CHAPTER NINE

THE GENERAL PROVISIONS OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. Introduction

Bruno Simma has remarked that the ICESCR “[i]n spite of [its] impressive record . . . shares the chronic weakness apparently befalling all international instruments for the protection of economic, social and cultural rights: It is not taken seriously, one way or another”.¹ He argues that there are particularly two ways in which the ICESCR is not taken seriously.² On the one hand, there is the nonchalant, minimalist or bureaucratic attitude towards the ICESCR. It entails softening the substantive obligations and the implementation procedure of the ICESCR, by downgrading the Covenant’s significance, be it, initially, in the act of “selling” the Covenant to the legislature or, subsequently, in its day-to-day interpretation and application. It is accomplished by propagating that the ICESCR does not really change anything. On the other hand, there is the pseudo-maximalist approach “attempting to distort the nature of the treaty obligations beyond meaningful proportions into something threatening or absurd”.³ The assertion is that the ICESCR brings with it enormous and incalculable commitments. Neither approach is correct. Simma’s observations make it clear that an effort needs to be made to describe the nature and scope of obligations imposed by the ICESCR in a truthful manner. It needs to be shown that the ICESCR imposes clear legal obligations, but that, at the same time, it does not require states parties to make available more resources for the realisation of ESCR than they can reasonably afford in the circumstances.

It is important to do so within the context of this book, as the right to education is one of the rights protected by the ICESCR. It should be shown that it is not sufficient for states parties to the ICESCR to merely take note in passing of article 13 ICESCR and, in the end, “to leave things as they are”. It should, however, also be shown that article 13 does not

¹ Simma, 1991, p. 75.
² See ibidem at pp. 75–79.
³ Ibidem at p. 78.
create rights to benefit from the educational services of a full-fledged welfare state, however poor the society.

The present Chapter will examine articles 2(1), 2(2) and 4 ICESCR. Article 2(1) is the linchpin of the ICESCR. It describes the general nature of state obligations in the realisation of Covenant rights. It provides for the progressive realisation of ESCR. Article 2(2) is a non-discrimination provision. It prohibits discrimination on specified grounds in the exercise of the rights protected under the Covenant. Article 4 is a general limitation provision. It sanctions, but simultaneously restricts, limitations of rights of the Covenant. Whereas the rights provisions of the Covenant are contained in Part III ICESCR, articles 2(1), 2(2) and 4 appear in Part II ICESCR. As it were, the broad provisions of Part II must inform the interpretation and application of the rights provisions of Part III.

2. Article 2(1) ICESCR: The Progressive Realisation of Covenant Rights

It is important to properly understand the nature and scope of obligations imposed by the ICESCR. Essentially this requires an examination of article 2(1) ICESCR, which provides as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

In what follows, article 2(1) ICESCR will be examined. First of all, it will be examined whether, in the light of the notion of progressiveness in article 2(1), the ICESCR is, in fact, a legally binding instrument. Next, the various elements of article 2(1) will be analysed one by one. Lastly, a few words will be said on the value of article 2(1) in times of economic hardship. Whenever appropriate, the discussion will be related to article 13 ICESCR.

4 The equivalent provision in the CRC is art. 4 of that Convention. Art. 4 states, “States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation”. What is said on art. 2(1) ICESCR in the discussion below, applies mutatis mutandis to art. 4 CRC. See also ComRC, General Comment No. 5 (Thirty-Fourth Session, 2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44(6) CRC) [Compilation, 2004, pp. 332–353].