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DRAFT INTERNATIONAL COVENANT ON HUMAN RIGHTS
AND MEASURES OF IMPLEMENTATION

Provisions concerning economic, social and cultural rights

(Memorandum by the Secretary-General)

This document discusses certain problems raised by General Assembly resolution 543 (VI) and 544 (VI) in so far as they relate to the substantive provisions of the proposed Covenant on economic, social and cultural rights.

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I. Introduction

1. General Assembly resolutions 543 (VI) and 544 (VI) make provisions relating to the drafting of articles on economic, social and cultural rights. Resolution 543 (VI), inter alia, requests the Economic and Social Council to ask the Commission on Human Rights to draft two Covenants on human rights, one to contain civil and political rights and the other to contain economic, social and cultural rights, the two Covenants to contain as many similar provisions as possible, particularly in so far as the reports to be submitted by States on the implementation of those rights are concerned. In the preamble of resolution 544 (VI) appears the statement that the wording of the articles drafted by the Commission at its seventh session on economic, social and cultural rights "should be improved in order to protect more effectively the rights to which they refer".
2. These two resolutions, among others, were adopted on the basis of the report of the Third Committee on the draft International Covenant and measures of implementation (A/2112), which furnishes a general survey, inter alia, of the work of the thirteenth session of the Economic and Social Council and of the Third Committee of the General Assembly at its sixth session relating to the drafting of provisions on economic, social and cultural rights.^{1/}
3. The present memorandum is devoted mainly to observations of representatives in the Third Committee of the General Assembly at its sixth session and in the Economic and Social Council at its thirteenth session, and observations communicated by governments and by specialized agencies to the Council at that session concerning substantive provisions on economic, social and cultural rights. Some tentative suggestions by the Secretariat are also included. The question of the measures of implementation to be included in the proposed Covenant on economic, social and cultural rights is not treated in the present memorandum. Nor is it the intention of the present memorandum to describe in detail all expressions of opinion on the drafting of substantive articles on economic, social and cultural rights; the aim is merely to recapitulate such of the main trends of opinion as may be of interest to the Commission within the context of the problem now before it. The ~~citing~~ below of statements relating to the drafting

^{1/} A/2112, paragraphs 2, 6, 9, 11, 12, 16-23 and 42-55.

of articles on economic, social and cultural rights does not necessarily signify that the authors thereof were in favour of the treatment of those rights in a separate covenant.

4. In addition to the report of the Commission on Human Rights at its seventh session,^{2/} the Council at its thirteenth session had before it observations of governments,^{3/} of specialized agencies,^{4/} and of the Office of the High Commissioner for Refugees^{5/} on the draft Covenant. The relevant Council debates are set out in E/SR.522-525. The representative of UNESCO addressed the Third Committee during its debates on the draft Covenant.^{6/} The debates of the Third Committee relating to the present subject-matter are contained in A/C.3/SR.360-71 and those of the General Assembly in plenary meeting appear in A/PV.374-375.

II. General observations on the existing articles on economic social and cultural rights

5. Various representatives on the Council and on the Third Committee of the General Assembly at its sixth session and certain governments in observations circulated to the Council at its thirteenth session, as well as the International Labour Organisation (ILO) and the Office of the High Commissioner for Refugees, made general observations on the provisions on economic, social and cultural rights drafted by the Commission on Human Rights.

6. The representatives of Belgium,^{7/} China,^{8/} India,^{9/} and Syria^{10/} drew attention to a lack of balance arising out of the fact that certain articles had been drafted in greater detail than others.

^{2/} E/1992 and Add.1

^{3/} E/2059 and Add.1-8.

^{4/} E/2057 and Add.1-5.

^{5/} E/2085 and Add.1.

^{6/} A/C.3/SR.367, paragraphs 31-39.

^{7/} E/SR.523, paragraph 17.

^{8/} A/C.3/SR.369, paragraph 6.

^{9/} E/SR.523, paragraph 31.

^{10/} A/C.3/SR.364, paragraph 12.

7. Other statements set out below drew attention in particular to an alleged lack of clear definition of the obligations which would rest upon States Parties.

8. The representative of Belgium said that it would be essential to review one by one the articles drafted on economic, social and cultural rights and measures of implementation and to revise a number of them. The terminology called for revision, and the articles needed to be co-ordinated with some of the provisions already existing in the international conventions drawn up by some of the specialized agencies.^{11/}

9. The Government of Denmark stated that it had some hesitation concerning the formulation of articles 19, 20 and 24, inasmuch as the obligations of the States Parties to the Covenant did not seem clearly defined. Moreover, these articles concerned subjects only partly within the control of the individual countries.^{12/}

10. The representative of France, while speaking favourably of article 27 and article 28, paragraphs 2, 7 and 9, when read in conjunction with article 19, paragraph 4, added that those drafting the Covenant had no right to ignore reality and to represent as commitments texts which were in reality illusory and which no responsible government would ratify. Thus, the obligation to reduce infant mortality or to ensure adequate housing could not be drafted in the same direct terms as those used, for example, for the freedom of belief or association.^{13/}

11. The representative of Guatemala stated that the articles of part III - articles 20, 21, 22, 23, 24 and 28, for example - which dealt with fundamental rights such as the right to work, the right to social security, and the right to education, merely acknowledge those rights. The Covenant should not be limited, however, to establishing a scale of values similar to that in the Universal Declaration of Human Rights, but should state the principle of the responsibility of the State with regard to the implementation of fundamental human rights. That principle was enunciated, rather weakly, only in articles 25 and 30 of the draft before the Committee. In its existing form, the draft met the requirements of an unduly individualistic concept of society by confining

^{11/} E/SR.523, paragraph 17.

^{12/} E/2059/Add.8, page 1.

^{13/} A/C.3/SR.363, paragraphs 15-16.

itself to stating principles without laying down the obligation of States to use all available means to ensure the enjoyment of the rights which had been stated. Thus, article 26 on the protection of mothers and children was not sufficiently imperative.^{14/}

12. The representative of India expressed the opinion that the Commission had been unable to produce a text dealing with economic, social and cultural rights which was clear and enforceable.^{15/} The same representative later added that the articles on certain rights did not all go as far as the fundamental principles expressed in national legislations. Certainly the legislative principles adopted in regard to health by one Indian State, with the provisions of which he was familiar because he had helped to draft them, went quite a long way beyond article 25.^{16/}

13. The representative of Liberia was disappointed to note that some articles in the draft Covenant, in particular articles 20 - 28 of part III thereof, merely "recognize" the existence of certain rights, since they were rights which the majority of States represented on the Commission had, as members of the ILO, long since recognized, and were also rights which appeared in one form or another in the constitutions of most democratic countries. The existing draft did not provide for any sanction or involve any undertaking on the part of signatories.^{17/}

14. The representative of Syria felt that both the form and the substance of articles 19 and following might be improved. He thought that some articles on economic, social and cultural rights needed to be so amended as to bring out more clearly the obligations resting on States.^{18/}

15. The representative of the United Kingdom said that the manner in which the Commission on Human Rights had included articles on economic, social and cultural rights in the draft Covenant seemed to show some confusion with regard to the kind of obligation to which a covenant ought to give rise. Whether the economic, social and cultural rights could be so formulated in a general instrument as to create the kind of obligation that would really safeguard such rights was doubtful.^{19/}

^{14/} A/C.3/SR.360, paragraphs 25-27.

^{15/} E/SR.523, paragraph 27.

^{16/} E/SR.523, paragraph 31.

^{17/} A/C.3/SR.366, paragraph 20.

^{18/} A/C.3/SR.364, paragraph 12.

^{19/} A/C.3/SR.361, paragraphs 41-47.

16. The ILO stressed the importance placed by the Governing Body on the principle that the articles on economic and social rights "should be drafted as brief clauses of a general nature, leaving to the ILO or other specialized agency concerned the detailed working out and application in respect of matters within its competence by means of the precise and detailed provisions and obligations necessary for effective implementation"; the ILO added that the Employers' members of the Governing Body wished their view to be recorded that the principle that there could be no rights without corresponding duties should be stated in an appropriate manner in the Covenant, perhaps among other considerations included in the preamble.^{20/}

17. The Office of the High Commissioner for Refugees stated, inter alia, that it was essential that economic, social and cultural rights be secured not only for nationals, but for all, including refugees.^{21/}

18. It may be desirable to clarify the relationship between the obligation laid down in article 19, paragraph 4, on the one hand, and the additional obligations laid down in article 25, second sentence and sub-paragraphs (a) - (d), article 28, paragraph 9, and articles 29 and 30, on the other hand. The question arises whether the former may not be interpreted as governing the latter.

19. It may also be desirable to clarify the relationship between article 19, paragraph 4, on the one hand, and the provision of article 26 and article 28, paragraphs 2 - 7, on the other. Whereas most provisions in part III "recognize" certain rights and thus afford a clear link between the rights specified and the obligation laid down in article 19, paragraph 4, progressively to achieve "the full realization of the rights recognized in this part of the present Covenant", article 26 and article 28, paragraphs 2 - 7, "recognize" that certain steps "should" or "shall" be taken.

III. Observations on particular existing articles on economic, social and cultural rights

20. In addition, various observations were made on particular existing articles on economic, social and cultural rights, as follows:

(i) Article 19^{22/}

^{20/} E/2057/Add.2, pages 5 and 6.

^{21/} E/2085/Add.1, page 3.

^{22/} See also paragraph 9 above.

21. The representative of Guatemala maintained that paragraphs 1, 2 and 3 of article 19 contained considerations which would be better placed in the preamble which would introduce either the single Covenant or the Covenant on economic, social and cultural rights, as the case may be. Article 19, paragraph 4, and article 31 and 32 related to all economic, social and cultural rights and should, therefore, be inserted at the beginning of part III.^{23/}

(ii) Article 20^{24/}

22. The representative of China regarded article 20 as redundant, and also as not satisfactorily defining the right to work since work was not confined to working for a livelihood but might also imply, for example, working for some altruistic purpose.^{25/}

23. Attention is drawn to the fact that there is in the French text of article 20 ("...le droit fondamental qu'a toute personne de gagner sa vie par un travail librement accepté") no equivalent of the word "opportunity" which appears in the English wording: "... the fundamental right of everyone to the opportunity, if he so desires, to gain his living by work which he freely accépts".

(iii) Article 21

24. The Government of Australia pointed out that the phrase "equal remuneration for work of equal value" had, because of its precision, been used in the instrument prepared by the International Labour Office rather than the phrase "equal pay for equal work", which appeared in article 21 of the draft Covenant.^{26/}

25. The Government of Denmark stated that, as far as private enterprise was concerned, that Government left it to the parties in question to decide through free negotiations questions of remuneration and working-hours. To a certain extent other working conditions were decided in the same manner.^{27/}

26. The representative of Iraq suggested that it was unnecessary to qualify "remuneration" by "minimum" in article 21.^{28/}

^{23/} A/C.3/SR.360, paragraph 24.

^{24/} See also paragraph 9 above.

^{25/} A/C.3/SR.369, paragraph 6.

^{26/} E/2059/Add.4, page 1.

^{27/} E/2059/Add.8, page 1.

^{28/} A/C.3/SR.371, paragraph 1.

27. Similarly, the Governing Body of the ILO considered the word "minimum" as being unnecessary and limitative in its effect.^{29/}

28. It may appear that neither the words "equal pay for equal work" in article 21, sub-paragraph (b) (i), being governed as they are by the word "minimum", nor article 31 read along with the provision for "fair wages" in sub-paragraph (b) (i) would necessarily mean that both sexes and all workers would be equally accorded anything more than whatever may be regarded as minimum remuneration for any particular work.

(iv) Article 24^{30/}

29. The representative of Iraq felt that article 24 did not express sufficiently clearly the need for a continuously rising standard of living.^{31/}

30. The ILO communicated the suggestion of the Governing Body that the intent of article 24 might be more clearly and realistically conveyed by language referring to the right of everyone to "an adequate and improving standard of living".^{32/}

(v) Article 25^{33/}

31. The representative of Peru regarded the protection of mothers and children guaranteed in articles 25 and 26 as inadequate, in view of the fact that all nations represented groups of family units. Such rights were especially important because they involved the assumption of certain obligations.^{34/}

32. Consideration may be given to the question whether administrative measures as well as legislative measures should be mentioned in article 25 as being necessary to promote and protect health.

(vi) Article 26^{35/}

33. The English text of article 26, dealing with the protection of maternity, motherhood and children, might be redrafted to bring it into conformity with the wording used in article 28, paragraphs 2 - 7, by changing the word "should"

^{29/} E/2057/Add.2, pages 5-6.

^{30/} See also paragraph 9 above.

^{31/} A/C.3/SR.371, paragraph 1.

^{32/} E/2057/Add.2, pages 5-6.

^{33/} See also paragraph 18 above.

^{34/} A/C.3/SR.363, paragraph 33.

^{35/} See also paragraphs 19, 31 and 54 of this document.

(used three times in article 26) into "shall". It will be observed that in the French texts the verbs "devoir" and "avoir droit", used in their present tense, appear in articles 26 and 28 where "should" and "shall" appear in the English, and that "ne peuvent...être astreints..." appears in article 26, paragraph 2, where "should not be required..." appears in the English.

(vii) Article 27

34. The representative of Iraq felt that article 27, dealing with the right to form and join trade unions, would have been better placed in the position occupied by article 22, fitting in more logically between the articles dealing with economic and with social rights.^{36/}

35. Article 27, which includes a reference to the present article 16, may require redrafting as a result of the division of the draft Covenant into two, which will result in the inclusion of the present article 16 in a separate instrument from that which will contain article 27.^{37/} The question arises whether to maintain essentially the present wording would not have the result that the signatory of one covenant would be bound by a provision in another covenant to which it may not yet have become a party.

(viii) Article 28^{38/}

36. The Government of Denmark stated that in principle it agreed with the provision made in article 28, paragraph 9, but was of the opinion that it ought to be interpreted with a certain reservation, namely, that no teaching can be undertaken if contrary to decency and public order.^{39/}

37. Article 28, paragraph 2, may require redrafting as a result of the division of the draft Covenant into two, since it contains a reference to the principle of non-discrimination enunciated in the present article 1, paragraph 1.^{40/}

38. Unlike paragraphs 1 - 7, paragraphs 8 and 9 of article 28 appear to fall outside the structure of that article since they are not introduced by the words: "The State Parties to the Covenant recognize", which appear at the beginning of the article. It will be observed that in the French text of this

^{36/} A/C.3/SR.371, paragraph 3.

^{37/} See also paragraph 58(f) below.

^{38/} See also paragraphs 18 and 19.

^{39/} E/2059/Add.8, page 1.

^{40/} See also paragraphs 54 and 58(b) below.

article, paragraphs 2 - 9 are all uniformly introduced by the word "que" in paragraph 1.

39. It may be added, however, that the word "notament" in the French text of article 28, paragraph 1, represents an idea which is not present in the English text.

(ix) Article 29^{41/}

40. It will be recalled that the word "available" was used in article 28, paragraph 3, so as to make it clear that, while primary education must be compulsory, and while free primary education must be available to all, parents should not be obliged to avail themselves of the free primary education provided.^{42/} While the same principle is set out explicitly in article 28, paragraph 8, it may be desirable that the same concept should appear also in article 29, which at present uses the words "...compulsory primary education free of charge for all".

(x) Article 30^{43/}

41. The representative of Iraq regretted that the references to cultural rights (article 30) contained no specific recognition of the right to join cultural unions.^{44/}

(xi) Article 31

42. The representative of the Dominican Republic stated that article 31 should become the first article of the Covenant, since the equal right of men and women to all rights set forth must be recognized at the outset.^{45/}

43. The representative of Iraq, while fully supporting the provisions of article 31, thought that the article would have been more suitably placed elsewhere.^{46/}

44. An observation made by the representative of Guatemala on the placing of articles 31 and 32 is set out in paragraph 21 above.

^{41/} See also paragraph 18 above.

^{42/} Cf. E/CN.4/SR.229, page 19.

^{43/} See also paragraph 18 above.

^{44/} A/C.3/SR.371, paragraph 4.

^{45/} A/C.3/SR.367, paragraph 28.

^{46/} A/C.3/SR.371, paragraph 4.

(xii) Article 32

45. The comments of the French member of the Commission which appear in annex II to the report of the Commission at its seventh session (E/1992) included a statement that the text of article 32, the general limitation clause, is imperfectly drafted, and that wording similar to that used in the Universal Declaration of Human Rights would appear to be indicated.

46. An observation made by the representative of Guatemala on the placing of article 32 is set out in paragraph 21 above.

IV. Observations relating to provisions concerning additional economic, social or cultural rights

47. Certain observations were made on the possibility of providing for additional economic, social or cultural rights.

(i) Family rights

48. The representative of Peru deplored the absence of any reference to family rights in the Covenant.^{47/}

(ii) The right to own property^{48/}

49. The Belgian representative drew attention to certain articles which had not yet been inserted in the draft Covenant, for the inclusion of which his delegation had repeatedly asked; these included property rights.^{49/}

50. The representative of Peru criticized the omission of an article on the right to property, on the ground that such an omission would enable certain States to deprive their subjects of that right. Although in most States the right to property was limited by taxation, everyone should be entitled to a minimum of goods which he could call his own.^{50/}

51. The United States called attention to the desirability of including in the Covenant on Human Rights an article on the right of everyone to own property.^{51/}

^{47/} A/C.3/SR.363, paragraph 33.

^{48/} At its seventh session, the Commission adopted by 10 votes to 6, with 2 abstentions, the following resolution moved by the representative of Denmark

"III. Article on the right of property

"The Commission on Human Rights

"Decides not to include, at present, an article on the right of property in the International Covenant on Human Rights." (E/1992, paragraph 49).

^{49/} E/SR.523, paragraph 13.

^{50/} A/C.3/SR.363, paragraph 32.

^{51/} E/1992, Annex II.

/(iii) The right to

(iii) The right to food^{52/} and clothing

52. The representative of China felt that article 23 was inadequate; under-developed countries recognized the need for the statement of the right to food and clothing as well as the right to adequate housing,^{53/}

53. The representative of Iraq similarly observed that it was not clear why the Commission had thought it necessary to make specific reference to housing, while not mentioning food and clothing.^{54/}

(iv) The prevention of discrimination

54. The attention of the Commission is drawn to provisions I, III, part 2, and IV of the provisions proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities for inclusion in the Draft Covenant on Human Rights.^{55/} In provision IV the Sub-Commission recommends that a general provision forbidding discrimination in regard to economic, social and cultural rights should precede the formulation of such rights.^{56/} Provision I relates to non-discrimination in respect of governmental licensing arrangements and has a relevance to the right to carry on a business, profession, vocation or employment, while in provision III, part 2, the Sub-Commission recommends that article 26, paragraph 2, be redrafted so as to read: "Special measures of protection should be taken on behalf of children and young persons, whether born in or out of wedlock...."

(v) The protection of minorities

55. Provision II of those proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (see paragraph 54 above) which relates to measures for the protection of minorities, is relevant here to the extent that it concerns the right of persons belonging to certain minorities... to enjoy their own culture...or to use their own language".

^{52/} In this connexion attention is drawn to a statement by the representative of the Food and Agriculture Organization addressed to the Economic and Social Council at its twelfth session: E/SR.439, paragraphs 35-41.

^{53/} A/C.3/SR.369, paragraph 6.

^{54/} A/C.3/SR.371, paragraph 1.

^{55/} Annex II of the report of the fourth session of the Sub-Commission, E/CN.4/641.

^{56/} See also sub-paragraph 58(b) below.

V. Observations relating to a possible new classification of rights for treatment in separate covenants

56. The attention of the Commission is drawn to the proposals of Israel (A/C.3/L.193) and Lebanon (A/C.3/L.198/Rev.2), which the General Assembly in resolution 547 (VI) requested the Economic and Social Council to forward, with other proposals, to the Commission as basic working papers on the subjects with which they deal. These two proposals relate, inter alia, to a possible reclassification of rights for treatment in separate covenants.

VI. Observations relating to the inclusion in the two Covenants of as many similar provisions as possible

57. Resolution 543 (VI) of the General Assembly stated that the two Covenants envisaged therein should contain as many similar provisions as possible. In general, delegations appear to have had in mind principally the possibility of inserting similar provisions for reporting procedures in the two Covenants, and resolution 543 (VI) speaks in particular of similar provisions in respect of reporting procedures.

58. Besides the reporting procedures, however, there exist certain other questions in connexion with the drafting of similar provisions. These may include, as far as concerns the proposed Covenant on economic, social and cultural rights, the following:

(i) Preamble^{57/}

(a) The question of the drafting of a preamble: whether to adopt the present article 19, paragraphs 1 - 3; whether to supplement these paragraphs, after such adaptation, with elements from the preamble to the present draft Covenant; or whether to draft a substantially new preamble.

^{57/} See also paragraph 21 above.

(ii) Article on non-discrimination^{58/}

(b) The question of the drafting of a general article on non-discrimination to supplement the present article 28, paragraph 2, which deals with non-discrimination in making educational facilities accessible, and article 31, which deals with non-discrimination on grounds of sex, such an article being analogous to the second part ("...without distinction", etc.) of the present article 1, paragraph 1.

(iii) Article on domestic remedies

(c) The question of the drafting of an article similar to the present article 3 of the draft Covenant, which would ensure to the individual the enforcement on the national level of any aspect of the economic, social and cultural rights to be provided for, once that aspect had been recognized in the law of a State Party to the Covenant on economic, social and cultural rights.

(iv) Article on right of self-determination

(d) The problem, raised by resolution 545 (VI) of the General Assembly, relating to the right of peoples to self-determination should be included in one or both covenants.^{59/}

(v) Articles safeguarding existing rights

(e) The question raised by the International Labour Office in suggesting that paragraph 2 of article 18 of the draft Covenant, which states that nothing in the Covenant may be interpreted as limiting or derogating from any of the rights and freedoms which may be granted under the laws of any Contracting State or any conventions to which it is a party, should be made clearly applicable to part III.^{60/} The question here raised in relation to part III of the existing draft Covenant applies at least as much to a separate draft Covenant on economic, social and cultural rights.

^{58/} See also paragraph 54 above. At its seventh session the Commission agreed to postpone consideration of the proposal of the representative of the United States of America (E/CN.4/610), which was as follows: "Each State Party to the Covenant recognizes that Part IV and the principle of non-discrimination enunciated in Part I, Article 1, paragraph 1, are applicable to the provisions of this Part of the Covenant", until the Commission had considered the provisions of part I and part IV (present part VI) of the draft Covenant. (Report of seventh session of the Commission, E/1992, paragraph 51).

^{59/} See a separate memorandum prepared by the Secretary-General on the question of the right of peoples to self-determination, E/CN.4/649.

^{60/} E/2057/Add.2, page 4.

/(f) The

(f) The related question of whether to add to the present article 27, on the right to form and join trade unions, a provision such as that made in the present article 16, paragraph 3.

(vi) Final clauses^{61/}

(g) The question of the drafting of clauses of the nature of those contained in the present articles 70 and 73, dealing with signature, ratification, accession and entry into force; and amendment of the Covenant.

(h) The question of the Federal State article.

(i) The question of a territorial application clause of the nature of the present article 72.

oOo

^{61/} See footnote to heading VI (ii) above.