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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights

Preliminary report submitted by the Special Rapporteur, Marc Bossuyt

Summary

In its resolution 2004/5, the Sub-Commission on the Promotion and Protection of Human Rights appointed Marc Bossuyt as Special Rapporteur to undertake a study on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, based on the working paper prepared by Emmanuel Decaux (E/CN.4/Sub.2/2004/24), on the comments received and the discussions held at the fifty-sixth session of the Sub-Commission. The present preliminary report is limited to a review of some academic writings on the nature of economic, social and cultural rights. In the academic literature, a distinction has been made between rights that require the State to abstain from certain action and those that require the State to intervene actively. The report notes that the mechanisms for implementation of these different rights and obligations are generally different. The report emphasizes that both categories of rights are equally important and urgent and that non-respect of any right has a detrimental affect on other rights. The rights contained in the International Covenant on Economic, Social and Cultural Rights, such as the right to education and freedom of education, contain elements of both sets of rights. Finally, the report notes that the prohibition on discrimination is applicable to all human rights, but it has more far-reaching effects with respect to rights that carry positive obligations. The progress and final reports of the Special Rapporteur will consider what elements allow for the determination of a violation of the prohibition on discrimination with respect to economic, social and cultural rights.

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Introduction

1. In its resolution 2003/12, the Sub-Commission, at the request of the Committee on Economic, Social and Cultural Rights, requested Emmanuel Decaux to prepare a working paper on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights. The working paper was submitted by Mr. Decaux to the fifty-sixth session of the Sub-Commission (E/CN.4/Sub.2/2004/24). In its resolution 2004/5, the Sub-Commission appointed Marc Bossuyt as Special Rapporteur to undertake a study on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, based on Mr. Decaux's working paper, on the comments received and the discussions held at the fifty-sixth session of the Sub-Commission. In its decision 2005/105, the Commission on Human Rights approved the appointment of Mr. Bossuyt.

2. In the short time separating the date of the decision and the requested date of the submission of the present preliminary report, the Special Rapporteur was only able to summarize some of the writings on the legal nature of the rights enunciated in the International Covenant on Economic, Social, and Cultural Rights. The Special Rapporteur contributed to this discussion in his earlier publications. Some of those have provoked controversy, sometimes partly based on misunderstandings and misinterpretations. As those misunderstandings and misinterpretations might be detrimental to a correct understanding of the nature of social rights and their effective implementation, it may be useful to clarify some elements of this controversy in order to stimulate reflection about those rights.

I. THE LEGAL NATURE OF THE RIGHTS ENUNCIATED IN THE ECONOMIC, SOCIAL AND CULTURAL RIGHTS

3. The present Special Rapporteur has devoted much attention to the legal nature of social rights in his doctoral thesis published in 1976.[1] It was stated there that the traditional concept of human rights, as it originated in the West, confined the notion of human rights to civil rights only. However, under the pressure of socialist States and third world States, social rights have also been included in international instruments of human rights.[2]

4. In the European Convention on Human Rights, adopted in 1950, priority has been given to "essential rights and fundamental freedoms" as objections had been raised with respect to the inclusion of the right to education and the right to property. In his report on the draft convention to the Consultative Assembly of the Council of Europe, Sir David Maxwell-Fyfe mentioned three arguments put forward against the insertion of those rights: (a) the difficulty of judicial interpretation and application of those rights; (b) even in national constitutions, those rights are not defined in a manner which allows for legal sanctions; (c) it is difficult to know where to stop when defining social and economic rights. In the absence of unanimity among the Governments of the member States of the Council of Europe, those rights were not included in the European Convention as signed on 4 November 1950. After having been referred three times to the Committee of Experts, those rights could be included in a (first) Additional Protocol signed on 20 March 1952. The right to property was formulated in a negative way.

5. The European Social Charter, signed on 18 October 1961, contains 19 articles in its Part I and 72 paragraphs in its Part II. The Contracting Parties consider Part I as a "declaration of the aims" which they will pursue by all appropriate means, while they consider themselves only bound by at least 5 of 7 articles specifically mentioned, and in addition by a total of not less than 10 articles or 45 paragraphs. Such an option, to select among the rights a State party accepts to be bound by, would be unconceivable in a convention on civil rights such as the European Convention. Contrary to the European Convention, which sets up a European Court of Human Rights, composed of judges and competent to render legally binding judgements, the European Social Charter provides only that recommendations based on reports presented by the Contracting Parties may be addressed by the Committee of Ministers to those Contracting Parties.

6. In the International Covenants on Human Rights, adopted on 16 December 1966, the nature of the engagements assumed by the States parties differs considerably in the two Covenants. In article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, on the one hand, each State party to that covenant undertakes "to take steps, individually and through international assistance and cooperation, especially economic and technical, *to the maximum of its available resources, with a view to achieving progressively* the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". In article 2, paragraph 1, of the International Covenant on Civil and Political Rights, on the other hand, each State party to that covenant undertakes "*to respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant …" (emphasis added).

7. The obligations undertaken by becoming party to the latter covenant have to be respected from the moment it enters into force, while the obligations undertaken in the former covenant may be given effect progressively. The extent of the resources available in a State party are a factor to be taken into account when judging the performance of that State party with respect to the rights enunciated in the International Covenant on Economic, Social and Cultural Rights but not with respect to the rights recognized in the International Covenant on Civil and Political Rights.

8. The supervisory mechanism of the International Covenant on Economic, Social and Cultural Rights is also much weaker than the one provided for in the International Covenant on Civil and Political Rights. The former provides only for the submission by the States parties of reports which will be transmitted for consideration to the Economic and Social Council. Moreover, the Council may only submit "from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States parties" (art. 21). On the contrary, the latter provides for the establishment of a Human Rights Committee composed of independent experts. Moreover, the Human Rights Committee is not only competent to study reports submitted by the States parties, but it may also be rendered competent to receive and to consider inter-State communications as well as individual communications alleging that a State party is not fulfilling its obligations under that covenant. The Committee may transmit "general comments" on the reports, submit a report on inter-State communications and forward its "views" on individual communications.

9. On the basis of the above-mentioned analysis, it seemed possible to propose a theoretical scheme distinguishing civil rights from social rights. Both categories were considered to have an autonomous meaning in the field of human rights, independent of the meaning they might have in the civil code or in social legislation. The extent to which the right in question required financial efforts on the part of the State was believed to be the essential criterion allowing a distinction to be made between one and the other.[3] It was explicitly stated that it would be a mistake to believe that the financial effort required from the State to respect civil and political rights would be equal to zero; it would only be less than the financial effort that could be invoked as a reason for failing to respect the rights in question. Moreover, it was stressed that a right did not require an additional financial effort because it was a social right, but that it was a social right if it *required* such an effort.[4]

10. Seen from that angle:

(a) Civil rights require from the State a duty to *abstain*, while social rights require a duty to *intervene*;

(b) Civil rights impose *negative* obligations on the State, while social rights create *positive* obligations for the State;

(c) The content of civil rights is necessarily *invariable* (the content of those minimal rights should not vary from State to State), while the content of social rights may be *variable* from State to State in accordance with the resources available in the State and the priorities set by it in giving effect to those rights;

(d) The nature of civil rights is *absolute* as they are inherent to human dignity and positive law confines itself to protecting an interest (or a matter) the human being possesses already, while social rights have a *relative* nature as they can be invoked only to the extent the necessary legislative measures spelling out the modalities and the conditions under which they may be enjoyed, are taken.[5]

11. As a consequence, the modalities of implementation of both categories of rights are different:

(a) *Ratione temporis*: civil rights have to be respected immediately, while social rights may be implemented progressively when the available resources are not sufficient;

(b) *Ratione materiae*: all civil rights have to be respected fully, while in the absence of sufficient resources social rights may be implemented partially;

(c) *Ratione personae*: every human being is entitled to the enjoyment of all civil rights, while it will not always be possible for every person to enjoy all social rights immediately.[6]

12. Whenever a State party does not have the resources that would allow it to implement all social rights for everybody at once, it shall be selective by fixing priorities *ratione temporis, ratione materiae* and *ratione personae*. It is here that the prohibition of discrimination takes a very prominent place. Its effects, when applied to social rights, are much more far-reaching than when applied to civil rights.

13. The different nature of civil and social rights also explains why the supervisory machinery for civil rights is more developed than for social rights. As no economic element may serve as an excuse for not respecting civil rights, those rights may be easily subjected to judicial control. It is the violation of a civil right - and not its implementation - which has political implications. Determined to a large extent by financial and economic constraints, the fixing of priorities in the implementation of social rights is a matter of politics rather than of law. Even at the national level, only those social rights, which already benefit from detailed and often complex regulations, are fit for judicial control within the limits traced by those regulations. At the international level, the control mechanism for social rights is generally not judicial - or not even quasi-judicial - but only administrative or political.[7]

14. The usefulness of an international system for the protection of civil rights depends to a large extent on the efficiency of the supervisory mechanism it establishes. As far as those rights are concerned, the institutional aspect is more important than the normative aspect, as judges may enforce those rights even in the absence of detailed regulations spelling out the modalities of their application. On the contrary, as far as social rights are concerned, for which the supervisory mechanism is generally not very developed, the impact of an international system for the protection of those rights will depend to a large extent on the precision with which the normative provisions are formulated. The enjoyment of a social right can be claimed only to the extent it is implemented by detailed regulations that are constitutive of rights. The recognition of civil rights is declaratory of rights since in matters of civil rights it is not up to the State to provide the individual with a matter it does not yet possess, but to protect that matter (fundamental freedoms) against the interference of the State.[8]

15. In a publication of 1978, E.W. Vierdag[9] also examined the legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights. He emphasized “enforceability” as an essential part of the concept of “the right of an individual” that appears to prevail in international law. On that basis, he concludes that “only enforceable rights will be considered as ‘real’, legal, rights”. Vierdag, rejecting the absence of financial support on the part of the State as an adequate criterion for the differentiation between civil and social rights,[10] considers the enforceability of rights as the most appropriate key to the question of their legal nature. According to Vierdag, in order to be a legal right, a right must be legally definable; only then it can be legally enforced, and only then it can be said to be justiciable.[11] He notes that - save for a few possible exceptions - the economic, social and cultural rights of the like-named covenant may not be enforceable.[12]

16. Vierdag[13] concludes that the rights granted by the International Covenant on Economic, Social and Cultural Rights appear to be “heterogeneous”:

(a) A first category would contain social rights to something that is immediately available at no cost, and thus not inherently unenforceable (such as trade union freedom and the right to strike);

(b) The second category of social rights (such as social security, food and clothing or medical care) would seem to include rights to something that is immediately available, which demands expenditure, but which can be divided in order to serve varying numbers of people;

(c) In the third category emerge social rights to something that is not available, or is of limited availability, while every decision to increase facilities necessary to implement the right (such as the right to work, to "adequate" housing or to education) for all those qualified to enjoy it, is a political question as it involves, inter alia, considerable expenditure.[14] As the expenditure necessary for every addition is essentially a matter of economic, social and cultural priorities, the implementation of these provisions is a political matter, not a matter of law, and hence not a matter of rights.

17. Consequently, Vierdag[15] suggests that "it is misleading to adopt an instrument that by its very title and by the wording of its relevant provisions purport to grant 'rights' to individuals, but in fact appears not to do so, or to do so only marginally". He considers it "regrettable that, in this way, a notion of 'right' is introduced in international law that is utterly different from the concept of 'right of an individual' as it is traditionally understood in international law and employed in practice". He fears that "it detracts from the effectiveness and force that legal norms should have, and thus it may have a negative effect on the legal system as a whole". Nevertheless, he adds significantly: "This is not to say that what is to be undertaken and realized under the International Covenant on Economic Social and Cultural Rights [ICESCR] is not of great importance, because it certainly is. Civil and political rights cannot be meaningfully enjoyed in miserable economic, social and cultural conditions. It is submitted only that the legal technique chosen, that of seemingly granting rights to individuals, is not an adequate one, and that more appropriate methods should have been utilized such as e.g., undertakings to initiate programmes."[16] And the final sentence of Vierdag's contribution reads as follows: "except in circumstances of minimal or minor economic, social or cultural relevance, and subject to the distinctions made above, the rights granted by the International Covenant on Economic, Social and Cultural Rights are of such a nature as to be legally negligible".[17]

18. Over the years it has been fashionable to downgrade the juridical differences between civil and social rights. The question remains whether blurring the distinction between both categories of rights contributes to a better understanding of the challenges that confront the victims of violations of those rights and whether it helps in finding ways and means to put an end to those violations. The controversy does not at all relate to a different weight given to the one rather than to the other category rights. Every human being is eager to enjoy all human rights regardless of whether those are civil rights or social rights. Social and economic welfare is neither less important nor less urgent[18] than freedom of opinion, but the extent to which legal instruments may contribute to the implementation of the one rather than the other may be different.

19. Already in 1975/1976, the present Special Rapporteur stressed the interdependent character of civil and social rights by emphasizing that a lesser enjoyment of a right has inevitably consequences for the enjoyment of other human rights.[19] In its resolution 32/130 adopted on 16 December 1977, the General Assembly asserted that "All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights."[20]

20. In a publication of 1990, G.J.H. van Hoof,[21] however, was very critical of the "school of thought" represented by M. Bossuyt and E. Vierdag. The statement by Vierdag that "rights granted by the International Covenant on Economic, Social and Cultural Rights are of such a nature as to be legally negligible" was criticized most. As rightly written by van Hoof,[22] Vierdag "focuses almost entirely upon the 'rights' (of individuals)-side", while he himself draws attention to "the other side of the medal", which in his view is equally important, viz. "the 'obligations' (of States)-side". Van Hoof continues: "As a consequence the danger arises, for instance of confusing the so-called direct effect of treaty provisions, for which the degree of concreteness of a rule is decisive, and the legally binding nature of the rule, for which it is not." It seems possible to agree with both authors: on the one hand and despite the (in international law not at all unusual) absence of possible legal enforcement through courts of law, the States parties to the International Covenant on Economic, Social and Cultural Rights are beyond any doubt legally bound by its provisions; on the other hand, most of the provisions of that Covenant are not formulated in a sufficiently precise and complete manner as to enable their judicial enforcement.

21. In van Hoof's view, the "very far-reaching" differences put forward by Bossuyt were in its "rigid form" considered "difficult to uphold".[23] According to van Hoof,[24] while they may constitute "useful tools for analysis", they were applied in "too black-and-white a fashion". The statement that "in recognizing civil rights, positive law can only protect those things that man already possesses" is dismissed by van Hoof[25] as "based on some concept of Natural Law". The point made in that statement was that the matter or the interest of a civil right is not given by the State but belongs to each individual independently of its protection by the law. However, it is obviously only a right once it is protected by (positive) law (hence *exit* Natural Law). Indeed, it is not the State that gives life or freedom to a person. The State merely has to protect it by not depriving (at least not arbitrarily) someone of his or her life or freedom. In the same vein, the State may not interfere arbitrarily in someone's privacy, family, home or correspondence, freedom of thought, conscience and religion, freedom of expression, assembly and association, etc. On the contrary, food (the example given by van Hoof in contrast to life) is not a matter a person possesses by virtue of his birth as a human being and in which the State should not interfere (if a person does not possess life, because he is dead, there is no point in the State protecting it). The right to food as a social right requires from the State to intervene actively to undertake all that is necessary to provide a hungry person (who by definition does not possess food) with food.

22. Of course, as stated by van Hoof,[26] "the expenditure involved in, for instance, the holding of free and secret elections or the setting up of an adequate judiciary and legal aid system may be quite considerable". Nevertheless, compared with the expenditure required to provide every individual with proper health care, with free education, with food, with adequate housing and, more in general, with the benefits of a social security system guaranteeing a replacement income for the elderly, the sick and the unemployed, the expenditure for the functioning of a Ministry of the Interior or a Ministry of Justice is modest. In any case, each sovereign State "able and willing to carry out [the] obligations" of the Charter of the United Nations is, in principle, supposed to be able to support the expenditure required for the respect of civil rights as defined above (and not necessarily the expenditure of a full-fledged social security system).

23. The power acquired by the notion of human rights is such that the political rhetoric is inclined to qualify every desired goal or aspiration as a human right. Men and women have a variety of aspirations. Many are legitimate and a just society should do all it can to meet those aspirations. However (and paradoxically lawyers know it better than non-lawyers), law is not an instrument that can guarantee the fulfilment of all human aspirations. Whether law can protect a human aspiration has nothing to do with its importance, nor even with its legitimacy, but with its content. Several aspirations are of the utmost importance and perfectly legitimate, but they are not suited for legal protection and should not be labelled as human rights. Nothing is more important in life than happiness. But to recognize a right to happiness as a human right would be meaningless. Qualifying some legitimate aspirations as internationally guaranteed "rights" despite the finding that they are unfit for judicial protection would create only an illusion of progress. A careless utilization of the terms "rights" and "human rights" weakens the whole concept of human rights. Confused terminology weakens the very concept of human rights. In the absence of judicial enforcement, only the appearance of legal protection is given. The pursuit of an efficient economy coupled with a fair social system will improve the socio-economic conditions of mankind more than any international legal machinery.[27]

24. The concept of human rights itself is not unequivocal. In its traditional sense, a human right was an interest protected by law and enforceable before a judge. This meaning is still valid for civil rights. However, the Universal Declaration of Human Rights has also included social rights without defining them in a manner that is sufficiently precise to get them enforced by a judge. In doing so, the notion has been abandoned that human rights are minimum guarantees of rights that everyone not only *should* but also *can* enjoy through justifiable enforcement.[28]

25. Consequently, not all rights are human rights and not all human rights are judicially enforceable rights. It is not, however, because social rights, while not judicially enforceable, are included in the concept of human rights that civil rights should no longer be judicially enforceable. The extension of the notion of human rights to social rights implies that social rights are different from civil rights; if not, social rights would have been included in that notion from the beginning. By neglecting the difference between civil rights and social rights, one runs a double risk: (a) the risk that some could believe that the obligations of States to recognize civil rights are as vague as in the field of social rights; (b) the risk that the impression would be created that legal mechanisms are appropriate to provide humankind with all the benefits that social rights are supposed to bring about: work, education, food, health, shelter and so forth. Whatever may have been the arguments favouring the broadening of the human rights concept to non-justiciable rights, it is difficult to see what useful purpose can be served by watering down the juridical differences between civil and social rights.

26. In his doctoral thesis published in 1992, Patrice Meyer-Bish[29] considers the approach of Bossuyt as too "radical" and lacking of respect for the complexity of interdisciplinary reasoning.[30] He insists particularly on so-called "mixed rights" such as trade union freedom, the right to property, the rights of children.[31] For him, the creation of positive norms is only slower for social rights than for civil rights.[32] He fears that the principle of progressive application

might be invoked in order to justify any loose interpretation of international norms and that one might believe that recognition of civil rights and providing for its judicial control might be sufficient for their effective application.[33]

27. In her doctoral thesis published in 1999, Kitty Arambulo[34] acknowledges that Bossuyt considers both groups of human rights to be "equally important", but that his main criterion of State abstention or intervention is "not accurate" and that his reasoning contains "several imprecisions".[35] According to Arambulo,[36] the latter is the case particularly when relying on the "vague and abstract formulation" of economic, social and cultural rights while some civil and political rights can be considered to be formulated in an equally vague or abstract manner.

28. This criticism appears to be based on a misunderstanding: of course, several civil rights are formulated in a vague and abstract manner. The difference between the two categories of rights is precisely that civil rights, because of their characteristics as described above, are perfectly fit for judicial determination despite their often vague and abstract formulation, while social rights, because of their characteristics, need further legislative or regulatory clarification determining what are the precise obligations resting upon States called upon to implement those rights. In order to enable a judge to determine whether a given State is fulfilling its human rights obligations towards individuals, much more precision is required when the violation of a civil right is invoked (requiring essentially a negative obligation of non-interference) than when the violation of a social right is invoked (requiring a positive intervention from the State). And of course, once a social right enunciated in an international convention is implemented in national legislation, which is generally extremely elaborate and precise, it is perfectly fit for judicial determination.

29. Moreover, there is no doubt that, as stated in the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), States parties to the International Covenant on Economic, Social and Cultural Rights do not have the right "to defer indefinitely efforts to ensure full realization" of the rights enunciated in that covenant or, as stated by the Committee on Economic, Social and Cultural Rights in its general comment No. 3 on the nature of States parties' obligations, adopted in 1990, that they should move as expeditiously as possible towards the realization of those rights and that they have the obligation to immediately take steps to fulfil their obligations under the Covenant.[37] As rightly stated by Arambulo,[38] "whatever the magnitude of its available resources, a State must do as much as possible within its own financial constraints to achieve its Covenants obligations, with a view to fully realizing the rights contained in the Covenant".

30. In his doctoral thesis published in 2003, Gunter Maes[39] states that the strict division of human rights into two categories cannot be maintained.[40] He defines social rights as those fundamental rights which concern relations of social law[41] (and prefers to speak about fundamental rights to which social rather than "classical" aspects are related.[42] He rejects the opposition between classical and social rights as fundamentally incorrect since human rights contain in general a combination of both characteristics.[43] Referring to the jurisprudence of the European Court of Human Rights, he concludes that many rights contain

aspects of social rights as well as aspects of classical rights;[44] that positive and negative obligations are not only intensely entangled but also influence each other in a decisive manner;[45] and that important aspects of social rights are guaranteed by an enlarged protection of classical rights.[46]

31. From a closer examination of his analysis, it appears that his firm stand against a strict division between social and classical rights seems to be more rhetorical than substantive. Indeed, Maes concludes that social and classical rights are not the same and that there are differences between both categories of rights, but that they are interrelated and interdependent.[47] Once one acknowledges the possibility of distinguishing between the social and classical aspects of human rights, it is useful to analyse what the different characteristics of those aspects are and what consequences those differences entail.

32. The theoretical analysis of the difference between two major categories of human rights has no other purpose than to contribute to a better understanding of the characteristics of those rights by explaining why different instruments have been adopted for the different categories of rights. It should be acknowledged that the lawyers, diplomats and politicians who drafted the two covenants did not always perceive the importance, the reasons and the consequences of that distinction, but the distinction imposed itself upon them. It was neither an ideology of liberalism blind to the social needs of mankind, nor an ignorance of the realities of the world, nor a regrettable negligence or oversight that explains why two different covenants have been drafted.[48]

33. This analysis was never intended to be applied in a black-and-white fashion[49] in order to impose on each individual right a rigid interpretation with far-reaching consequences regardless of the intention of the Contracting Parties, the specific drafting of the right in question, its context and the modalities of its application. It is nothing more than a convenient tool for a better understanding of the legal characteristics of the different categories of human rights.[50] Such a categorization does not prevent either the authors of international human rights instruments or national legislators from determining the extent to which they intend to be bound by the legal provisions they draft. It does not prevent supervisory organs of international conventions or national judges from interpreting those provisions in conformity with that intention. It may only contribute making them better aware of the consequences of their drafting or their interpretations. A right generally considered to be a civil right drafted or interpreted in a manner that imposes an active intervention on the part of the State, loses the characteristics of a traditional civil right and acquires the characteristics of a social right.[51]

34. The relevant point is that a right can in varying degrees have at the same time a civil as well as a social component. A good example to illustrate this point is the human right that concerns education. It is perfectly possible to distinguish, on the one hand, the right to education, which is a social right, and, on the other hand, the freedom of education, which is a civil right. The latter guarantees only the right (or perhaps better, the freedom) of a person (or a group of persons) to establish a school of his/her own choice and the right of a person to send his/her children to the school of his/her choice. This freedom does not entail a right to government subsidies nor a right to recognition of the certificates issued by such a private school. But it would be contrary to the freedom of education if the opening of such a private

school or attendance at this school were prohibited. The obligation of the State towards such a private school is one of non-interference, as is the case with other civil rights or fundamental freedoms. The right to education requires from the Government the setting up of a school system which is, as stated in article 13 of the International Covenant on Economic, Social and Cultural Rights, at the level of primary education “available free to all”, while secondary education (and higher education) “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education”.

II. NON-DISCRIMINATION AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS

35. The distinction between the civil and the social component is particularly relevant when the question of discrimination is raised. Once a person is prevented from attending a private school, the freedom of education of that person is violated and, as a consequence, that person is also discriminated against in his right to freedom of education. The same is true for each person who is prevented free (in French *gratuitement*) access to primary education. It is interesting to note that, while undoubtedly a social right, the right to free access to primary education received by its precise wording, quite exceptionally, the same protection as if it were a civil right. As far as secondary and higher education are concerned, free access is not immediately guaranteed to all. As a consequence, the simple fact that a person does not get free access to a university is not a violation of that right. It is only when that person is refused free access to university in a discriminatory manner that his right to education is violated.

36. The prohibition of discrimination has no “independent existence” in the sense that it always has to be considered in relation to a specific right. In some international instruments the prohibition of discrimination is limited to the rights guaranteed by the same instrument as the one containing the prohibition of discrimination. Examples of such a limited prohibition of discrimination are article 2, first paragraph of the Universal Declaration of Human Rights, article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, article 2, paragraph 1, of the International Covenant on Civil and Political Rights, article 14 of the European Convention on Human Rights, article 1 of the American Convention on Human Rights and article 2 of the African Charter on Human and Peoples’ Rights. Examples of a general prohibition of discrimination are article 26 of the International Covenant on Civil and Political Rights, article 24 of the American Convention on Human Rights, article 3 of the African Charter on Human and Peoples’ Rights and article 1 of Additional Protocol No. 12 to the European Convention on Human Rights. The limitation of the prohibition of discrimination has no normative effects: it does not imply that discrimination in rights not guaranteed by the said instrument would not be prohibited. It has only institutional effects: it excludes from the competence of the supervisory organ set up by the said instrument the power to determine whether a difference of treatment in such a right is discriminatory or not.

37. In any case, the prohibition of discrimination does not apply to matters not regulated by law. If the necessity is felt to extend the prohibition of discrimination to matters to which it does not already apply, it is sufficient to regulate that matter by law in order to extend to those matters also the prohibition of discrimination. As discrimination is an arbitrary distinction in a right (an

interest protected by law), an arbitrary protection by law cannot be valid as it would be contrary to a superior norm (contained in the national constitution or in international conventions) prohibiting such distinctions. The only limit to the intervention of the law in matters not yet protected by law is the right to privacy, which itself is a fundamental human right. However, it is the law that determines the limits of the right to privacy.

38. The absence of an independent existence of the prohibition of discrimination may not be confused with the possible "autonomous application" of the prohibition of discrimination. The prohibition of discrimination is applied autonomously when it is possible to determine the existence of discrimination in a right that in itself is not violated. This is perfectly possible with respect to social rights. As those rights may be implemented progressively and the scarcity of the resources available may make it necessary for a State to establish priorities in the realization of those rights, as well as *ratione materiae*, *ratione temporis* and *ratione personae*, the simple fact that a particular person does not at a given moment enjoy a specific social right does not constitute in itself a violation of that right. If, however, that person can demonstrate that other persons are - by virtue of national legislation or regulations - entitled to that right and he/she is excluded from that category of persons on the basis of a ground that is not relevant for that right, he/she will be considered to be a victim of discrimination with respect to that right. As a result of the prohibition of discrimination, he/she will be entitled to that right despite the fact that neither the international instruments nor the national law provisions with respect to that right provide that he/she is entitled to that right. This is the so-called "creative effect" of the prohibition of discrimination. A person is entitled to a right on the basis of the prohibition of discrimination despite the fact that the international and national provisions dealing with that right do not grant him/her that specific right.

39. Of course, international instruments may determine under which conditions which persons are entitled to which social rights. In that case, national judicial organs will be able to enforce those rights as they would with respect to civil rights. As the realization of social rights has a considerable economic impact and the resources available may vary considerably from State to State, it is difficult to elaborate universally accepted minimum standards. Considerable leeway has to be given to States, which have to set priorities. Setting such priorities is in general left to the political authorities of the State rather than to their judicial authorities. At the international level in particular, States are reluctant to subject their political choices to international organs that would have the power to take legally binding decisions which could entail considerable financial repercussions.

40. The prohibition of discrimination is applicable to social rights as well as to civil rights. However, the effects of that prohibition are more far-reaching with respect to social rights than to civil rights. It is indeed very difficult to find examples of a violation of the prohibition of discrimination of a civil right that is not itself simultaneously violated. This is quite the contrary with respect to social rights. Consequently, it is particularly relevant to try to better understand what elements allow for the determination of a violation of the prohibition of discrimination with respect to economic, social and cultural rights. This is the task left for the progress and the final reports to be submitted to the Sub-Commission by the Special Rapporteur.

Notes

[1] Marc Bossuyt, *L'interdiction de la discrimination dans le droit international des droits de l'homme*, Brussels, Bruylant, 1976, 262 p. An advance publication of the relevant chapters can also be found in the *Human Rights Journal/Revue des droits de l'Homme* of 1975 (pp. 783-820) under the title "*La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels*".

[2] Bossuyt, "La distinction …", p. 785.

[3] It may be even more correct to state that it is the "economic impact" of the measures required from the State to respect the right in question that is the relevant criterion. If those measures do not go beyond what is expected from a State to respect the rule of law, it should be considered to be a civil right. If the economic impact of the necessary measures requires the Government, in view of the scarcity of the resources available, to fix priorities in the implementation of the different rights, it should be considered to be a social right.

[4] Bossuyt, *L'interdiction …*, p. 185 (the exclamation point was inserted in the original text published in 1975/1976). It has never been claimed that if a right is contained in an international instrument which, according to its title, is supposed to guarantee either civil or social rights, every right contained in that instrument should necessarily have the characteristics of, respectively, civil or social rights, as mentioned above. The approach taken was exactly the opposite: if a right has those respective characteristics, it should be considered to be a civil or a social right. For that reason, examples given by critics of "social rights" not requiring any financial effort or of "civil rights" requiring such efforts are missing the point.

[5] Ibid., pp. 185-187.

[6] Ibid., pp. 187-188.

[7] Ibid., pp. 188-190.

[8] Ibid., pp. 190-191.

[9] E.W. Vierdag, "The Legal Nature of the Rights granted by International Covenant on Economic, Social and Cultural Rights", *Netherlands Yearbook of International Law*, 1978, pp. 69-105. In his Ph.D. thesis, *The Concept of Discrimination in International Law with Special Reference to Human Rights*, published in 1973 in The Hague, however, Vierdag had stated (p. 76) "there is nothing in the nature of the rights to warrant such a clear-cut division into types on the basis of State action or abstention".

[10] This rejection is based on the outcome that trade union rights and the right to strike are considered by Bossuyt as civil rights since their enjoyment requires no financial support on the part of the State (Vierdag, "The Legal Nature …", p. 82). "The right of everyone to form trade unions and join the trade union of his choice" is guaranteed in article 8 of the International Covenant on Economic, Social and Cultural Rights, but also as an aspect of everyone's right to

freedom of association with others "including the right to form and join trade unions for the protection of his interests" in article 22 of the International Covenant on Civil and Political Rights. Is it - despite its quite identical wording - a civil right in the latter and a social right in the former? Does a civil right - formulated as an aspect of a "freedom" - become a social right because it is included in a convention guaranteeing social rights? If the distinction between civil and social rights is not based on the extent of intervention (rather than abstention) required from the State, on what criterion is the distinction based?

[11] Ibid., pp. 76-77.

[12] Vierdag (ibid., pp. 92-93) argues his views as follows: "a remedy [against a violation of a social right] would imply the competence of a court to compel the administration to take measures creating conditions under which a social right can be enjoyed. Such a competence would, however, cover utterly political questions, and would thus nullify the separation of powers that is the cherished basis of the system of government in a great many countries. It would turn the judiciary into a political organ. How is a court of law to protect, say, the enjoyment of the right to work? How is it to judge and to declare *on the basis of the law* that a policy of full employment is not effective, and should be realised in another way?" With respect to article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights, Vierdag (ibid., p. 101) concludes: "It is highly improbable that as a consequence of this obligation individuals would be effectively protected against inaction on the part of governments if confronted with a worsening economic, social or cultural situation. It is all the more unlikely that, on the basis of the International Covenant on Economic, Social and Cultural Rights [ICESCR], they would be effectively ensured continuously improving economic, social and cultural conditions."

[13] Ibid., pp. 102-103.

[14] It is striking that, while rejecting the absence of financial support on the part of the State as an adequate criterion for the differentiation between civil and social rights, Vierdag nevertheless distinguishes among the rights guaranteed in the International Covenant on Economic, Social and Cultural Rights a first category that is immediately available at no "cost", a second category that is immediately available but which demands "expenditure" and a third category that is of no or limited availability and which involves "considerable expenditure".

[15] Ibid., p. 103.

[16] In referring to C.W. Jenks (*Social Justice in the Law of Nations. The ILO Impact after Fifty Years*, London, 1970, pp. 70-79), E.A. Landy (*The Effectiveness of International Supervision. Thirty Years of ILO Experience*, London, 1966, chap. I) and N. Valticos (*Droit International du Travail*, Paris, 1970, p. 157), Vierdag (ibid., pp. 104-105) notes that "ILO Conventions already deal with social rights in a more precise and detailed way, and in several instances go further than the provisions of the International Covenant on Economic, Social and Cultural Rights [ICESCR]" and "The machinery of supervision of the ILO is a very

sophisticated one, in comparison to which the regulation laid down in the International Covenant on Economic, Social and Cultural Rights [ICESCR] can only be characterised as poor."

[17] Ibid., p. 105.

[18] Bossuyt, *L'interdiction …*, p. 210: "*Le caractère relatif des droits socio-économiques ne veut nullement dire que la réalisation de ces droits est pour l'homme moins importante ou moins urgente que le respect des droits civils. La distinction ne se fonde pas sur une quelconque priorité dans les besoins des hommes, car l'épanouissement libre de l'homme requiert aussi bien la réalisation des droits sociaux que le respect des droits civils. La distinction entre ces deux catégories de droits n'est pas non plus une distinction de valeur entre droits primaires et droits secondaires; elle n'est pertinente que du point de vue de la technique juridique*."

[19] Ibid., p. 195: "*la jouissance moindre d'un droit se répercute inexorablement sur la jouissance des autres droits de l'homme*".

[20] In the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993 it was reaffirmed that "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

[21] G.J.H. van Hoof, "The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views", in P. Alston and K. Tomasevski, *The Right to Food*, The Hague, Nijhoff, 1990, pp. 97-110.

[22] Ibid., p. 101.

[23] Ibid., p. 103.

[24] Ibid., p. 105.

[25] Ibid., p. 104.

[26] Ibid., p. 103.

[27] Marc Bossuyt, "International Human Rights Systems: Strengths and Weaknesses", in K.E. Mahoney and P. Mahoney, *Human Rights in the Twenty-first Century*, Kluwer, 1990, pp. 52-55.

[28] Ibid., p. 54.

[29] Patrice Meyer-Bish, *Le corps des droits de l'homme. L'indivisibilité comme principe d'interprétation et de mise en œuvre des droits de l'homme*, Fribourg, 1992, 401 p.

[30] Ibid., p. 135.

[31] Ibid., pp. 141-142.

[32] Ibid., p. 152.

[33] Ibid., p. 155.

[34] Kitty Arambulo, *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights. Theoretical and Procedural Aspects*, Antwerp, Intersentia, 1999, 449 p.

[35] Ibid., pp. 71, 75 and 81.

[36] Ibid., p. 75.

[37] Quoted by Arambulo, p. 80.

[38] Ibid.

[39] Gunter Maes, *De afdwingbaarheid van sociale rechten* (The enforceability of social rights), Antwerp, Intersentia, 2003, 523 p.

[40] Ibid., p. 28, No. 55.

[41] Ibid., p. 29, No. 58.

[42] Ibid., p. 30, No. 61.

[43] Ibid., p. 42, No. 77.

[44] Ibid., p. 488, No. 951.

[45] Ibid., p. 490, No. 956.

[46] Ibid., p. 491, No. 958.

[47] Ibid., No. 959.

[48] Cf. Bossuyt, *L'interdiction …*, p. 184.

[49] See ibid., p. 195, note 10: "*Ici, comme d'habitude dans les sciences humaines, il n'y a pas que du noir et du blanc. Il y a du gris, surtout du gris, du gris foncé et du gris clair*."

[50] It is no different from other legal distinctions, such as the one between public law and private law, the one between codification and progressive development of international law or the one between a unitarian and a federal or a confederal State. Several legal concepts contain elements of public law as well as elements of private law. Nearly all international conventions elaborated

under the auspices of the International Law Commission contain provisions of codification and provisions of progressive development of international law. Institutions of one and the same State can, despite what may be claimed (or proclaimed) by its constitution, contain in varying degrees elements of a unitarian, a federal or a confederal State. No one would nevertheless claim that such legal categorizations are inaccurate, imprecise, difficult to uphold, dangerous or regrettable.

[51] For instance, if a traditional civil right such as the "right to privacy" is interpreted as a right that requires from the State the elaboration of an extensive programme of isolation of houses in order to protect persons living in the neighbourhood of an airport against excessive noise during night-time, that right will in that interpretation lose the characteristics of a social right. On the contrary, when a right contained in an international instrument on social rights is implemented in the national legislation of a State party in a manner such that it can be immediately and fully guaranteed to all, it will be judicially enforceable, as is the case with traditional civil rights.