

Comment

Monitoring Mechanisms for International Agreements Respecting Economic and Social Human Rights

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Introduction

Although the monitoring mechanisms established under international human rights agreements do not receive as much public attention as the substantive rights that the agreements recognize, they are equally important. In the domestic context, when a right is newly recognized it can be implemented through already existing administrative and legal institutions. This is rarely true of international human rights agreements. International administrative and legal institutions are still embryonic, and the implementation of each new human rights accord normally involves the creation of an entirely new monitoring system to encourage compliance. Over time, the monitoring institutions and practices established under international human rights agreements may become sufficiently robust and flexible to support new accretions of responsibility. For the time being, however, substantial innovation is still required.

Indeed, the rapidly evolving character of international administrative and legal institutions lends a double importance both to the monitoring provisions of new human rights agreements¹ and to experimental procedures introduced by existing monitoring bodies.² In addition to perform-

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1. For example, the Organization of American States is currently considering a draft protocol on economic and social rights to be added to the American Convention on Human Rights. ORGANIZATION OF AMERICAN STATES, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1985-1986, at 195-211 (1986).

2. The monitoring bodies established or designated under human rights agreements possess discretionary control over their own procedural rules and work methods and can thus exert some influence over the specific design features of the monitoring processes they supervise. Human rights monitoring mechanisms cannot be completely specified in advance. Moreover, the consequences of procedural decisions made to implement monitoring provisions are often both significant and controversial. For example, after the European Social Charter entered into force, a dispute arose over whether the Committee of Experts that considers state

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ing an obvious role in implementing specific agreements, these innovations add to the general institutional flux from which models for future institutions emerge. For this reason, monitoring systems that evolve under human rights agreements have an importance which transcends their immediate goals.

There is a particular need, in this regard, to develop effective monitoring mechanisms for use in implementing international agreements respecting economic and social human rights.³ This need stems both from special difficulties associated with the task of monitoring compliance with existing international agreements respecting economic and social human rights,⁴ and from the fact that private human rights organizations have not been active in supplementing official monitoring activities in this area.⁵

This comment suggests ways in which monitoring mechanisms suitable for use in the implementation of economic and social human rights agreements might be rendered more effective and politically palatable. More specifically, it identifies the principal types of monitoring mechanisms available for use in the implementation of economic and social human rights agreements and discusses a variety of ways in which these mechanisms can be configured (or reconfigured) to enhance their effectiveness and political appeal. The emphasis in this analysis is on the po-

reports submitted under the agreement should include state-specific recommendations for policy changes in its own conclusory reports. The Charter itself neither mandates nor prohibits such a practice. Resolution of the issue was perceived as having a significant effect on the strength of the Charter's monitoring mechanism. *See* A. MOWER, *INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE* 208-30 (1985). Another example of the evolution of monitoring structures is provided by the United Nations Economic and Social Council's efforts to define the type of working committee appropriate for evaluating the state reports that it receives under the monitoring provisions of the International Covenant on Economic, Social and Cultural Rights. *See infra* text accompanying notes 41-45.

3. The current distinction made between economic and social human rights, on the one hand, and civil and political human rights, on the other hand, originated in disagreements which arose during the drafting of the Universal Declaration of Human Rights, G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810 (1948). Since then, it has become customary to use the term "political and civil rights" to refer to rights that tend to ensure such things as freedom of conscience, expression, and association; equal protection and due process of law; freedom from slavery and torture; and freedom of assembly and participation in political affairs. In other words, "civil and political rights" are rights such as those singled out for protection in the Bill of Rights and other amendments to the U.S. Constitution. In contrast, the term "economic and social rights" are rights that tend to ensure such things as access to work, education, and medical care; an adequate material standard of living; and the freedom to retain and cultivate a cultural identity. Such rights are not afforded significant constitutional protection in the United States, and there is a tendency to regard them as inferior to civil and political rights, if they are considered to be rights at all.

4. *See infra* text accompanying notes 10-27.

5. *See* Alston, *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 COLUM. J. TRANSNAT'L L. 79, 104-05 (1979).

tential importance of even relatively small adjustments in the structural and procedural architecture of a specific type of monitoring mechanism, and on the relatively large number of such potentially effective adjustments available to the designers of actual monitoring systems.

I begin with a brief discussion of the nature of the obligations incurred by parties to existing international agreements respecting economic and social human rights. This discussion emphasizes the inherently greater difficulty of monitoring state compliance with agreements that impose only promotional obligations with respect to the "rights" they enumerate, as opposed to agreements that impose an obligation to guarantee the enumerated "rights" immediately. I then describe the general form of the monitoring mechanisms established under three key international agreements operative in this field of international law—the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶ the European Social Charter,⁷ and the Constitution of the International Labor Organization.⁸ Although the monitoring regimes established under all three agreements rely primarily on state reporting systems, significant differences exist among them. Finally, I analyze the inherent strengths and weaknesses of the state reporting systems, as well as of two other types of monitoring mechanisms suitable for use in implementing economic and social human rights agreements—complaint procedures and independent commission inquiries. As indicated above, the focus of this analysis is on the many ways in which each of these mechanisms can be configured.

I. Promotional Obligations Versus Immediate Guarantees

The effectiveness of the monitoring mechanisms established under human rights agreements depends not only on the nature of the mechanisms themselves, but also on the nature of the substantive obligations incurred by the parties to the agreements. It is therefore appropriate to begin our discussion of monitoring mechanisms with a brief inquiry into the nature of the obligations incurred by state parties to existing economic and social human rights agreements.

I am not referring here to the listings of rights contained in such agreements, but to the obligations incurred by states with regard to the realization of those rights. The ultimate goal of economic and social human rights agreements is to ensure the realization of rights such as assured

6. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

7. Oct. 18, 1961, Europ. T.S. No. 35, 529 U.N.T.S. 89 [hereinafter Charter].

8. 62 Stat. 3485, T.I.A.S. No. 1868, 15 U.N.T.S. 35 [hereinafter ILO Constitution].

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access to education, medical care, food, and work (just as the ultimate goal of civil and political human rights agreements is to ensure the realization of rights such as freedom of conscience, expression, and association).⁹ In the analysis that follows, however, the substance of these rights is less important than the specific nature of the undertakings to which the parties to an agreement commit themselves.

While some articles of the ICESCR specify particular undertakings to which state parties obligate themselves,¹⁰ the general obligation they incur is "to take steps . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant."¹¹ In other words, the state parties commit themselves only to working *towards* the realization of the rights specified in the ICESCR, not to guarantee them immediately. In this respect, the ICESCR imposes less stringent obligations on its adherents than does its counterpart Covenant on Civil and Political Rights. State parties to the latter agreement incur an obligation to guarantee most of the rights enumerated in the agreement immediately. There the general obligation of a state party is "to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant,"¹² not simply to "take steps" towards the realization of these rights.

In addition to the vague domestic commitment implicit in the ICESCR's general obligation, adhesion to the agreement entails acceptance of an obligation to support a variety of international actions for the purpose of promoting the realization of economic and social human rights. These actions include "the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the

9. See *supra* note 3.

10. The most specific of these is contained in article 14, under which states not yet providing free compulsory primary education in their metropolitan areas or other territories under their jurisdiction agree, within two years of their becoming a party to the agreement, to adopt a plan to provide such education "within a reasonable number of years, to be fixed in the plan." ICESCR, *supra* note 6, art. 14. In most of the other articles in which rights are specified, the state parties merely "recognize" the rights in question and bind themselves only to the general obligations specified in article 2(1). In four articles, somewhat stronger language is used. The state parties undertake to "guarantee" the right to non-discriminatory treatment (art. 2(2)); to "ensure" both the equal right of men and women to enjoy the rights recognized in the Covenant (art. 3), and the right to freedom of association (in trade unions) (art. 8); and to "respect" freedom of scientific research and creative activity (art. 15(3)). ICESCR, *supra* note 6. What distinguishes these rights from those which the state parties simply "recognize" is their dual identity. They are civil rights as well as economic rights, and the privileged status they are accorded under the ICESCR seems to follow from the generally stronger protection afforded under the International Covenant on Civil and Political Rights. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

11. ICESCR, *supra* note 6, art. 2(1).

12. ICCPR, *supra* note 10, art. 2(1).

holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the Governments concerned."¹³

Because of the limited nature of these obligations, it has become customary to refer to the rights protected by the ICESCR as "relative," "progressive," "programmatic," or "promotional," and to contrast them with the "absolute," "immediate," or "legally justiciable" rights protected by the International Covenant on Civil and Political Rights.¹⁴ It should be noted, however, that there is nothing inherent in economic and social rights that limits them in this way. Economic and social rights can be guaranteed immediately, like any other right, so long as the state parties to an agreement respecting them are willing to undertake an obligation to do so.¹⁵

To be sure, states generally have been unwilling to accept such obligations with regard to economic and social rights. The same is often true, however, of certain political and civil rights. The clearest example of this is the right of self-determination declared in the first article of both the Covenant on Civil and Political Rights and the ICESCR. State parties to these agreements bind themselves only to "promote the realization of the right," not to guarantee its immediate achievement.¹⁶ It has similarly been observed that the obligation of states to "take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution" is also purely promotional.¹⁷

Rather than attempting to distinguish between civil and economic rights on this basis, it would be more accurate to say that states tend to resist incurring an obligation to guarantee (rather than merely to promote) a right immediately whenever realization of that right would either be very expensive or would require fundamental structural changes in the society. It is in this context that the frequently cited distinction between

13. ICESCR, *supra* note 6, art. 23.

14. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETH. Y.B. INT'L L. 69, 80-81, 83-84 (1978); cf. P. SIEGHART, *THE LAWFUL RIGHTS OF MANKIND* 81-83, (1985) (arguing that the customary distinctions made between economic and social rights on the one hand and civil and political rights on the other are largely artificial).

15. Vierdag acknowledges as much, although he concludes that the indefinite character of the obligations imposed on state parties to the ICESCR means that "the rights granted by the International Covenant on Economic, Social and Cultural Rights are of such a nature as to be legally negligible." Vierdag, *supra* note 14, at 83-86, 105.

16. ICESCR, *supra* note 6, art. 1(3); ICCPR, *supra* note 10, art. 1(3).

17. ICCPR, *supra* note 10, art. 23(4); see Schwelb, *Some Aspects of the International Covenants on Human Rights of December 1966*, in *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS: PROCEEDINGS OF THE 7TH NOBEL SYMPOSIUM* 103, 108 (A. Eide & A. Schou eds. 1968) [hereinafter *INTERNATIONAL PROTECTION*].

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positive rights (those that require state action for their realization) and negative rights (those that require state abstention) is relevant.¹⁸ It is not true, though, that economic and social rights are inherently positive in this sense, while civil and political rights are inherently negative. Consider, for example, the problem of racial discrimination. Few people in the United States today would question that such discrimination violates human rights standards, but the nation's history (for example, in the area of school desegregation) amply demonstrates that extensive and exceedingly intrusive governmental action may be required in order to achieve reasonable compliance with these standards. Undoubtedly, the realization of many economic and social human rights would be equally difficult to achieve. The difficulty lies not in their characterization as economic and social rights, however, but in the profound social, economic, and political changes that would be required to guarantee them.

The claim that the realization of economic and social rights requires state action, while the realization of civil and political rights merely calls for state abstention from action, is also based on the assumption that a state's obligations under a human rights agreement only implicate governmental behavior. If the right not to be victimized by racial discrimination is indeed a *human* right, however, then it is hard to justify a distinction that would find a violation of that right in the behavior of individuals acting as government agents, but not in the behavior of individuals acting for private interests.

What are the obligations of a government to protect its citizenry from human rights violations by private parties? Surely something more than abstention from doing positive harm is required. While determining the extent of a state's obligation to take affirmative steps in such areas is not easy, as soon as the obligation is acknowledged the conventional distinction between "negative" and "positive" rights no longer holds. The right to be free from racial discrimination may still be characterized as a "negative" right, but "positive" state action might be required to protect it. Whether the action required to realize particular civil and political rights is greater than that required to realize particular economic and social rights depends on the nature of the right, the character of existing social institutions, and the degree to which they are susceptible to change through state action.

Whatever the difficulties associated with the realization of particular rights, the task of monitoring a state's compliance with a human rights agreement will be easier when the state's obligations take the form of an

18. See, e.g., Vierdag, *supra* note 14, at 80-82; A. MOWER, *supra* note 2, at 3.

immediate guarantee of those rights rather than an obligation merely to promote them. This follows because the scope of promotional obligations is indefinite in comparison to obligations to guarantee particular rights immediately. The European Social Charter illustrates one form that immediate guarantees can take in an economic and social human rights agreement. State parties to the Charter incur two types of obligations: the parties are generally obligated to "accept as the aim of their policy" (i.e., to promote) the realization of all of the rights specified in the Charter,¹⁹ but they also must agree to "consider themselves bound" to guarantee immediately a self-selected subset of those rights.²⁰ In this respect, the Charter imposes obligations that are considerably more stringent than those assumed by state parties to the ICESCR. Moreover, while still phrased in general terms, the Charter also attempts to specify what public policies a state party must implement to satisfy its obligations with regard to those rights that it agrees to guarantee immediately.

The convention system of the International Labor Organization (ILO) provides another model for including immediate guarantees in international agreements respecting economic and social human rights.²¹ The ILO Constitution imposes on a member state the obligation to protect specific economic and social human rights only if that state has ratified one or more of the conventions adopted by the Organization's General Conference.²² Over 150 such conventions have been adopted since 1919, with member states ratifying an average of thirty-three conventions each.²³ The conventions themselves are detailed agreements focusing on issues ranging from particular work hazards, such as benzene exposure,²⁴ to general freedoms, such as the right to organize and engage in collec-

19. Charter, *supra* note 7, pt. I (introductory paragraph) & pt. III, art. 20(1)(a).

20. *Id.* pt. II (introductory paragraph) & pt. III, art. 20.

21. The ILO was established as part of the peace accords ending World War I and is now a specialized agency of the United Nations. On the origins and history of the Organization, see generally J. SHOTWELL, *THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION* (1934); Beguin, *ILO and the Tripartite System*, 523 INT'L CONCILIATION 405 (1959); D. MORSE, *THE ORIGIN AND EVOLUTION OF THE I.L.O. AND ITS ROLE IN THE WORLD COMMUNITY* (1969); A. TIKRITI, *TRIPARTISM AND THE INTERNATIONAL LABOUR ORGANIZATION* (1982).

22. Having ratified a convention, a member state incurs an obligation to "take such action as may be necessary to make effective the provisions of such Convention." ILO Constitution, *supra* note 8, art. 19(5)(d).

23. A. TIKRITI, *supra* note 21, at 377-83.

24. Convention Respecting Protection Against Benzene Poisoning (ILO Convention No. 136), adopted June 23, 1971, reprinted in INTERNATIONAL LABOR ORGANIZATION, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1981, at 377-80 (1982).

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tive bargaining.²⁵ Some conventions require immediate guarantees²⁶ while others merely impose promotional obligations.²⁷

Thus international agreements respecting economic and social human rights vary in the balance that they strike between the duty to promote and the duty to guarantee; while it is possible to monitor compliance with both types of obligations, it is inherently more difficult to do so with regard to the former. This point warrants emphasis, because some monitoring mechanisms may be more suitable than others for dealing with this difficulty. With this in mind, I examine below the monitoring mechanisms embodied in the ICESCR, the European Social Charter, and the ILO Constitution.

II. Existing Monitoring Mechanisms

A. *The International Covenant on Economic, Social and Cultural Rights*

The implementation provisions of the ICESCR are contained in articles 16 through 23 of the agreement.²⁸ These provisions establish a state reporting system under the aegis of the Economic and Social Council of the United Nations (ECOSOC).²⁹ State parties to the ICESCR are obligated to submit reports on “the measures which they have adopted and the progress made in achieving the observance of the rights recognized”

25. Right of Association (Agriculture) Convention (entered into force May 11, 1923); Convention Concerning Right to Organize (ILO Convention No. 87), *adopted* July 9, 1948; Convention Concerning Right to Collective Bargaining (ILO Convention No. 98), *adopted* July 1, 1949; Rural Worker's Organizations Convention (ILO Convention No. 141), *adopted* June 23, 1975; Collective Bargaining Convention (ILO Convention No. 154), *adopted* June 19, 1981. INTERNATIONAL LABOR ORGANIZATION, *supra* note 24, at 3-8, 15-17, 218-20.

26. For example, a ratifier of Convention No. 11 “undertakes to secure to all those engaged in agriculture the same rights of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture.” Right of Association (Agriculture) Convention (ILO Convention No. 11), art. 1. INTERNATIONAL LABOR ORGANIZATION, *supra* note 24, at 3.

27. For example, a ratifier of Convention No. 154 is obligated to take “[m]easures adapted to national conditions . . . to promote collective bargaining.” Collective Bargaining Convention (ILO Convention No. 154), art. 5(1). INTERNATIONAL LABOR ORGANIZATION, *supra* note 24, at 219.

28. ICESCR, *supra* note 6. For a fuller description of the ICESCR's implementation mechanisms, see Das, *United Nations Institutions and Procedures Founded on Conventions on Human Rights and Fundamental Freedoms*, in *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 303, 331-34 (K. Vasak & P. Alston eds. 1982) [hereinafter *INTERNATIONAL DIMENSIONS*].

29. The Economic and Social Council consists of 54 members elected by the General Assembly for staggered three-year terms. It occupies a position in the structure of the U.N. that formally parallels that of the Security Council, though its powers are more limited. See U.N. DEPARTMENT OF PUBLIC INFORMATION, *EVERYBODY'S UNITED NATIONS* 14-20 (1986). Its province includes the promotion of human rights, and it drafted both the ICESCR and the ICCPR.

in the ICESCR.³⁰ The reports are to be completed "in stages, in accordance with a programme to be established by the Economic and Social Council."³¹ They are submitted to the Secretary General of the United Nations who then forwards them both to ECOSOC³² and to those specialized agencies with responsibilities in the reported areas.³³

ECOSOC is also empowered to "make arrangements" with the specialized agencies to receive reports from them on "the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities," including information regarding any decisions or recommendations made by them with respect to the implementation of the specified rights.³⁴ ECOSOC is *not* empowered to receive complaints alleging non-compliance with its provisions, either from state parties or from individuals. In this respect, the ICESCR differs from the Covenant on Civil and Political Rights.³⁵

ECOSOC may transmit both the state reports and the reports of specialized agencies to the Commission on Human Rights³⁶ for "study and general recommendation" or merely "for information."³⁷ The ICESCR does not provide for this Commission to pass judgment on the adequacy of a state's compliance with the ICESCR, but merely to make general,

30. ICESCR, *supra* note 6, art. 16(1).

31. *Id.* art. 17(1). A six-year program for the receipt of reports was established by ECOSOC, with reports on articles 6 through 9 due in 1977, reports on articles 10 through 12 due in 1979, and the last group of reports covering articles 13 through 15 due in 1981. A. MOWER, *supra* note 2, at 31-35. The compliance of state parties with this schedule has been very poor. By May 1984, almost three years after the last reports were due, only 27 of 69 states had submitted third stage reports, originally due in September 1981. *Id.* at 40.

32. ICESCR, *supra* note 6, art. 16(2).

33. These include, for example, the International Labor Organization (ILO), the World Health Organization (WHO), and the United Nations Educational, Scientific, and Cultural Organization (UNESCO).

34. ICESCR, *supra* note 6, art. 18. Since the specialized agencies receive copies of the state reports and are authorized to submit their own reports to ECOSOC, some latitude exists for them to undertake state-specific reviews of compliance in the areas of their competence and for their conclusions to be received by ECOSOC. The ILO, in particular, has taken advantage of this opening. See A. MOWER, *supra* note 2, at 69-78.

35. Though the compulsory implementation provisions of the Covenant on Civil and Political Rights establish only a state reporting system, there is an optional article allowing state parties to authorize the Covenant's Human Rights Committee to receive complaints from one state party alleging a violation of the agreement by another, and there is an optional protocol allowing state parties to recognize the competence of the Committee to receive complaints from individuals. ICCPR, *supra* note 10, art. 41; Optional Protocol to the International Covenant on Civil and Political Rights, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966) [hereinafter *Optional Protocol*].

36. The Commission on Human Rights is a subsidiary of ECOSOC. Established in 1946, it now consists of representatives of 44 member states and operates with a broad-based mandate to study, promote, and monitor observance of human rights around the world. See U.N. DEPARTMENT OF PUBLIC INFORMATION, *supra* note 29, at 19, 302.

37. ICESCR, *supra* note 6, art. 19.

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non-state-specific recommendations. If the Commission on Human Rights makes general recommendations in light of these reports, then any state party to the ICESCR and any of the concerned specialized agencies may submit "comments" to ECOSOC in response.³⁸

With the information and comments thus received, ECOSOC itself may submit "reports with recommendations of a general nature" to the General Assembly.³⁹ ECOSOC may also "bring to the attention of other organs of the United Nations . . . any matters arising out of the reports" it receives under the ICESCR in order to assist those organs in deciding "on the advisability of international measures" to further the aims of the ICESCR.⁴⁰ Again, these procedures do not include a mandate for any of the involved bodies to pass judgment on the adequacy of a state's compliance with its ICESCR obligations.

The effectiveness of the monitoring mechanisms established under the ICESCR has been questioned. In particular, the quality of review provided for state reports under procedures established by ECOSOC has been a source of ongoing controversy.⁴¹ ECOSOC originally established a fifteen-member Sessional Working Group to consider the state reports and to submit a report to the full Council.⁴² At first, the Sessional Working Group consisted of government representatives, with seats on the committee rotating among state parties according to a formula that ensured a geographic distribution of members. In response to widespread criticism of the quality of its review work, the Sessional Working Group was reformed in 1982. Henceforth, those states which were assigned seats were represented by experts in economic and social policy. The committee was renamed the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights.⁴³ Criticism of the new Working Group continued, and in 1985 agreement was reached to replace it with a committee of eighteen experts serving in their personal capacity. This body is called the Committee on Economic, Social and Cultural Rights,⁴⁴

38. *Id.* art. 20.

39. *Id.* art. 21.

40. *Id.* art. 22.

41. See, e.g., A. MOWER, *supra* note 2, at 31-65; Commentary, *Implementation of the International Covenant on Economic, Social and Cultural Rights: ECOSOC Working Group*, 27 I.C.J. REV. 26 (1981).

42. A. MOWER, *supra* note 2, at 34-35, 41-43.

43. E.S.C. Res. E/1982/33, U.N. Doc. E/1982/INF/7, at 57 (1982); see A. MOWER, *supra* note 2, at 52-60.

44. E.S.C. Res. 1985/17, 1985 U.N. ESCOR Supp. (No. 1) at 15, U.N. Doc. E/1985/85 (1986).

and it met for the first time in March 1987.⁴⁵ This process of change clearly demonstrates that the monitoring mechanisms established under the ICESCR should not be regarded as a fixed system, but rather as one that, within limits, can be modified over time.

B. *The European Social Charter*

Like the ICESCR, the European Social Charter relies exclusively on a state reporting system for its implementation.⁴⁶ There are, however, significant differences between the two systems. First, the Charter explicitly provides for the establishment of an Independent Committee of Experts to receive the required state reports.⁴⁷ This Committee consists of not more than seven persons who serve in their individual capacity, not as governmental representatives. Members of the Committee are appointed to staggered six-year terms of office by the Committee of Ministers of the Council of Europe⁴⁸ "from a list of independent experts of the highest integrity and of recognized competence in international social questions."⁴⁹ A representative of the ILO also participates "in a consultative capacity in the deliberations of the Committee of Experts."⁵⁰ Although ECOSOC has now established a similar committee of independent experts,⁵¹ the fact that the Charter Committee is mandated by the agreement itself lends it added stature and independence. A second difference is that under the Charter, certain national organizations of employers and trade unions are entitled to comment to the Committee of Experts on the reports prepared by their governments.⁵²

The "conclusions" of the Committee of Experts are transmitted to two bodies. One is the Governmental Committee on the European Social

45. See E.S.C. Decision 1986/123, U.N. Doc. E/1986/INF/4, at 71 (1986).

46. For a fuller description of the Charter's implementation mechanisms, see Vasak, *The Council of Europe*, in INTERNATIONAL DIMENSIONS, *supra* note 28, at 457, 539-42. For a description of their actual operation, see A. MOWER, *supra* note 2, at 203-38.

47. Charter, *supra* note 7, art. 24.

48. *Id.* art. 25(1), (2). The Committee of Ministers consists of the foreign ministers of all of the member states of the Council of Europe. The Council's Parliamentary Assembly (commonly called the European Parliament) is the organization's chief deliberative body, but the Committee of Ministers, which has independent deliberative authority, is the only body empowered to take action in the name of the Council. See Statute of the Council of Europe, May 5, 1949, art. 13, 87 U.N.T.S. 103, 110. The Council's specialized institutions include the European Commission of Human Rights and the European Court of Human Rights. Both the Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention], and the Charter, *supra* note 7, are products of the Council.

49. Charter, *supra* note 7, art. 25(1).

50. *Id.* art. 26.

51. See *supra* notes 41-45 and accompanying text.

52. Charter, *supra* note 7, arts. 23, 24.

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Charter (Governmental Committee), a subcommittee of the Governmental Social Committee of the Council of Europe,⁵³ which consists of representatives of the governments of state parties to the Charter.⁵⁴ The other body is the Parliamentary Assembly of the Council of Europe,⁵⁵ which represents the European voting public rather than its governments.⁵⁶ Both of these groups consider the Committee of Experts report and then transmit their own "conclusions" or "views" to the Committee of Ministers of the Council of Europe, a body which, like the Governmental Committee, represents governments.⁵⁷ The Committee of Ministers may, on the basis of these reports and consultations, "make to each Contracting Party any necessary recommendations."⁵⁸ Thus, another significant difference between the implementation procedures of the ICESCR and those of the Charter lies in the nature of the final response that the monitoring bodies are empowered to make. Under the ICESCR, only general recommendations are mandated; under the Charter, the monitoring bodies are instructed to make state-specific conclusions and recommendations.

In practice the Committee of Ministers (with the support of the Governmental Committee⁵⁹) has been hesitant to make state-specific recommendations, even though it has come under considerable pressure from the Parliamentary Assembly (and indirectly from the Committee of Experts) to do so.⁶⁰ Its inaction demonstrates that Western European governments are more reluctant to criticize one another than are bodies that do not represent governments.⁶¹ The Committee of Experts has been particularly vigorous in its interpretation of its mandate to review the state reports submitted under the Charter.⁶² It has performed its assigned task with a thoroughness that is in marked contrast to the per-

53. *Id.* art. 27(1).

54. *Id.* art. 27(2). The Governmental Committee consists of one representative of each state party to the Charter. In addition, no more than two international employer organizations and two international trade union organizations are represented "as observers in a consultative capacity at its meetings." Up to two representatives of international non-governmental organizations with expertise in relevant areas may also be consulted. *Id.*

55. *Id.* art. 28.

56. The Parliamentary Assembly (formerly called the Consultative Assembly) is composed of representatives selected by the member states of the Council of Europe. Each nation's representatives are elected by the nation's parliament or appointed according to a procedure (such as direct election) chosen by the nation. The Assembly's statutory powers are strictly consultative, but it has considerable influence as a voice of collective European public opinion. *See supra* note 48.

57. Charter, *supra* note 7, arts. 27(3), 28; *see supra* note 48.

58. Charter, *supra* note 7, art. 29.

59. *See supra* text accompanying notes 53-54.

60. A. MOWER, *supra* note 2, at 208-30.

61. *See supra* notes 53-57 and accompanying text.

62. A. MOWER, *supra* note 2, at 208-30.

formance of the Sessional Working Group originally established under the ICESCR.⁶³

C. *The Constitution of the International Labor Organization*

While the monitoring mechanism established under the European Social Charter has proved to be more rigorous in practice than its ICESCR counterpart, there is widespread agreement that the ILO's monitoring activities are even more thorough.⁶⁴ This is so even though the ILO Constitution is less precise than either the ICESCR or the Charter in specifying the structure of the monitoring process upon which the organization primarily relies. The ILO Constitution mandates a vaguely defined state reporting procedure,⁶⁵ and a much more specific complaint procedure.⁶⁶ The latter has been used only infrequently, however,⁶⁷ while the former has evolved into a powerful monitoring device.

The ILO Constitution requires merely that a member state "make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party," and that the Organization's Director General "lay before" the ILO General Conference a "summary" of these reports.⁶⁸ In 1926, however, the ILO General Conference agreed to establish a Committee of Experts whose duties included the receipt and review of state compliance reports.⁶⁹ The Committee is responsible for reporting to the General Conference on "the extent to which it appears that the position of each state is in conformity with the terms" of each covenant it has ratified.⁷⁰

63. See *supra* notes 41-45 and accompanying text.

64. For citations to the relevant literature, see Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748, 778 n.74.

65. ILO Constitution, *supra* note 8, art. 22.

66. *Id.* arts. 23-34.

67. A. MOWER, *supra* note 2, at 97. The complaint procedure has, however, come into greater use in recent years. Of the 14 complaints filed during the ILO's existence, 13 were entered between 1961 and 1983, and 8 were filed in the 1970's. *Id.*

68. ILO Constitution, *supra* note 8, arts. 22-23. The General Conference of the ILO is the organization's deliberative body. Each member nation has four seats in the General Conference, two of which are filled by government delegates and two going to "delegates representing respectively the employers and the workpeople of each of the Members." *Id.* art. 3(1). The latter two delegates are nominated by the member states that undertake to choose them "in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries." *Id.* art. 3(5). For the history of this tripartite structure, see *supra* note 21. For a more detailed description of the schedule pertaining to reporting obligations currently in force with respect to ratified conventions, see A. MOWER, *supra* note 2, at 81-82.

69. A. MOWER, *supra* note 2, at 70, 81.

70. Report [3] of the Committee of Experts on the Application of Conventions and Recommendations (Part 4A), International Labor Conference, 63rd Sess. (1977), at 13, quoted in A. MOWER, *supra* note 2, at 82.

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The review process undertaken by the Committee of Experts is rigorous and has proven to be controversial. In particular, socialist countries have criticized the Committee for failing to reflect a proper balance in its assessment of conditions in countries with different economic, social, and political systems.⁷¹

As noted above, the ILO complaint system is described in considerably more detail in the Organization's constitution than is the ILO's state reporting system. Actually, two different complaint systems are established, a limited one for non-governmental associations of employers or workers, and a more complete adjudicatory system for government complaints. Employer or worker associations may make "representations" to the International Labor Office alleging non-compliance with a Convention by a member state, and the accused government can respond to the allegation.⁷² If no response is forthcoming, or if the response is "not deemed to be satisfactory," both the representation and the government's response, if any, may be published.⁷³ No further proceedings are mandated. In contrast, when a state that has ratified an ILO convention submits a complaint alleging non-compliance with the convention by another ratifying state, a Commission of Inquiry is appointed to investigate the matter.⁷⁴ The Commission of Inquiry makes findings of fact and may make recommendations "as to the steps which should be taken to meet the complaint and the time within which they should be taken."⁷⁵ The government parties to the proceeding may accept or reject these recommendations, and, in the latter case, may submit the dispute to the International Court of Justice for binding adjudication.⁷⁶

The governmental complaint system is thus quite powerful, and the non-governmental system, although more limited, at least allows complaints from non-governmental organizations to be formally received and permits accused governments to respond. This is substantially more than other economic and social human rights agreements provide, and though neither the "complaint" nor the "representation" mechanism has been used frequently in the past, both are becoming increasingly popular.⁷⁷

71. *Id.* at 89-90. For a general description of the Committee's work, see *id.* at 81-90.

72. ILO Constitution, *supra* note 8, art. 24.

73. *Id.* art. 25.

74. *Id.*

75. *Id.* art. 28.

76. *Id.* arts. 29, 31-32.

77. While the representation procedure was used only 13 times between 1919 and 1980, it was used 7 times between 1980 and 1983. Similarly, the complaint procedure was used only 6 times between 1919 and 1970, but 8 times from 1971 until 1983. A. MOWER, *supra* note 2, at 97.

III. Advantages and Disadvantages of Different Monitoring Mechanisms⁷⁸

The monitoring mechanisms established under the ICESCR, the European Social Charter, and the ILO Constitution are all, with the exception of the ILO complaint procedure, state reporting systems. Yet there are significant differences among the systems. If other implementation mechanisms are considered, still greater variety is possible. In the discussion that follows, the inherent strengths and weaknesses of three general types of monitoring systems will be analyzed. The first type consists of state reporting systems such as those discussed above. The second type consists of complaint systems such as the one established under the ILO Constitution. The third type is a system of country reports prepared by an independent commission of inquiry, either as a supplement to, or as a replacement for, state reports submitted by governments.

The variations considered in each type of system involve one or more of the following factors: (1) limitations on the type or source of input allowed in the monitoring process; (2) the composition and status of the monitoring bodies; (3) the procedures followed by the monitoring bodies; and (4) the nature of the decisions or recommendations that the monitoring bodies are authorized to make. The focus of the discussion will be on the suitability of each type of monitoring system for the implementation of an economic and social human rights agreement, and the effect of variations in each type of monitoring system on both the system's effectiveness and its political acceptability.

A. *State Reporting Systems*

A state reporting system is the least intrusive means of monitoring the compliance of individual state parties to a human rights agreement. Since most states are protective of their sovereignty and suspicious of the motives of other states, they generally prefer state reporting systems. There are, however, other reasons for relying on such a system. If the obligations assumed by a state involve promises to work towards the realization of certain rights, rather than immediate guarantees, then those rights may not be justiciable. A complaint would have to allege that a state failed to make a good faith effort to promote the right in question, rather than simply that it did not observe it. Such a claim would be

78. For general discussions of the effectiveness of alternative implementation mechanisms employable in human rights agreements, see Capotorti, *The International Measures of Implementation Included in the Covenants on Human Rights*, in INTERNATIONAL PROTECTION, *supra* note 17, at 137; Vasak, *The Distinguishing Criteria of Institutions*, in INTERNATIONAL DIMENSIONS, *supra* note 28, at 215.

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exceedingly difficult to prove in a traditional adversarial proceeding. Hence, with this type of rights provision periodic reports detailing a state's efforts to meet its obligations may be the most appropriate method of evaluating its compliance. A systematic state reporting system also may make more sense than a complaint procedure where the agreement in question is not really intended to protect individual or group rights directly, but to facilitate international cooperation in joint undertakings. It may be, for example, that this motivation underlies the diverging obligations incurred by parties to the ICESCR and the Covenant on Civil and Political Rights,⁷⁹ a difference that is obscured by the rhetorical tendency to describe the two agreements as reflecting similar commitments.

Are monitoring mechanisms which rely on state reporting systems inherently weaker than those based on complaint systems? There is a tendency to think so because of the generally acknowledged weakness of the ICESCR and the Charter in comparison to human rights agreements that provide for complaint systems.⁸⁰ Experience with the ILO state reporting system, however, suggests that the weaknesses of the ICESCR and the Charter stem not so much from inherent limitations in state reporting systems as from the limited nature of the obligations assumed by state parties to the latter agreements and from a lack of political support of governments for the conclusory recommendations of monitoring bodies consisting of independent experts. Promises by a state to *try* to realize certain rights over time are clearly weaker than immediate guarantees of the same rights, and the effectiveness of any monitoring mechanism will depend on the amount of political support it commands.

Given the type of obligation incurred by the state parties to an agreement—to guarantee or merely to promote the enumerated rights—and the general level of political support that exists for the enforcement effort, the effectiveness and political palatability of a state reporting system are likely to depend on secondary characteristics of the system. These include the form of the reports, whether cognizance is given to critical responses they engender, the composition of the monitoring body that receives the reports, the degree of inquisitorial power vested in the moni-

79. Cf. Alston, *supra* note 5, at 94-95 (contrasting reporting systems of ILO Constitution and ICESCR).

80. See Schwelb, *Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1 REVUE DES DROITS DE L'HOMME 363, 377 (1968). For provisions in civil and political human rights agreements establishing complaint systems, see ICCPR, *supra* note 10, art. 41; Optional Protocol, *supra* note 35; European Convention, *supra* note 48, arts. 24-25; American Convention on Human Rights, Jan. 7, 1970, arts. 44-45, O.A.S. Official Records, OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 [hereinafter American Convention].

toring body, and the extent of the monitoring body's own reporting powers.

A state report drafted without clear directives regarding the nature of the information to be provided will probably be of limited value in judging the extent of the state's compliance with a human rights agreement. If, on the other hand, very specific information is demanded, based on clearly conceived performance indexes, then state reports can be a useful and efficient way for a monitoring body to obtain the data it needs.⁸¹ This is especially true with regard to agreements respecting economic and social rights, since standardized quantitative data (e.g., unemployment rates, disease and mortality rates among specified population groups, school enrollment figures) generally provide better measures of national performance respecting the protection of these rights than they do of civil and political rights. Moreover, the reliability of the information provided in state reports may be enhanced if the body receiving the reports is given the power to audit the information, with on-site inspection tours if necessary, and to make follow-up queries addressed to the reporting state.

The composition of the monitoring bodies in a state reporting system will also have an impact on the system's effectiveness. The most significant variable in this regard is whether the reports are examined by a political body whose members take instruction from the governments they represent (such as the Governmental Committee on the European Social Charter or the Committee of Ministers of the Council of Europe⁸²), or by a body whose members sit in their individual capacity as "experts" or "guardians" of the rights protected by the agreement (such as the Committee of Experts established under the Charter⁸³). As one commentator has noted:

[A] body composed of government representatives must take into account considerations of prestige and respect of State sovereignty. . . . A body composed of individuals independent from governments is on the contrary exclusively bound to general interests: its members will enjoy larger freedom of initiative and will be capable of assuming a critical position, if they think it necessary, with greater objectiveness.⁸⁴

81. For a description of actual practice under the ICESCR and European Social Charter state reporting systems with regard to the specification of the format of submitted reports, see A. MOWER, *supra* note 2, at 36-39, 48-52, 205-08. On ILO practice, see generally E. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF ILO EXPERIENCE* (1968).

82. *See supra* text accompanying notes 47-63.

83. *Id.*

84. Capotorti, *supra* note 78, at 136.

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The same commentator concedes, however, that where state reports are intended more to promote international cooperation among states than to protect individuals from violations of their rights, a political organ may be the appropriate monitoring body.⁸⁵ This latter consideration seems to have prevailed in the original design of the monitoring system established under the ICESCR, but the European Social Charter demonstrates that compromise solutions are also possible, with more than one body having successive responsibility for considering state reports.⁸⁶

Another important factor influencing the effectiveness and political acceptability of a state reporting system is whether monitoring bodies are given the authority to take official cognizance of critical responses to the reports by non-governmental organizations. Under the ICESCR, no provision is made for such responses to be received. The ILO Constitution is also silent on the matter, but comments by national organizations of employers and employees are, in practice, received and considered by the ILO Committee of Experts. Indeed, they are actively sought.⁸⁷ Under the European Social Charter, responses may be received, but only from specified national organizations of employers and trade unions.⁸⁸ Requiring states to publish their reports, and allowing monitoring bodies to consider responses to the reports (submitted by other states, non-governmental organizations, and individuals) would go a long way towards strengthening a state reporting system. Such an arrangement would put pressure on a state to respond to its critics, much as it would have to respond to individual complaints if such complaints were permitted.

Also, a state reporting system that institutionalizes critical comment would probably be better suited than a complaint system for monitoring compliance with agreements that require promotional efforts rather than the immediate protection of rights. In a complaint system, the burden of going forward with proof of non-compliance falls initially on the complainant. It would be extremely difficult to carry this burden where a lack of good faith effort on the part of the state must be shown. In contrast, a state reporting system in effect places the burden of going forward with proof of compliance on the state. Critics of a state's performance in promoting human rights may find it easier to present their "case" when it is framed as a response to the state's own report of its efforts.

85. *Id.*

86. *See supra* text accompanying notes 46-58.

87. A. MOWER, *supra* note 2, at 94-97.

88. Charter, *supra* note 7, art. 23.

As the European Social Charter demonstrates, however, a state reporting system does not have to open the floodgates to independent comment. Standing to submit formal responses to a monitoring body can be limited. States that are unwilling to countenance a complaint system might therefore prefer a state reporting system that vests a right of response only in certain designated organizations. Over time, more groups may be granted standing as the state parties to the agreement become more comfortable with its monitoring procedures.

Still another factor influencing the effectiveness and political acceptability of a state reporting system is whether limits are imposed on the type of judgments and recommendations that monitoring bodies are empowered to make. The principle issue here is whether these judgments and recommendations can be state-specific (as is the practice of the Committee of Experts established under the European Social Charter) or whether they must be "general" in character (as ICESCR provisions suggest). A further distinction can be made between the power to issue findings of fact, judgments regarding compliance, and recommendations for policy changes or initiatives.

Having the power to issue state-specific evaluations clearly enhances a monitoring body's ability to put pressure on individual governments. However, that ability may be constrained by limiting the body to the issuance of certain types of evaluations. For example, a monitoring body consisting of "technical experts" might be empowered to issue state-specific factual summaries concerning economic and social conditions in particular countries, but be prohibited from passing final judgment as to the state's compliance with its legal obligations or from making state-specific policy recommendations.

Alternatively, a monitoring body might be empowered to make state-specific policy recommendations without passing explicit judgment on the adequacy of the country's current efforts to realize economic and social rights. If all the state parties to an agreement receive such "technical advice," tailored to local conditions, then the monitoring body's work might be perceived as carrying less political sting. Thus, while an agreement empowering a monitoring body to reach state-specific conclusions of all three types would clearly be the strongest, a wide variety of weaker arrangements are available if political factors dictate their consideration.

B. *Complaint Systems*

The most generally recognized alternative to a state reporting system is a complaint system. Such systems have been established in human rights agreements respecting civil and political rights, but are typically

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established under separate articles or protocols to which state parties to the overall agreement are invited, but not required, to adhere.⁸⁹

In contrast, among principal international agreements respecting economic and social human rights, only the ILO Constitution provides for the establishment of a complaint system. One frequently cited explanation for this fact is that differences in the substantive nature of the rights protected under the two kinds of covenants call for different implementation mechanisms. A complaint system is deemed appropriate for enforcing justiciable rights, that is, rights that are guaranteed immediately, but not for enforcing compliance with purely promotional obligations. In the latter case, it is argued, a state reporting system is more likely to encourage the international cooperation necessary to realize the goals of the agreement.⁹⁰

Yet the European Social Charter eschews a complaint procedure, despite the fact that state parties to it assume obligations to guarantee certain rights immediately. It seems likely that a second reason that complaint procedures are not often utilized in international agreements respecting economic and social rights is simply that governments have been disinclined to submit to such an intrusive monitoring mechanism, and the political interests favoring the strict enforcement of economic and social rights have not been strong enough to overcome this resistance.

Obligations to promote the realization of human rights over time, rather than to guarantee them immediately, may be better monitored by means of a reporting system. It does not follow, however, that a complaint procedure would be a useless appendage to such a system. Complaint procedures could effectively supplement reporting systems in implementing international agreements respecting economic and social rights—provided that states could be induced to accept them.

There are instances in which promotional obligations could be viewed as giving rise to justiciable claims of non-compliance. For example, a state party to the ICESCR is obligated “to take steps . . . to the maximum of its available resources, with a view to achieving progressively” the rights specified in the agreement.⁹¹ If a state undertakes to implement policies that cause a clear deterioration in the protection hitherto afforded a right specified in the agreement, a complainant might argue

89. See ICCPR, *supra* note 10, art. 41; Optional Protocol, *supra* note 35; European Convention, *supra* note 48, art. 25; American Convention, *supra* note 80, art. 45.

90. See Schwelb, *supra* note 17, at 106; van Boven, *Distinguishing Criteria of Human Rights*, in *INTERNATIONAL DIMENSIONS*, *supra* note 28, at 43, 50.

91. ICESCR, *supra* note 6, art. 2(1).

that the state was violating its obligation to work for the *progressive* achievement of that right. Even if a state merely tolerated a deterioration in conditions affecting the degree of protection afforded a particular right, its inaction might justify a claim that the state had not taken steps to the *maximum* of its available resources to realize the right. Reductions in government-financed social welfare benefits could give rise to claims of the first type, while intentional government inaction in the face of clear deterioration in certain indices of social well-being could give rise to claims of the second type. The legal theory advanced in both instances would be that the agreement imposes ratcheted obligations on state parties to the agreement with respect to the listed rights. That is, state parties may not be obligated to achieve any particular level of protection for the listed rights, but once having achieved a certain level, they may be obligated to maintain it.

When the agreement imposes obligations to guarantee certain rights immediately, then the major obstacle to the use of a complaint procedure seems to be the reluctance of states to submit to one. To overcome this reluctance, complaint systems may be constrained in various ways to render them more politically palatable. The simplest type of constraint would be to limit standing to submit complaints. The ILO Constitution adopts this approach and grants standing only to state parties and designated non-governmental organizations.⁹² Similarly, the International Covenant on Civil and Political Rights allows state parties to adhere separately to complaint systems with different limitations on the standing of complainants. Article 41 permits state parties to the overall agreement to recognize the competence of the Human Rights Committee to receive complaints alleging their non-compliance with the agreement from other state parties that similarly adhere to the article.⁹³ The Optional Protocol to the agreement allows complaints also to be received from individuals.

Under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the competence of the European Commission of Human Rights to receive complaints by state parties alleging non-compliance on the part of other state parties is automatic,⁹⁴ but complaints from individuals, groups of individuals, or non-governmental organizations may be received only if the state party charged with non-compliance has explicitly recognized the competence of the Commission to do so.⁹⁵ Under the American Convention on Human Rights, this pat-

92. *See supra* text accompanying notes 72-77.

93. ICCPR, *supra* note 10, art. 41.

94. European Convention, *supra* note 48, art. 24.

95. *Id.* art. 25.

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tern is reversed. The competence of the Inter-American Commission on Human Rights to receive complaints from individuals is automatic,⁹⁶ but it may receive complaints from state parties only if the state against which the complaint is made has recognized its competence to do so.⁹⁷

Another means of constraining a complaint system is to limit the jurisdiction of monitoring bodies. Typical restrictions include requirements that domestic judicial remedies be exhausted before resort is had to the international forum,⁹⁸ prohibitions on the receipt of complaints that have been submitted under another international agreement,⁹⁹ and provisions analogous to statutes of limitations.¹⁰⁰

C. *Independent Commission of Inquiry Systems*

Complaints and state reports are not the only possible sources of primary input for a human rights monitoring system. Reports prepared by independent commissions of inquiry can also perform this function. Indeed, before the adoption of the American Convention on Human Rights, the Inter-American Commission on Human Rights relied extensively on this monitoring mechanism, deriving its authority directly from the Charter of the Organization of American States.¹⁰¹ The Commission's practice, however, has been to undertake individual country studies only when it has received substantial allegations of widespread human rights abuses in the country.¹⁰² It has not attempted a systematic survey of human rights conditions within each of the member states of the O.A.S. Such surveys could, however, serve as the primary monitoring mechanism for an international human rights agreement and would be especially useful for monitoring an agreement respecting economic and social rights.

A monitoring system based on systematic country studies prepared by an independent commission of inquiry would have a number of advantages over complaint and state reporting systems. The most obvious would be the greater objectivity of the reports as compared to those pre-

96. American Convention, *supra* note 80, art. 44.

97. *Id.* art. 45.

98. ICCPR, *supra* note 10, art. 41(1)(c); Optional Protocol, *supra* note 35, art. 5(2)(b); European Convention, *supra* note 48, art. 26; American Convention, *supra* note 80, art. 46(a).

99. Optional Protocol, *supra* note 35, art. 5(2)(a); European Convention, *supra* note 48, art. 27; American Convention, *supra* note 80, art. 46(c).

100. European Convention, *supra* note 48, art. 26; American Convention, *supra* note 80, art. 46(b).

101. See Buergenthal, *The Inter-American System for the Protection of Human Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 439, 479-87 (T. Meron ed. 1984); T. BUERGENTHAL, R. NORRIS & D. SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS 140-92 (1982).

102. Buergenthal, *supra* note 101, at 480.

pared by states themselves. There are, however, other advantages. First, it could serve as an excellent vehicle for developing and applying uniform standards for assessing compliance with a particular agreement. Monitoring bodies charged with the evaluation of state reports currently are hindered in their efforts to develop uniform assessment standards by the lack of uniformity in the information they receive. Detailed instructions can be provided to governments regarding the information that they are requested to submit,¹⁰³ but it would clearly be easier to develop uniform assessment standards if the monitoring body was empowered to complete its own report forms and to gather information from all available sources in doing so.

The data relevant to an assessment of a nation's performance respecting the realization of economic and social rights are particularly diverse and specialized, ranging from aggregate economic performance data to information concerning the administration of statutory benefit programs. Much of this data is already available because of its relevance to a broad range of policy questions in which governments have a natural interest. Nevertheless, marshalling and collating it for specific analytic purposes is both difficult and costly. Developing objective standards for measuring a nation's relative performance in realizing economic and social rights would require considerable expertise and financial backing, as well as political support. If the requisite financial and political support existed to undertake such a task, an independent commission of inquiry could more easily pursue it than a monitoring body operating within the framework of a complaint or state reporting system.

Another advantage of an independent commission of inquiry system is its particular suitability for monitoring progress towards the realization of rights that a state has a duty to promote rather than to guarantee. The task of monitoring compliance with promotional obligations necessarily relies on the consistent measurement and reporting of performance data over time. An independent commission of inquiry could be expected to do a better job of this than would governments called upon to report their own progress. Since the obligations incurred by state parties to international agreements respecting economic and social human rights are so frequently promotional, this can be regarded as a particular advantage of the independent commission of inquiry mechanism for monitoring compliance with such agreements.

Two final advantages of such a monitoring system, at least in comparison to a complaint system, are its suitability for assessing the role played

103. See A. MOWER, *supra* note 2, at 36-39, 88, 205-08.

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by extranational forces in constraining a nation's ability to comply with its human rights obligations, and its suitability for assessing systemic as opposed to individual human rights abuses. Both of these advantages are likely to be particularly important in monitoring compliance with international agreements respecting economic and social human rights. Governments frequently blame extranational forces for their failure to give effect to economic and social human rights, and a complaint proceeding does not provide a particularly good forum for assessing the validity of these claims. Also, abuses of economic and social human rights are more likely to be systemic than individual, and a mechanism suited for the study of aggregate trends is more likely to be useful in monitoring such abuses than a mechanism designed to adjudicate individual claims.

Like other monitoring devices, the independent commission of inquiry mechanism also has its disadvantages. It would be expensive, subject to constant political pressure from governments seeking favorable comment on their domestic economic and social policies, and would have to overcome the hostility that governments tend to feel for outside monitoring of domestic policies. A complaint system would also result in outside scrutiny of governmental actions, but such scrutiny would be intermittent and narrowly focused, and might even be entirely avoided. A system of regular reports by outside monitors would probably be seen as more intrusive.

Just as it would be possible to limit the reporting powers of monitoring bodies under a state reporting system, so the contents of the reports could be limited to make an independent reporting system more palatable politically. For example, findings of fact regarding economic and social conditions could be included without drawing conclusions regarding the adequacy of a government's efforts to improve those conditions. Also, as with the mandate given to ECOSOC under the ICESCR, the monitoring body could be limited to general, as opposed to state-specific, recommendations based on its findings from the individual country reports.¹⁰⁴ The long-term benefit that could derive from the establishment of a systematic international reporting system could justify such compromises, and the authority of the monitoring body could gradually be increased over time, as it proved its objectivity and as governments became more accustomed to outside monitoring.

104. See *supra* text accompanying notes 39-40.

Conclusion

A wide variety of monitoring mechanisms may be effective in implementing international agreements respecting economic and social human rights. Though state reporting systems are the most widely used mechanism, other systems are feasible even where an agreement imposes only promotional obligations on the parties to it. Also, a state reporting system need not result in weak monitoring. Indeed, the key conclusion to be drawn from this comment is that the secondary characteristics of a monitoring regime may be more important in determining its overall effectiveness than its general structure. Moreover, many of these secondary characteristics are susceptible to evolutionary change under existing human rights agreements. Thus, in drafting new agreements, and in trying to improve the monitoring mechanisms established under already existing ones, particular attention should be paid to the detail features of the monitoring mechanism. By careful adjustment of these features, it may be possible to enhance the overall effectiveness of the monitoring process, while still being responsive to the sensitivities of governments in matters touching their sovereignty.