restrictions on abortion,<sup>222</sup> gendered Aboriginal marital property rights,<sup>223</sup> and "deeply rooted traditions and cultural prejudices [that] marginalize certain categories of persons, such as migrant workers and some women."<sup>224</sup> In one interesting instance,

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215. Rolando Gaete, *Rites of Passage into the Global Village*, in LAWS OF THE POSTCOLONIAL 233, 235 (Eve Darian-Smith & Peter Fitzpatrick eds., 1999).

216. GANDHI, *supra* note 107, at 129.

217. Concluding Observations of the Committee on Economic, Social and Cultural Rights: France, U.N. ESCOR, 27th Sess., 77th mtg. ¶ 7, U.N. Doc. E/C.12/1/Add.72 (2001); *see also* Review of the Implementation of CESC: Togo, U.N. ESCOR, 25th Sess., 26th mtg. ¶ 10, U.N. Doc. E/C.12/1/Add.61 (2001) (commending Togo's promotional attempts to lower instances of FGM).

218. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Syrian Arab Republic, U.N. ESCOR, 26th Sess., 53d mtg. ¶¶ 12, 14, U.N. Doc. E/C.12/1/Add.63 (2001).

219. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Zimbabwe, U.N. ESCOR, 16th Sess., 25th mtg. ¶ 10, U.N. Doc. E/C.12/1/Add.12 (1997).

220. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nepal, U.N. ESCOR, 26th Sess., 55th mtg. ¶¶ 10, 18, 43, U.N. Doc. E/C.12/1/Add.66 (2001).

221. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Senegal, U.N. ESCOR, 26th Sess., 53d mtg. ¶ 39, U.N. Doc. E/C.12/1/Add.62 (2001).

222. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Poland, U.N. ESCOR, 18th Sess., 26th mtg. ¶ 12, U.N. Doc. E/C.12/1/Add.26 (1998).

223. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada, U.N. ESCOR, 19th Sess., 57th mtg. ¶ 29, U.N. Doc. E/C.12/1/Add.31 (1998).

224. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea, U.N. ESCOR, 25th Sess., 26th mtg. ¶ 10, U.N. Doc. E/C.12/1/Add.59 (2001).

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the Republic of Korea government asserted a cultural norm of high esteem for teachers as its reason for limiting teachers' union activities.<sup>225</sup> The Committee rejected this rationale.<sup>226</sup> The Committee also noted that "prevailing Chinese traditions" favoring "avoiding direct confrontations and strikes in favour of personal or family ties" hamper collective bargaining and strikes in Macau.<sup>227</sup>

### C. *The Poorest Child in the Poorest Country*

A third concern found in the postcolonial theoretical literature is a concern with the need to elevate the voices of the most oppressed people.<sup>228</sup> Seeking theoretical integrity, post-colonial academics present important challenges to the human rights regime, but appear to be sympathetic to many of the values at least facially expressed in human rights standards. Predictably, this is not an uncomplicated relationship. One of foundational concepts of postcolonial theory is the notion of subalternity. The theorists use subalternity to mean both "the in-between class," or the indigenous "lieutenants of the ruling class as opposed to the masses."<sup>229</sup> However, Young points out that the focus of the influential *Subaltern Studies* journal is "very much at the bottom of the social scale."<sup>230</sup> At the conference for which this paper was produced, one of the noted post-colonial theorists present stated that he, and, he felt sure, many of his colleagues, had "said things" at human rights conferences for which they felt ashamed.

In translating these admittedly reluctant activist orientations into the specific work of the Committee on Economic, Social and Cultural Rights, there is clearly a large and meaningful area of overlap. Within the bounds of international coercion that postcolonial theory might "tolerate," it seems that the key question is one of effectiveness. Like most human rights entities, the UN Committee on Economic, Social and Cultural Rights has a broad mandate and

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225. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Republic of Korea, U.N. ESCOR, 26th Sess., 55th mtg. ¶ 10, 18, 43, U.N. Doc. E/C.12/1/Add.66 (2001).

226. *Id.*

227. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Portugal (Macau), U.N. ESCOR, 15th Sess., 54th mtg. ¶ 8, U.N. Doc. E/C.12/1/Add.9 (1996).

228. See, e.g., YOUNG, *supra* note 3, at 354. But see SAN JUAN, *supra* note 106, at 13 (stating that "outside of the multiculturalism debate," postcolonial theory has failed to focus attention on important concerns that "elude representation in the postal conversation," such as refugees, political prisoners, refugees, unjust wars, and vulnerable workers).

229. YOUNG, *supra* note 3, at 354.

230. *Id.*

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severely insufficient resources for carrying it out. The Committee is charged with management of 142 treaty signatories, standards development and promotion and outreach to technical agencies, but currently has the assistance of only two UN secretariat staff members. The Committee rarely travels, and never on its own budget, so it has to rely on the fact finding of other agencies, which are rarely specialized enough to meet the Committee's needs, and the work of governments and civil society participating in the reporting process. Despite strategic work on the part of the Committee and the many attempts of the Committee's constituent international NGOs to support domestic civil society,<sup>231</sup> this limitation inevitably cuts off much participation by southern NGOs and relevant domestic government actors.<sup>232</sup> The resulting northern bias in the discussions clearly does no one any good.

## V. CONCLUSION

In making these suggestions for the priorities and development of the Committee, the author cannot help but feel the legacy of a little-known Hungarian political writer named Zoltán Szilágyi. Dr. Szilágyi's 1986 treatise, *The United Nations' Role in the Liquidation of Colonialism*, fulsomely celebrated the work of the UN Special Committee on the Implementation of the Declaration on Decolonisation. Published by the Hungarian Academy of Sciences Institute for World Economy, Dr. Szilágyi's treatise pledged the support of socialist nations in "the fight for economic decolonization."<sup>233</sup>

The existence of one more obscure committee, and moreover one that may soon be subsumed in a larger body with a massive mandate, can hardly seem to matter, for example, to a malnourished child living in a poor country, on the brink of a painful, utterly preventable death of dysentery. Moreover, the days appear to be gone when a UN Committee will request that the Secretary General "undertake . . . a sustained and broad campaign . . . informing world public opinion of the facts concerning the pillaging of natural resources in colonial territories and the exploitation of their indigenous populations by

231. See Dandan, *supra* note 56, at 228-29.

232. See, e.g., Stefanie Grant, *The NGO Role: Implementation, Expanding Protection and Monitoring the Monitors*, in *THE UN HUMAN RIGHTS TREATY SYSTEM IN THE 21ST CENTURY* 212 (Anne Bayefsky ed., 2000) (noting that in the absence of treaty body capacity to liaison directly with national NGO's access by national NGO's will be uneven).

233. ZOLTÁN SZILÁGYI, *THE UNITED NATIONS' ROLE IN THE LIQUIDATION OF COLONIALISM* 81 (1986).

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foreign monopolies.”<sup>234</sup> With neither the splendid rhetoric of the 1970s nor the heat of the anti-apartheid movement, the legacy of the Committee’s first fifteen years may have to stand or fall on the references to the General Comment 3 in *Grootboom*, the groundbreaking South African constitutional case granting limited housing rights to displaced people.<sup>235</sup>

However, to the extent that post-colonial theory is generically concerned with revealing the otherwise hidden messages of the “subaltern,” and “the suffering,” its goals would seem to converge with those of the Committee and the activists influencing its development. Identifying and alleviating suffering in the global south must involve leveraging important sources of power and resources. The international financial community, both private and inter-governmental, commands significant control and resources in the global south; all sides should agree that finding ways to influence it in a re-distributive direction is critical to the goal of alleviating suffering. The Committee should work to become expert in operations of the international financial institutions and multinational corporations, and partner with its States’ Parties to manage their interactions with these powerful actors in a way that lessens human suffering.

Differences clearly exist. Post-colonialists might urge the Committee away from taking coercive measures against former colonies, because of the impossibility of erasing the historical taint and the attendant likelihood of inappropriate and counterproductive intervention. A human rights activist might urge the Committee to use any tool at its disposal to maximize its influence over the potentially re-distributive policies of former colonies. A post-colonial agenda for the Committee would doubtless include a greater attention to regional diversity in the Committee’s membership and staff, an issue that has not been strongly pressed by the civil society currently interacting with the Committee.

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234. *Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Vol. II*, U.N. GAOR, 28<sup>th</sup> Sess., Supp. No. 23, at Recommendation 7.(10), U.N. Doc. A/9023/Rev.1 (1973).

235. *See Government of RSA and others v. Grootboom and others*, Constitutional Court, 1995(1)SA46(CC). In that case, the South African Supreme Court used the Committee’s progressive reading of Covenant Article 2(2) to interpret the South African Constitutional provision on right of access to housing. *Id.* at 45. For an assessment of the domestic implications of *Grootboom*, see Pierre De Vos, *Grootboom, The Right of Access to Housing and Substantive Equality as Contextual Fairness*, 17 S. AFR. J. HUM. RTS. 258 (2001).

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The decisions the Committee makes about its priorities and methods are critically important. The Committee provides at least some counterpoint to the relentless privatization and trickle down economics peddled elsewhere in the international community. It has proven that it can make an impact in the formation of progressive new soft law on remedial welfare issues. The Committee is leveraging marginal international resources uniquely to advocate and support policies that will benefit the poorest child in the poorest country. Upendra Baxi summarizes the argument best: "[T]he nirvana that contemporary human rights seek is sometimes said to suffer from a relatively impoverished cosmology. However, human rights activism has its own dharma, which is the performance of righteous deeds (karma) which, too, earn merit (punnya) to redeem the "soul."<sup>236</sup> The International Committee on Economic, Social and Cultural Rights has made important strides in its first fifteen years, and must continue to use creative efforts to carry out its critical mission of speaking for the poor.

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236. Upendra Baxi, *Voices of Suffering and the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 125, 154 (1998).