場次二：兩公約與一般性評議

Panel II: The Two Human Rights Covenants and the General Comments

主持人/Moderator ：洪德欽 教授
(Professor Der-Chin Horng)

發表人/Presenters ：張文貞 副教授
(Associate Professor Wen-Chen Chang)
高涌誠 律師
(Mr. Yung-Cheng Kao)

與談人/Discussants ：姚孟昌 助理教授
(Assistant Professor Meng-Chang Yao)
Mr. Edmond Bon

演進中的法：
一般性意見作為兩公約的權威解釋

張文貞

（臺灣大學法律學院 副教授、美國耶魯大學法學博士）

摘要

公民與政治權利國際公約及經濟社會文化權利公約，透過兩公約施行法的實施，已正式成為我國法律體系的一部份。兩公約施行法第 3 條規定：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」不過，究竟兩公約的規範意旨及相關解釋是什麼？表現在什麼樣的法律文件？具備什麼樣的規範地位及效力？負責兩公約的執行機構一直以來均有一般性意見(general comments)的作成。這些一般性意見或建議作成的依據、其規範地位及效力為何？是否即為我國公約施行法中所稱的解釋而為我國相關機關在適用公約權利時應加以參照？為釐清前述問題，本文探討一般性意見作成的規範依據、功能演變、及其規範地位與效力加以探討，並對其於我國法律體系的進一步適用，提出具體建議。

關鍵字

兩公約、一般性意見、一般性建議

壹、前言

〈公民與政治權利國際公約〉(International Covenant on Civil and Political Rights, ICCPR)及〈經濟社會文化權利國際公約〉(International Covenant on Economic, Social and Cultural Rights, ICESCR)（以下簡稱兩公約），在 2009 年 3 月 31 日經我國立法院以條約案方式通過，同時制定兩公約施行法，此一施行法於 2009 年 12 月 10 日正式實施。[1] 兩公約施行法第 2 條規定：「兩公約所揭示保障人權之規定，具有國內法律之效力。」同法第 3 條亦規定：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」這不但使得兩公約所保障的人權，成為我國內國法的一部分，更重要的是，我國政府、尤其是法院，在適用及解釋兩公約人權時，必須參照兩公約的規範意旨、以及兩公約委員會所作的解釋。不過，究竟兩公約的規範意旨及相關解釋是什麼？表現在什麼樣的法律文件？具備什麼樣的規範地位及效力？

無獨有偶，我國政府在 2007 年 2 月正式完成加入〈消除對婦女一切形式歧視公約〉(Convention on the Elimination of All Forms of Discrimination against Women, CEDAW)的內國程序，同時在 2009 年 3 月公布加入後的首次國家報告。[2] 2011 年 5 月 20 日，立法院通過 CEDAW 施行法，同年 6 月 8 日總統正式公布，並明定將於 2012 年 1 月 1 日正式實施。跟兩公約施行法的規定一樣，CEDAW 施行法第 2 條也明文規定：「公約所揭示保障性別人權及促進性別平等之規定，具有國內法律之效力。」同法第 3 條也規定：「適用公約規定之法規及行政措施，應參照公約意旨及聯合國消除對婦女歧視委員會對公約之解釋。」同樣的問題是：究竟 CEDAW 公約的意旨及其委員會對公約所作的解釋是什麼樣的法律文件？具備什麼樣的規範地位及效力？

不管是兩公約或 CEDAW，其所負責執行的委員會均有所謂一般性意見

[1]本文以下單獨提到〈公民與政治權利國際公約〉，係以 ICCPR 簡稱；單獨提到〈經濟社會文化權利國際公約〉，則以 ICESCR 簡稱；同時提到兩個公約時，方以兩公約簡稱，先予說明。兩公約批准案，是民進黨執政時的行政院於 2008 年 2 月 13 日經行政院院會決議，認為我國已於 1967 年 10 月 5 日由當時常駐聯合國代表團的劉鍇大使代表政府簽署，但迄未完成批准程序，遂決定送立法院審議以完成批准程序，而於 2008 年 2 月 19 日將兩公約批准案送國民黨占絕大多數的第 7 屆立法院審議。立法院於 2009 年 3 月 31 日三讀通過批准案。參見：立法院公報，98 卷 14 期，頁 378-433。同時，行政院鑑於我國國際處境特殊，兩公約正式批准後是否能順利完成交存秘書長的手續，尚有極大困難，為了確保兩公約在我國法律體系上的定位及效力，也同時提出兩公約施行法，使兩公約所保障的權利具有國內法上的效力。兩公約施行法三讀通過的決議及討論，參見：立法院公報，98 卷 14 期，頁 433-257。

[2] 2006 年 7 月 12 日，行政院院會決議將我國加入 CEDAW 的條約案送立法院審議，立法院 2007 年 1 月 5 日通過此一條約案；同年 2 月 9 日，陳水扁總統頒佈我國的簽署加入書。外交部透過友邦國家，希望將我國的加入書於聯合國秘書長處存放，可惜於同年 3 月 29 日即被潘基文秘書長予以拒絕。關於 2009 年的國家報告、國外專家的審查、以及後續討論，均經財團法人婦女權益促進發展基金會（以下簡稱婦權基金會）整理，收錄於婦權基金會網站上的 CEDAW 專區，參見 http://wrp.womenweb.org.tw/Page_Show.asp?Page_ID=632

(general comments)或一般性建議(general recommendations)的作成。這些一般性意見或建議作成的依據、其規範地位及效力為何？是否即為我國公約施行法中所稱的解釋而為我國相關機關在適用公約權利時應加以參照？為釐清前述問題，本文以下將從 ICCPR、ICESCR 及 CEDAW 相關規定，對一般性意見及一般性建議的規範依據、功能演變、及其規範地位與效力加以探討，並對其於我國法律體系的進一步適用，提出具體建議。

貳、一般性意見的規範依據

我們從 ICCPR 及 ICESCR 的官方網站，都分別可以看到其所作成的一般性意見。[3] 不過，這兩個公約作成一般性意見的機構、以及其作成一般性意見的規範依據，其實並不相同。

一、公民與政治權利國際公約

ICCPR 第 28 條設立人權事務委員會(Human Rights Committee)來負責該公約的監督與執行。公約第 40 條第 1 項規定締約國繳交國家報告的義務，同條第 2 項規定國家報告應送交聯合國秘書長轉交人權事務委員會審議。同條第 4 項並進一步規定：「委員會應研究本公約締約國提出之報告書。委員會應向締約國提送其報告書及其認為**適當之一般性意見**（或譯一般評議[4], general comments）。委員會亦得將此等一般性意見連同其自本公約締約國收到之報告書副本轉送經濟暨社會理事會。」而這正是人權事務委員會作成一般性意見的規範依據。

值得注意的是，委員會依據本條所作的一般性意見，究竟是針對繳交國家報告的特定國家？抑或並不針對特定國家，而是在審查所有或部分締約國的國家報告後所作成的通案性意見？事實上，在聯合國大會討論 ICCPR 草案時，原本的條文只有「……應向締約國提送其報告書及其認為適當之意見。……」。直到最後一刻，才在適當意見的前面，加上一般(general)這樣的文字。（Steiner, Alston & Goodman, 2007）也因為這樣的文字更動，使得後來人權委員會在作成一般性意見時，認為因為加上了「一般」這樣的文字，而認為一般性意見是廣泛適用於全體的締約國。[5]（Steiner et al., 2007）而此一對於一般性意見的定位，也被其他公約如 ICESCR 及 CEDAW 所接受。

人權事務委員會在 1981 年作成第 1 號一般性意見，該號意見正是針對所有

---

[3] ICCPR: http://www2.ohchr.org/english/bodies/hrc/comments.htm,
ISESCR: http://www2.ohchr.org/english/bodies/cescr/comments.htm

[4] 「一般評議」是公約繁體中文版的譯法，這也是我國正式批准及簽署的版本；公約簡體中文版則譯為「一般建議」，而國內目前官方及民間多數使用「一般性意見」。本文作者過去間或使用一般評議或一般性意見，本文則採國內多數譯法的「一般性意見」。

[5] *See also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 748 (2nd Revised Edition, 2005).

公約締約國繳交國家報告的議題。從那時開始，截至 2011 年 11 月底，人權事務委員會總共作成了 34 號一般性意見。[6]

二、經濟社會文化權利國際公約

ICESCR 一開始是直接以聯合國經濟暨社會理事會（以下簡稱經社理事會）作為公約的監督及執行機構。ICESCR 第 16 條第 1 項規定締約國繳交國家報告的義務，同條第 2 項第 1 款則規定國家報告應送交聯合國秘書長轉交經社理事會進行審議。有意思的是，ICESCR 第 16 條並未如同 ICCPR 第 40 條般，直接對經社理事會作成一般性意見予以規定。不過，ICESCR 第 21 條卻也規定了經社理事會「得隨時向大會提出報告書，連同**一般性質之建議(recommendations of a general nature)**，以及從本公約締約國與各專門機關收到關於促進普遍遵守本公約確認之各種權利所採措施及所獲進展之情報摘要。」

1985 年，經社理事會作成決議，另外設立經濟社會文化委員會(Committee on Economic, Social and Cultural Rights, 以下簡稱經社文委員會)來負責該公約的執行。[7] 1987 年，經社理事會又再次作成決議，明白授權並規定經社文委員會作成前述一般性質之建議的具體程序；並在該決議第 9 段的文字中，具體建議經社文委員會採用人權事務委員會作成一般性意見(general comments)的方式。[8] 二年後，經社文委員會於 1989 年 2 月，就公布了其第 1 號的一般性意見(general comment)，內容也是針對締約國國家報告的繳交及審查等相關程序。截至 2011 年 11 月底，經社文委員會總共作成了 21 號一般性意見。[9]

三、消除對婦女一切形式歧視公約

值得併予一提的是，CEDAW 也有這樣的制度。CEDAW 第 17 條設立〈消除對婦女歧視委員會〉來負責公約的監督與執行，第 18 條則規定締約國的國家報告應送交聯合國秘書長轉送此一委員會來加以審議；第 21 條第 1 項則規定委員會「可 根據對所收到締約各國的報告和資料的審查結果，提出意見(suggestions)和一般性建議(general recommendations)。」 委員會在 1986 年針對締約國的國家報告事項公布第 1 號一般性建議，迄今已作成總共 28 號一般性建議。[10]

---

[6] 這些一般性意見的內容均公布於人權事務委員會的網站(http://www2.ohchr.org/english/bodies/hrc/comments.htm)，多數都有中文翻譯。

[7] Economic and Social Council resolution 1985/17, available at http://www2.ohchr.org/english/bodies/cescr/ (last visited Nov. 28, 2011) 在該決議中，經社理事會就特別強調設立經社文委員會來承擔其基於 ICESCR 第 21 條及第 22 條所負的義務。

[8] Economic and Social Council resolution 1987/5, available at http://www.radioradicale.it/exagora/resolution-1987-5 (last visited Nov. 28, 2011)

[9] 這些一般性意見的內容均公布於經社文委員會的網站(http://www2.ohchr.org/english/bodies/cescr/comments.htm)，多數都有中文翻譯。

[10] 這些一般性意見的內容均公布於消除對婦女歧視委員會的網站(http://www2.ohchr.org/english/bodies/cedaw/comments.htm)，多數都有中文翻譯。

參、一般性意見的功能演進

不管是兩公約的一般性意見(general comments)或是 CEDAW 的一般性建議(general recommendations)，從一開始協助委員會執行及監督締約國國家報告的撰寫及繳交（Nowok, 2005: 873-876），到後來針對公約相關條文的文義釐清與解釋，甚至是最近對公約內容所作體系化的解釋、以及相當程度的解釋造法(interpretation as law-making)（Black, n.d.: 9），都是經過一段不算短的時間的功能演變（參表 1）。[11]（Black, n.d.）

表 1：兩公約一般性意見及 CEDAW 一般性建議的功能演變

	ICCPR	ICESCR	CEDAW
國家報告撰寫的協助	GC01 (1981) - GC15 (1986)	GC01 (1989) - GC03 (1990)	GR01 (1986) - GR13 (1989)
公約內容的釐清與解釋	GC16 (1988) - GC22 (1993)	GC04 (1991) - GC13 (1999)	GR14 (1990) - GR22 (1995)
公約內容的體系化與完整化	GC23 (1994) - GC34 (2011)	GC14 (2000) - GC21 (2009)	GR23 (1997) - GC28 (2010)

來源：作者自製[12]

一、國家報告撰寫的協助

一般性意見早期的功能，在於協助締約國撰寫並提出國家報告。人權事務委員會一開始所作成第 1 號及第 2 號的一般性意見，就是直接針對締約國提出國家報告的義務以及撰寫國家報告的準則。經社文委員會的第 1 號一般性意見，消除婦女歧視委員會的第 1 號及第 2 號一般性建議，也都是針對國家報告的撰寫及提出所作。

而由於締約國在提出國家報告、或者委員會在審查各國國家報告時，可能會對公約相關條文的文義有所疑問，委員會在這段時間所作的一般性意見，也會對相關條文的文義予以釐清。不過，由於委員會作成一般性意見的權威地位尚未完全建立，在這個時期，委員會針對公約相關條文或權利所作的解釋，大體上趨於保守。（Steiner et al., 2007: 878-880）這個保守性可以從兩個面向看出。首先，一

[11]對於人權事務委員會在一般性意見作成上的功能演變，詳參 HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 875 (3rd ed., 2007): 873-886.

[12] 本表在 ICCPR 一般性意見的功能演進上的分析，參考 Steiner 的見解。不過，Steiner 是從時間的角度來分析 ICCPR 的一般性意見。他從四個時期（1981-1983, 1984-1988, 1989-1999, 2000-present）來討論一般性意見所扮演的不同功能，不同功能在不同時間或有重疊，而其所涵蓋的功能，也與本表相似。（Steiner et al., 2007: 878-884）

般性意見的篇幅都很短。人權事務委員會在這個時期所作的一般性意見約在一兩頁的範圍內，最多不會超過 20 個段落的文字說明。經社文委員會、消除婦女歧視委員會的文字篇幅更短。其次，在必須釐清或解釋公約相關條文的文義時，委員會傾向以公約所使用的文字直接予以闡明，並不會給予太多其他的詮釋。

不過，雖然委員會在一般性意見的內容上傾向謹慎及保守，但在這個一般性意見的制度草創初期，委員會作成一般性意見的速度倒是相對快速，數量也頗為可觀。人權事務委員會從 1981 年到 1986 年就作成 15 號一般性意見，其中有 11 個一般性意見是在 1981 年到 1983 年間作成。消除婦女歧視委員會也是一樣，從 1986 年到 1989 年間，就作成 13 號一般性意見。[13] 這也讓締約國明顯感受到委員會希望快速建立其作成一般性意見權威地位的企圖。（Steiner et al., 2007: 877）

二、公約內容的釐清與解釋

不論是負責 ICCPR 的人權事務委員會、負責 ICESCR 的經社文委員會、或是負責 CEDAW 的消除婦女歧視委員會，從 1980 年代中、後期開始，因應前蘇聯、東歐等前共產政權的轉型，面對全球所展開的一個全新的人權與憲政秩序，逐步開始解放過去趨於保守的一般性意見，而在闡釋公約權利時，其法律論述均較之前更形豐富。

以人權事務委員會為例，這段期間的一般性意見的篇幅開始增多，而對於公約具體權利的釐清，也會開始從公約的相關條文[14]、其他國際公約如消除對種族一切形式歧視公約(Convention on the Elimination of All Forms of Racial Discrimination, CERD)及 CEDAW[15]、甚至是引述委員會在審查締約國相關國家報告時，所曾經引述各種規範，包括聯合國體系中各種原則或準則[16]。值得注意的

---

[13] 經社文委員會因為比較晚才開始作成一般性意見，這個時期的一般性意見主要是針對國家報告的撰寫，當經社文委員會開始針對 ICESCR 的條文作釐清與解釋時，即已經採取跟人權事務委員會在第二階段一樣趨於積極的解釋方法。

[14] 例如，第 17 號一般性意見雖然是針對 ICCPR 第 24 條的兒童權利保障；不過，該號意見詳細闡述兒童同樣享有公約各條的其他權利如生命權、受平等審判的權利等。第 18 號一般性意見針對公約所定不歧視原則(non-discrimination)而發；不過，該號意見並不以公約第 2 條或第 26 條所規定的不歧視原則為限，而是擴張到各個相關權利去探究其實現上的平等、不歧視的內容及保障。

[15] 委員會第 18 號一般性意見闡述 ICCPR 所禁止的「歧視」(discrimination)時，就提到因為 ICCPR 並未對此一用語直接加以定義，但不管是 CERD 或是 CEDAW 均有對此一用語給予相同的定義，即使此一定義是適用在特定種族或對婦女歧視的脈絡，但委員會認為此一定義的一般含義仍適用於公約所稱的歧視。參見第 18 號一般性意見，第 6 段及第 7 段文字。

[16] 例如，在第 21 號一般性意見，委員會針對公約所定第 10 條第 1 款「自由被剝奪支人，應受合於人到及尊重其天賦人格尊嚴之處遇」進行闡述，而認為這裡所謂「人道及尊重人格的對待方式」至少應適用相關的聯合國標準，包括〈囚犯待遇最低限度標準規則〉(1957 年)、〈保護所有遭受任何形式居留或監禁的人的原則〉(1988 年)、〈執法人員行為守則〉(1978 年)、〈關於醫務人員、特別是醫生在保護被監禁和居留的人不受酷刑和其他殘忍、不人道或有辱人格的待遇或處罰方面的任務的醫療道德守則〉(1982 年)，而締約國在國家報告中應清楚以這些規範來討論其遵守

是，ICCPR 的締約國，不見得也是其他公約如 CERD 或 CEDAW 的締約國而必須受其等規範內容的拘束，人權事務委員會在解釋及闡述 ICCPR 公約內容時積極引用其他國際公約、甚至是聯合國體系內的軟法(soft law)文件，等於實質上擴大了 ICCPR 締約國對公約所負擔的義務內容及範圍。這也讓國際人權法學界及實務界清楚感受到，在東西方冷戰的國際局勢改變後，人權事務委員會積極擴張其解釋權、整合聯合國相關人權規範的高度企圖。（Steiner et al., 2007: 874）經社文委員會在這個時期所作的一般性意見，更是如此。不但在篇幅上動輒以數頁、包括數十個文字段落，更重視一般性意見的結構，清楚闡述公約所保障權利的定義、締約國在此一權利下的各項具體義務、何種情況即可視為是締約國義務的違反。[17] 在其他國際公約及各種軟法文件的直接適用或引用上，也是相當積極。[18]

最值得我們注意的是，經社文委員會在這段期間的一般性意見中，已經主動注意到經濟社會文化人權的內國落實問題。在第 9 號一般性意見中，經社文委員會特別直接引用〈維也納條約法公約〉第 27 條規定，明白指出締約國不得援引國內法規定為藉口而不履行條約。雖然 ICESCR 第 2 條對締約國履行公約的方式，採取了「以一切適當方法」的文字，來給予締約國比較寬廣及靈活的彈性，但這並不表示締約國就完全沒有必要修改內國法令政策，以實現公約所要求的義務。[19]同時，委員會也援引〈世界人權宣言〉第 8 條及 ICCPR 第 2 條第 2 項中權利必須受有效司法救濟的規定，認為在經濟社會文化權利受侵害時，如果不能以司法救濟作為輔助或補充的手段，很難認定該權利已受有效保障。委員會在本號一般性意見中，清楚明列出可在內國直接受司法救濟的經濟社會文化權利，也要求各國法院應該在內國管轄相關案件時，引述公約的權利及規定。[20]

消除婦女歧視委員會在這段期間所作的一般性建議，也不例外。其中最重要的可以說是第 19 號及第 21 號一般性建議。在第 19 號一般性建議，委員會將對婦女的暴力行為(violence against women)，直接以 CEDAW 第 2 條規定認為是一種「嚴重阻礙婦女與男子平等享受權利和自由的歧視」，並詳列各種行為類型，

及實現的情況。甚至對少年犯人的待遇，該意見也提到締約國必須表明其是否遵行〈聯合國少年司法最低限度標準規則〉(又稱 1987 年的北京規則)。參見第 21 號一般性意見，第 5 段及第 13 段文字。

[17] 在本時期所作一般性意見中，體系最完整的就是針對 ICESCR 第 11 條取得足夠食物的權利所作的第 12 號一般性意見，以及針對第 13 條受教育權所作的第 13 號一般性意見。

[18] 例如，在第 4 號一般性意見針對 ICESCR 第 4 條適足住房權的解釋上，委員會就參考了〈無家可歸者收容安置國際年〉大會所通過有關全球住房戰略的決議（第 2 段、第 15 段）、〈住房保健原則〉（第 8 段）。第 5 號一般性意見針對身心障礙者的權利，委員會對於何謂「身心障礙」一詞的定義，就認為應該參考 1993 年的〈身心障礙者機會均等標準規則〉（第 3 段），同時也參考了〈兒童權利國際公約〉、〈非洲人權和人民權利憲章〉、〈美洲人權公約經濟社會文化權利附加議定書〉的相關條文（第 6 段）。第 6 號一般性意見中，關於老人的定義，直接採用聯合國大會相關決議的術語（第 9 段），而對老人權利的保障，也引述聯合國大會 1991 年所通過的〈聯合國老年人原則〉，認為此一原則的相關內容與 ICESCR 所確認的各項權利密切相關（第 4 段）。第 7 號一般性意見針對強迫驅逐的問題，再次引用全球住房戰略（第 2 段）。第 8 號一般性意見則引用兒童權利公約及世界人權宣言，來說明締約國尊重國際規範的義務（第 8 段）。

[19] 參見第 9 號一般性意見，第 3 段文字。

[20] 參見第 9 號一般性意見，第 3 段、第 10 段及第 13 段文字。

要求締約國予以禁止，以確保婦女的權利。在第 21 號一般性意見，針對女性在婚姻與家庭關係中的平等，委員會清楚羅列出 CEDAW 所有相關條文，具體闡述這些權利關係中的性別平等。

三、公約內容的體系化與完整化

1990 年代末期、乃至新的千禧年來臨，全球重視人權的民主憲政國家達到史無前例的高峰，這也使人權事務委員會、經社文委員會及消除婦女歧視委員會在一般性意見的作成上，對公約所保障的權利內容，開始進行完整化及體系化的闡述，甚至以解釋來造法。（Black, n.d.: 9; Steiner et al., 2007: 873-336）其中一個最重要的發展，就是人權事務委員會開始將其在個人申訴(individual communications)決定中[21]、或是審查各國國家報告的觀察結論(concluding observations)上[22]，所表示的法律見解，直接作為一般性意見的內容，並且在註腳、甚至是一般性意見的本體中予以直接引用。

然而，個人申訴制度，並未見於 ICCPR，而是在第一任擇議定書(First Additional Protocol)中，截至目前為止，ICCPR 的 167 個締約國中，也只有 114 個締約國也同時加入了此一任擇議定書。[23] 而個人申訴制度，是指加入此一任擇議定書的締約國，允許其人民在受公約所保障權利受侵害、用盡內國救濟程序後，向人權事務委員會提出申訴，而委員會可認定系爭締約國是否確有違反公約權利保障規定之情事。如前所述，ICCPR 的締約國，不一定加入第一任擇議定書；而即使加入第一任擇議定書的國家，如果不是系爭個人申訴案件的當事國，亦不受委員會具體決定的拘束。委員會將其在個人申訴決定中所表示的法律見解納入一般性意見的結果，將使非第一任擇議定書、以及非受申訴國的國家都會受到其在個案中所表示法律見解的實質拘束。而委員會將其對特定國家的國家報告審查結論中所表示的法律見解，也納入一般性意見中，同樣有類似的問題。

人權事務委員會這種將個人申訴或國家報告觀察結論所表示的法律見解納入一般性意見的作法，從 1994 年第 23 號一般性意見開始，逐步成為其作成一般性意見的常態，也實質上擴張了其權限，將其在解釋公約、審查國家報告及作成個人申訴決定的各個權力面向作了有機結合。透過這樣的方式，人權事務委員會可以說讓自己從一個委員會的身分，逐步走向實質的人權法院，實質建構其作為 ICCPR 最終司法權威解釋機構的地位。

---

[21] 人權事務委員會第一次引用其在個人申訴案件中所表示的法律見解，就是在 1994 年所作關於 ICCPR 第 27 條少數族群權利的第 23 號一般性意見(第 4 段及第 5 段文字及其腳註)。自此之後，人權事務委員會即將個人申訴案件的引用視為常態，在第 28 號針對男女權利平等所作的一般性意見中，個人申訴案件的引用甚至已經出現在本文（第 32 段）。

[22] 例如，第 29 號關於緊急狀態下公民與政治權利是否得以減損的一般性意見，委員會就多次具體引用其對相關締約國國家報告審查的觀察結論（第 3 段、第 7 段、第 16 段、第 17 段文字及其腳註）。

[23] ICCPR 第一任擇議定書的締約國，參見 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en

除了將其在個人申訴及國家報告審查結論中所表示的法律見解納入一般性意見之外，近年來人權事務委員會對於 ICCPR 公約所保障權利的效力及公約的拘束力，也出現突破性的見解。[24] 其中最重要的就是第 24 號、第 26 號、第 29 號及第 31 號的一般性意見。

在 1994 年的第 24 號一般性意見中，人權事務委員會首次針對締約國對公約部分條款加以保留的作法，作出完整的闡述，並進一步劃出保留的界線。委員會透過一連串包括強行國際法論述在內的法律論證，具體指出有些公約條款是不可保留、或在特定情況下不能予以保留。[25] 委員會從公約的目的及功能(object and purpose of treaty)來決定保留的界限，甚至提到其自身基於公約第 40 條規定，所享有的解釋公約的權限，就是為達公約目標實現所不可或缺的條文，因此也屬於不可保留的部分！由於 ICCPR 並沒有明文限制締約國的保留，本號一般性意見的作成也引發委員會透過解釋來加以造法的爭議及討論。（Nowak, 2005: XXXI-XXXIII; Steiner et al., 2007: 886-888）

在 1997 年的第 26 號一般性意見中，委員會作風更形大膽。當時面對的問題是，前南斯拉夫解體後的各國，是直接繼受前南斯拉夫的締約國地位？抑或必須重新加入公約？人權事務委員會在本號一般性意見特別指出，ICCPR 之所以沒有廢止或退出公約的相關規定，就是因為「公約所保障的各項權利是屬於締約國領土上的人民。一旦人民在公約下獲得保障，此一保障即隨領土轉移並持續歸屬於人民所有，不論締約國政府是否更迭、解體成一個以上的國家或國家繼承」，都不影響人民繼續享有公約權利的保障。」人權事務委員會此一見解，明顯使 ICCPR 的規範地位更形崇高，但同樣引發解釋造法的爭議。

同樣地，在 2001 年的第 29 號關於緊急狀態下的人權保障是否可以減損的一般性意見中，人權事務委員會用了將近八頁的篇幅，來闡述 ICCPR 第 4 條所定不得扣減的權利(non-derogable rights)與絕對法(jus cogens)間的關係。委員會認為 ICCPR 所列在緊急狀態下不得減損保障的權利，雖然不能直接就認為等同於強行國際法的內容，但確實與其有關；而且第 4 條將這些權利定位為是不得扣減的權利，也有助於這些權利被認定為是強行國際法或絕對法的內容，尤其是第 6 條關於生命權及死刑、第 7 條關於酷刑禁止的規定。更重要的是，委員會甚至進一步闡述，認為即使是公約所並未列舉之不得扣減的權利，如構成強行國際法或絕對法之內涵，公約締約國亦不得因其並未列舉而於緊急狀態中予以限制，這樣的權利包括：違反國際人道法之劫持人質罪行、禁止集體懲罰(collective punishments)、禁止人權之恣意侵害(arbitrary deprivations of liberty)、禁止違反受公平審判權利保障之核心內容（如無罪推定原則）(deviating from fundamental

[24] 當然，這些見解也在國際人權法學界引起了相當多的爭議及討論，參見 HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS AND MORALS 875 (3rd ed., 2007): 886-890.

[25] 第 24 號一般性意見，第 6 段、第 8 段及第 10 段文字。

principles of fair trial)。[26] 很顯然地，這又是委員會再一次地以解釋造法，實質擴張 ICCPR 第 4 條的權利保障範圍。

2004 年人權事務委員會所作成的第 31 號一般性意見，是對透過一個完整的體系化方式，來清楚闡釋 ICCPR 締約國基於公約第 2 條所應負擔的義務。委員會不但強調締約國政府的所有部門，包括行政、立法及司法，以及地方政府，均有義務必須實現締約國的公約義務[27]，甚至還首次強調了締約國在領土外也可能承擔的義務(extra-territorial application)。[28] 人權事務委員會還特別強調了締約國司法部分在內國實現公約的義務包括：直接在內國執行公約的權利，或在適用內國法律時援引公約來予以解釋。[29] 這也是委員會首次對締約國司法部門應積極適用或援引公約作為規範依據的清楚表態。

如果我們認為人權事務委員會在近年透過一般性意見，對 ICCPR 規範內容的解釋造法，已達顛峰；那我們會更驚訝於經社文委員會在一般性意見上所作規範型塑的大幅進展。從 2000 年第 14 號關於健康權的一般性意見開始，經社文委員會就透過完整化及體系化闡釋 ICESCR 權利，實質擴增了其權利內涵及保障程度。在第 14 號一般性意見，經社文委員會對公約第 12 條健康權規定範圍給予清楚定義，同時對平等、不歧視享有健康權、健康權的性別觀點、健康權的保障與特定族群包括女性、兒童青少年、老年人、身心障礙者及原住民等，均鉅細靡遺加以闡釋。更重要的是，委員會清楚指出締約國對於健康權保障實現的內國及國際義務，並進一步劃出核心義務的範圍，具體指出國家可能違反此一權利保障的情況，甚至對國家如何於內國具體實現相關義務的政策、制度、指標等方法，都逐一予以羅列。這樣一個完整化及體系化的解釋方式，繼續出現在接下來第 16 號關於男女平等享有經濟社會文化權利、第 18 號關於工作權、第 19 號關於社會權、第 21 號關於文化權等一般性意見中，而逐步成為常態。經社文委員會採行此種完整化及體系化的闡釋方式，在在都是要打破一般人對經社文權利是無法立即要求國家予以實現的錯誤印象。

2002 年經社文委員會所作第 15 號一般性的意見，透過解釋 ICESCR 第 11 條及第 12 條規定而創設出水權(right to water)的保障，更是被認為這一波解釋造法的顛峰。在該意見中，委員會開宗明義就指出人民享有乾淨、充足的水權(right to water)，是一項不可缺少的人權，不但是維持有尊嚴生活的必要條件，也是其他人權獲得實現的前提。[30] 確保人民得以取得充足、安全的水，是立即生效的國家義務，也是每個國家在加入公約之後就必須立即採取的措施，不會因為區

[26] 第 29 號一般性意見，第 11 段文字。相關討論，亦可參見張文貞，〈國際人權法與內國憲法的匯流：臺灣施行兩大人權公約之後〉，收於社團法人臺灣法學會主編：《臺灣法學新課題（八）》，台北：元照出版，頁 1-26（2010）。
[27] 第 31 號一般性意見，第 4 段文字。
[28] 第 31 號一般性意見，第 10 段文字。
[29] 第 31 號一般性意見，第 15 段文字。
[30] 參見 ICESCR 第 15 號一般性意見，第 1 段文字。

域、國家、文化而有所不同。[31]

消除婦女歧視委員會跟人權事務委員會及經社文委員會一樣，也在近年表現出積極透過一般性意見完整化及體系化 CEDAW 所保障的權利。這個趨勢不僅可以從其一般性建議篇幅的大幅成長，也可以從註腳的出現可以看出。

肆、一般性意見的規範地位與效力

從 ICCPR、ICESCR 及 CEDAW 條文中關於一般性意見或建議作成的依據來看，誠如許多論者已經指出，這些公約一開始完全無法預期到後來人權事務委員會、經社文委員會及消除婦女歧視委員會在作成這些一般性意見及建議上會有這樣精彩的論述，在公約權利解釋有如此完整化及體系化的發展。（Nowak, 2005: 748; Steiner et al, 2007: 886-888; Blake, n.d.: 33-34）這也是當前國際人權法學界在論述一般性意見的規範地位與效力時，所不得不正視的巨幅改變。

一、拘束力有無之辯

多數國際人權法學者都會認為人權事務委員會、經社文委員會及消除婦女歧視委員會所作成的一般性意見及一般性建議，與公約本身的規範不同，對締約國並無傳統意義下的規範拘束力。（Black, n.d.: 33-34）不過，多數學者也會很快地指出，這點並非毫無爭議，而且沒有如公約本身一般的規範拘束力，並不表示這些一般性意見的內容對於締約國就毫無拘束的可能。

何以如此？因為人權事務委員會、經社文委員會及消除婦女歧視委員會，都是各該公約的執行及監督機構，其等對於締約國國家報告的審查、加入第一任擇議定書國家的個人申訴的決定，都還是會依據其等在一般性意見及一般性建議中對於公約內容所作的闡述及已經表現的法律見解。從這個角度來說，主張一般性意見或一般性建議對締約國實現公約義務完全沒有拘束力，並非正確。只要各該委員會確切遵循其所作成的一般性意見或一般性建議，來監督各締約國的執行，這些一般性意見或一般性建議就還是對締約國有發揮規範上的拘束功能。從而，不論是否承認一般性意見的拘束力，即使是將一般性意見定位為僅具有軟法(soft law)地位的學者，也無法不正視這些一般性意見及一般性建議實質上所發揮的規範功能。

另外一個令人無法忽視一般性意見拘束力的原因在於這些一般性意見所處理的議題及其所使用文字的規範強度。如前所述，人權事務委員會在第 24 號針對公約的保留、以及第 26 號針對公約義務的延續性、第 31 號針對締約國的義務，均作成規範強度相當高的解釋，並仰賴習慣國際法及強行國際法作為其論述基

[31] 參見 ICESCR 第 15 號一般性意見，第 37 段文字。進一步討論，參見，張文貞、呂尚雲，〈兩公約與環境人權的主張〉，《臺灣人權學刊》，創刊號，頁_-_（2011）。

礎。基於這些論述基礎所形成的一般性意見，縱令其拘束力並非直接來自於作成此一一般性意見的 ICCPR 第 40 條，也會有來自強行國際法或習慣國際法的規範拘束力。（Black, n.d.: 26）這也是何以近年來委員會愈來愈強調以強行國際法、習慣國際法或其他國際法上原理原則來強化這些一般性意見所作規範詮釋論據的原因。

二、權威解釋的確立

不論對一般性意見拘束力有無的主張為何，許多論者也無法不注意到這些一般性意見作為公約權威解釋地位，一再受到各個國際、區域及內國法院確認的趨勢。[32] 歐洲法院(European Court of Justice)在 1990 年代末期開始就多次具體適用相關委員會的一般性意見。（Black, n.d.: 17）美洲人權法院(Inter-American Court of Human Rights)也是多次在判決中直接適用相關委員會所作的一般性意見。（Black, n.d.: 18）人權事務委員會所作的一般性意見，也受到前南斯拉夫特別國際刑事法庭的直接引用。（Black, n.d.: 19）不僅如此，許多國家的內國法院，包括加拿大、英國、甚至是美國，以及我們鄰近的印度及香港，也會直接在個案中適用或引用各個委員會所作的一般性意見。（Black, n.d.: 20）從這些實踐我們可以清楚看出，人權事務委員會、經社文委員會或消除婦女歧視委員會對於各該公約所作的一般性意見及建議，已經在跨國司法實踐上，穩穩地建立起其作為公約權威解釋的地位。

伍、結語：不只是參照、而須積極適用

我國兩公約施行法第 3 條規定：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」從本文前述討論我們可以發現，本條有立法疏漏、甚至是立法錯誤的問題。事實上，ICCPR 的執行監督機構為人權事務委員會，其作成 ICCPR 相關的一般性意見。至於 ICESCR 的執行監督機構原本是經社理事會，後來授權經社文委員會，而 ICESCR 一般性意見的作成，均由經社文委員會為之。因此兩公約施行法所謂「兩公約人權事務委員會」的文字，應正確認知為 ICCPR 的人權事務委員會及 ICESCR 的經社文委員會。[33]

而兩公約施行法第 3 條所指的「解釋」，當然包括人權事務委員會及經社文委員會所作成的一般性意見。更重要的是，誠如前述討論所指出，這些委員會在近年的一般性意見中，也已經納入其等在審查締約國國家報告所作的觀察結論中、以及個人申訴案件決定中所表示的法律見解；委員會在這些觀察結論或申訴案件對公約所保障的權利所作的解釋，亦當然在本條所稱「解釋」的範圍內，我

[32] 詳細探討，參見 Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment*, Working Paper Series, Center for Human Rights and Global Justices, New York University School of Law, at 16-23.

[33] 這一點亦經國內外多位學者專家所清楚指出。

國政府機關，尤其是法院，均應積極予以適用。[34]

[34] 同樣地，CEDAW 施行法第 3 條所指「聯合國消除對婦女歧視委員會對公約之解釋」，也應作如此解。

參考文獻

Blake, Conway. 2011. Normative Instruments in International Human Rights Law: Locating the General Comment. Working Paper Series, Center for Human Rights and Global Justices, New York University School of Law. 2011/11/28.

Economic and Social Council resolution 1985/17, available at http://www2.ohchr.org/english/bodies/cescr/. 2011/11/28.

Economic and Social Council resolution 1987/5, available at http://www.radioradicale.it/exagora/resolution-1987-5. 2011/11/28.

ICCPR, http://www2.ohchr.org/english/bodies/hrc/comments.htm.

ISESCR, http://www2.ohchr.org/english/bodies/cescr/comments.htm.

Nowak, Manfred. 2005. U.N. Covenant on Civil and Political Rights: CCPR Commentary 748. 2nd Revised Edition.

Steiner, Henry J., Philip Alston & Ryan Goodman. 2007. International Human Rights in Context: Law, Politics and Morals 875. 3rd ed.

人權事務委員會網站，http://www2.ohchr.org/english/bodies/hrc/comments.htm。

消除對婦女歧視委員會網站，http://www2.ohchr.org/english/bodies/cedaw/comments.htm。

經社文委員會網站，http://www2.ohchr.org/english/bodies/cescr/comments.htm。

Evolving Law: General Comment as Authoritative Interpretations of Human Rights Covenants

Wen-Chen Chang

(Associate Professor, College of Law, National Taiwan University& LLM, JSD, Yale Law School)

Abstract

Taiwan ratified both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights in March 2009. At the same time, an Implementation Act was passed to make all of the rights enshrined in the two Covenants directly applicable in the domestic legal regime, having become effective in December 2009. This Implementation Act further demands the applications of the two Covenants to be made reference to the interpretations by the respective instruments. It is thus worthy of analysis on what are these "interpretations" and their legal status and effect. Beginning in the 1980s, the human rights committee, the committee on economic, social and cultural rights, and the committee on the elimination of discriminations against women all have issued "General Comments" or "General Recommendations." This article is aimed to analyze the legal basis, the evolving functions, and the legal status and legal effects of these general comments and recommendations, and provide suggestions on how these comments and recommendations should be resorted to in the domestic legal system of Taiwan.

Keywords

the Two Covenants, General Comments, General Recommendations

I. Introduction

Taiwan ratified both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights in March 2009. At the same time, an Implementation Act was passed to make all of the rights enshrined in the two Covenants directly applicable in the domestic legal regime, having become

effective in December 2009. Article 2 of such Implementation Act gives all of the rights enshrined in the two Covenants the domestic legal status. Article 3 further demands that applications of the two Covenants make reference to their legislative purposes and interpretations by the Human Rights Committee.[1]

Earlier, in February 2007, our government also ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the initial state report was released in 2009. This year, an Implementation Act on CEDAW was passed, which also gave gender equality rights specified in the convention the domestic legal status and demanded domestic applications make reference to interpretations by the committee on the elimination of discriminations against women (cedaw).

Based upon these two implementation acts, interpretations by human rights committee, committee on economic, social and cultural rights (cescr) and cedaw are to be made reference to in the domestic application of the rights in the two Covenants and CEDAW. It is thus worthy of analysis on what are these "interpretations" and their legal status and effect. Beginning in the 1980s, the human rights committee and cescr have since issued "General Comments," and cedaw "General Recommendations." [2] Are these comments or recommendations meant to be interpretations that must be made reference to in the two implementation act? What are the legal basis, functions, legal status and effects of these comments or recommendations? This article is aimed to answer these questions and provide suggestions on how to apply these General Comments and General Recommendations in the domestic legal system of Taiwan.

II. Legal Basis of General Comments

While the human rights committee, cescr and cedaw all have issued general comments or general recommendations, the legal basis on which these instruments are issued vary from one to another.

1. ICCPR

Article 28 of the ICCPR creates a human rights committee to carry out the

[1] The Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, English text of which is available at http://www.humanrights.moj.gov.tw/lp.asp?CtNode=30637&CtUnit=10696&BaseDSD=7&mp=200

[2] ICCPR: http://www2.ohchr.org/english/bodies/hrc/comments.htm, ISESCR: http://www2.ohchr.org/english/bodies/cescr/comments.htm

functions for the implementation of the ICCPR. Article 40, Section 1 of the same instrument obligates its member states to submit state reports on the measures they undertake to implement the ICCPR rights. Section 4 of such article stipulates: "*The Committee shall study the reports submitted by the States Parties to the present Covenant. It shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties.*" This has been thought as the legal basis on which the human rights committee issued General Comments.

One question rose as to the nature of these comments and to whom these comments were to be made in the beginning. It was quickly resolved due to the last-minute addition of the term "general" prior to "comments," (Steiner, Alston & Goodman, 2007) and the human rights committee concluded that general comments are to be issued to all member states based upon its general findings on the Covenant's implementation.[3] (Steiner et al., 2007) This view was later accepted also by cescr and cedaw. The human rights committee issued the first general comment in 1981, and up till the end of November 2011, it has altogether issued 34 general comments.[4]

2. ICESCR

The United Nations Economic and Social Council (ESC) was made to the initial machinery that directly supervised the implementation of ICESCR. Thus, Article 16 of the ICESCR directs copies of the state reports to be transmitted to the ESC, and Article 21 authorizes it to "*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 to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant*."

In 1985, the ESC decided to create the Committee on Economic, Social and Cultural Rights (cescr) to carry out the functions for the implementation of the ICESCR.[5] Two years later, in 1987, the ESC made explicit that the cescr was to render "recommendations of a general nature" stipulated in Article 21 of the ICESCR in the form of General Comment.[6] In 1989, the cescr issued the first general comment,

[3] *See also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 748 (2nd Revised Edition, 2005).
[4] These general comments are available at http://www2.ohchr.org/english/bodies/hrc/comments.htm
[5] Economic and Social Council resolution 1985/17, available at http://www2.ohchr.org/english/bodies/cescr/ (last visited Nov. 28, 2011)
[6] Economic and Social Council resolution 1987/5, available at http://www.radioradicale.it/exagora/resolution-1987-5 (last visited Nov. 28, 2011)

and has since issued altogether 21 general comments.[7]

3. CEDAW

It is worthy of noting that Article 17 of the CEDAW also create a committee on the elimination of discriminations against women (cedaw) for the instrument's implementation. Article 18 authorizes the cedaw to study the state reports submitted to it, and Article 21 authorizes it to issue suggestions and general recommendations. The cedaw issued the first general recommendation in 1986, and has since issued 28 general recommendations.[8]

III. The Evolving Functions of General Comments

The initial function of general comments under the two Covenants or general recommendations was to facilitate the writing and submission of state reports. However, this rather narrowly defined initial function has over time evolved into more sophisticated interpretative functions and even to progressive law-making functions. (Black, n.d.: 9, Steiner et al., 2007: 873-876) (Table 1)

Table 1 The Evolving Functions of General Comments

	ICCPR	ICESCR	CEDAW
Facilitation of the submissions of state reports	GC01 (1981) - GC15 (1986)	GC01 (1989) - GC03 (1990)	GR01 (1986) - GR13 (1989)
Clarification & interpretation of the instrument	GC16 (1988) - GC22 (1993)	GC04 (1991) - GC13 (1999)	GR14 (1990) - GR22 (1995)
Comprehensive interpretation of the instrument as well as law-making	GC23 (1994) - GC34 (2011)	GC14 (2000) - GC21 (2009)	GR23 (1997) - GC28 (2010)

Source: by author[9]

1. Facilitation of state reports submission

Initially, general comments were made to facilitate the submission state reports. General Comments No.1 and No.2 by the human rights committee, General Comment No.1 by the cescr, and General Recommendations No.1 and No.2 were all issued for such purpose.

To facilitate submission of state reports, the committee may also clarify wordings or meanings of certain rights or provisions. However, in this initial period, the

[7] These general comments are available at http://www2.ohchr.org/english/bodies/cescr/comments.htm

[8] These general recommendations are available at http://www2.ohchr.org/english/bodies/cedaw/comments.htm

[9] This table was made in some reference to Steiner's similar view. *See* Steiner, *id*. at 878-84.

authority of the committees[10] to interpret these instruments was not yet firmly established, and as a result, the attitude of the committees towards general comments or recommendations was rather "conservative" which was clearly observable in the length of these comments. These general comments were often very short, no more than one page and adopted formalistic and simplistic method of interpretation if so required. (Steiner et al., 2007: 878-880)

Short in length notwithstanding, the committees quickly issued quite a number of general comments or recommendations: 11 for the human rights committee in just two years between 1981 and 1983, and 13 for the cedaw in three years between 1986 and 1989. The speed in the issuance of these comments was clear evidence of the attempt by the committee in establishing their own institutional interpretive authority. (Steiner et al., 2007: 877)

2. Clarification and interpretation of the respective instruments

Beginning in the mid-1980s, along with the new global wave of democratic transitions following, the collapse of the communist regimes in the former Soviet Union and Eastern Europe, all three committees began to liberate their past rather conservative attitude in issuing general comments or recommendations.

For example, general comments issued by the human rights committee during this period not only directly addressed the concept, scope and limitation of the rights within the ICCPR but also began making references to other conventions and international rights instruments[11] such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD) or CEDAW and even to non-binding international soft laws.[12] This cross-reference to other international human rights instruments certainly enriches quite substantially the rights enshrined in the ICCPR. And more importantly, it indicates the ambitions of the human rights committee to take the lead in integrating and even harmonizing various human rights instruments within the United Nations. Yet not all member states to the ICCPR are member states to other human rights instruments of the United Nations, cross-referencing thus may come under criticism as it creates extra burdens borne by member states. (Steiner et

[10] For the convenience of writing, the committees hereinafter point to all three committees including the human rights committee, cescr, cedaw.

[11] For example, General Comment No.18 addresses the concept of discrimination by making reference to CERD and CEDAW.

[12] For instance, in General Comment No.21, references were made to the Standard Minimum Rules for the Treatment of Prisoners (1957), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), the Code of Conduct for Law Enforcement Officials (1978) and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1982), and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, known as the Beijing Rules (1987). G.C. No.21, paras. 5, 13.

al., 2007: 874)

Like the human rights committee, the cescr also began issuing lengthy general comments. These comments articulated the ICESCR rights in a very systematic and well-structure fashion. They typically included a clear definition of the right, the scope of the right, the obligations states must bear under such right and the articulated situations where states can be found as violating such a right.[13] Similar to the cross-referencing method employed by the human rights committee, the cescr also made references or even directly applied other international human rights instruments.[14]

Also noteworthy was the focus on the domestic implementation of economic, social and cultural rights by the cescr during this stage. In General Comment No.9, the cescr makes reference to Article 27 of the Vienna Convention on the Law of Treaties of 1969[15] to affirm the obligations that member state must bear under the ICESCR, and makes it explicit that the wording of "by all appropriate means" in Article 2 does not immune states from core obligations.[16] In addition, the right to judicial remedy on social, economic and cultural rights was strongly emphasized. The key reference was made to Article 8 of the Universal Declaration of Human Rights, according to which "*[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*." Compared to Article 2, Section 3 of the ICCPR that obligates states to provide judicial remedies for civil and political rights, the ICESCR has no such explicit demand. Yet the cescr emphasizes that if states fail to provide any domestic legal remedies for violations of economic, social and cultural rights, they "*would need to show either that such remedies are not 'appropriate means' or that, in view of the other means used, they are unnecessary*." For the cescr, the other means used are more likely to be rendered "*ineffective if they are not reinforced or complemented by judicial remedies*." In this comment, the cescr also advice courts to

[13] The best examples are General Comments No.12 regarding right to food, and No. 13 on right 在本 to education.

[14] For instance, in General Comment No.4 on right to adequate housing, referencing was made to the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987 (paras.2, 15). In General Comment No.5, on the term of "disability", the cescr adopted the definition in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (para.3), and references were also made to the Convention on the Rights of the Child (art. 23); the African Charter on Human and Peoples' Rights (art. 18 (4)); and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 18) (para.6).

[15] Article 27 prescribes that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"

[16] GC/CESCR No.9, para.3.

make reference to ICESCR rights in their domestic application.[17]

This progressive attitude in interpreting rights was made no exception to the cedaw. Among all general recommendations, most critical were General Recommendations No. 19 and 21. The former defines "*gender-based violence*" as "*a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men*" and hence demands states to provide for effective measures to deal with this form of discrimination against women.[18] The latter focuses on women's equality in marriage and family relations, and points to all relevant provisions to construe a comprehensive protection.[19]

3. Provision of comprehensive interpretation & law-making of the respective instrument

At the turn of this new millennium, the number of constitutional democracies reached to an unprecedented peak, and even an International Criminal Court was about to assume functions. Faced with this new global environment that seems very friendly to the development of human rights, all three committees undertook an even bolder step in issuing their general comments and recommendations. These general comments and recommendations were aimed at providing systematic and comprehensive constructions –and at times even law-making– of the rights enshrined in both covenants and convention. (Black, n.d.: 9; Steiner et al., 2007: 873-876) Most important step was the inclusion –in footnotes or even in the main text– of legal opinions that the committees had expressed in individual communications[20] or concluding observations when reviewing state reports[21] into these general comments.

However, the institution of individual communications was adopted not in the ICCPR but in its First Additional Protocol, to which only 114 of 167 member states to the ICCPR have so far acceded.[22] The decisions that the human rights committee made in individual communications –along with the legal opinions expressed in these decisions– are binding only to the disputed states, rendering no effects on states outside the dispute, let alone states that are not parties to the additional protocol. The

[17] GC/CESCR No. 9, paras.3, 10, 13.
[18] GR/CEDAW No. 19, paras.1, 2.
[19] GR/CECAW No. 21.
[20] The first time that the human rights committee cited its own legal opinion in the general comment was General Comment No. 23 regarding minority rights in Article 27 of the ICCPR (paras.4, 5 and footnotes). Since then it has become a standard practice. In General Comment No.28, the reference to the individual communication even appeared at the main text (para.32).
[21] For example, in General Comment No.29 regarding non-derogable rights, the human rights committee refers many times to its own concluding observations (paras. 3, 7, 16, 17 and accompanying footnotes).
[22] The number of state parties to the First Additional Protocol is available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en

same line of reasoning is also applicable to the concluding observations that the human rights committee expressed when reviewing any particular state reports, rendering no effect on other states. While it is plausible to distinguish decisions in individual communications from legal opinions expressed in those decisions and argue that the human rights committee are at its own interpretive discretion to apply its legal opinions whenever it sees fit, this practice nevertheless engenders certain controversy.

The human rights committee began referring to its own legal opinions expressed in individual communications and concluding observations in General Comment No. 23 and has since developed into a standard practice. This interpretive strategy has enabled the committee to integrate many faces of its own jurisdictions such as issuing general comments, reviewing state reports and adjudication in individual communications, and an as a result substantially enlarge its own interpretive powers and perhaps also its institutional authority.

Aside from the expansion in interpretive powers, the human rights committee has also striven to strengthen normative superiority of the ICCPR. (Steiner et al., 2007: 886-890) Most important views were expressed in General Comment No.24, 26, 29 and 31. In General Comment No. 24, the human rights committee deals with the issue concerning reservations. It notes that the ICCPR "*neither prohibits reservations nor mentions any type of permitted reservation*"[23], but "*the absence of a prohibition on reservations does not mean that any reservation is permitted*."[24] More importantly, the committee adopts the "object and purpose" test in deciding permissible or impermissible reservations. Under this test, reservations of non-derogable provisions are found offensive against objects and purposes of the ICCPR.[25] Equally found offensive is the reservation of the obligation to present state reports and have them considered by the Committee.[26] The human rights committee emphasizes its own role under Article 40 of the ICCPR, necessarily entailing interpreting powers and the development of jurisprudence. As a result, the committee boldly asserts that "*a reservation that rejects the Committee's competence to interpret the requirements of any provisions of the Covenant would also be contrary to the object and purpose of*

[23] GC/CCPR No. 24, para.5.
[24] GC/CCPR No. 24, para.6. The Committee notes that, for example, reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant. Equally, a reservation to the obligation to respect and ensure the rights, and to do so on a non-discriminatory basis (article 2 (1)) would not be acceptable. Nor may a State reserve an entitlement not to take the necessary steps at the domestic level to give effect to the rights of the Covenant (article 2 (2)). (para.9)
[25] GC/CCPR No. 24, para.10.
[26] GC/CCPR No. 24, para.11.

that treaty."[27] Since the ICCPR stipulates no restriction on reservation, the human rights committee's bold stand in General Comment No.24, making reservations of many provisions even including Article 40 regarding its own interpretive powers impermissible reservations, has unsurprisingly triggered debates. (Nowak, 2005: XXXI-XXXIII; Steiner et al., 2007: 886-888)

In 1997, the human rights committee issued General Comment No. 26 to give the ICCPR a normative superior status. The question was on continuity or discontinuity of ICCPR obligations after the collapse of Former Yugoslavia Republic. Noting that the ICCPR does not contain any provision regarding its termination nor provide for denunciation or withdrawal, the committee reasoned that:

> "..the rights enshrined in the Covenant belong to the people living in the territory of the State party. The Human Rights Committee has consistently taken the view, as evidenced by its long-standing practice, that once the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession or any subsequent action of the State party designed to divest them of the rights guaranteed by the Covenant. The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it."[28]

Similarly, General Comment No. 29 illustrates non-derogable rights in states of emergency. By giving non-derogable rights listed in Article 4 a peremptory nature, the human rights committee asserts that the category of peremptory norms extends beyond this very list.[29] As a result, it will be up the interpretive power of the committee to decide if there are other non-derogable rights in states of emergency. Some of the examples are given such as "*acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence*."[30] This was again an evident exercise of interpretive law-making by the human rights committee.

The last but not the least example is General Comment No. 31 regarding the

[27] GC/CCPR No. 24, para.11.
[28] GC/CCPR No. 26, paras.4, 5.
[29] GC/CCPR No. 29, para.11.
[30] *Id*.

general legal obligation of member states to the ICCPR. The human rights committee interprets Article 2 into a systematic legal obligation member states must bear and implement through domestic legislative, executive and judicial mechanisms.[31] Certain extra-territorial applications of the ICCPR rights are also in illustration.[32] The Committee particularly emphasizes domestic courts' obligation to address claims of ICCPR rights violations under domestic law.[33]

Evidently, the interpretive law-making function has become pivotal in the issuance of general comments by the human rights committee, and seems to be unsurpassed. Yet the recent general comments issued by the cescr seem to have achieved it even further. The first systematic and comprehensive interpretive approach was adopted by the cescr in General Comment No.14 of 2000 regarding the right to the highest attainable standard of health. This comment includes a clear definition of the right to health stipulated in Article 12 of the ICESCR, emphasizes equal and non-discriminatory enjoyment of this right, pays attention to disadvantaged groups and minorities such as women, the elderly, the disabled, children and indigenous for their rights, and mostly importantly points to specific obligations states must bear and varied approaches of implementation. This comprehensive method of interpretation continues in the following General Comments No. 16, 19 and 21. The cescr pays special attention to illustrating situations where states are deemed as violation of social, economic and cultural rights, facilitating their judicially enforceable nature.

Most radical interpretive law-making was the creation of the right to water by the cescr in General Comment No.15 of 2002. Based upon Articles 11 and 12 of the ICESCR, the committee asserts a human right to water that entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.[34] According to the committee, this right to water may also be derived from a number of international human rights instruments, most important among which are the right to life and human dignity.[35] Core obligations of states on the fulfillment of right to water are specified without distinctions of region, resources, economic developments or culture.[36]

This bold attitude in interpretative law-making was also followed by various other international human rights committee including the cedaw. (Black, n.d.: 33-34) General recommendations issued by the cedaw since 1997 began to adopt the systematic and comprehensive interpretive approach and include numerous footnotes

[31] GC/CCPR No. 31, para.4.
[32] GC/CCPR No. 31, para.10.
[33] GC/CCPR No. 31, para.15.
[34] GC/CESCR No. 15, para.2.
[35] GC/CESCR No. 15, para.3.
[36] GC/CESCR No. 15, para.37.

in lengthy discussions.

IV. Legal Status and Effects of General Comment

As discussed earlier, the initial function of general comments or general recommendations was to facilitate the submission of state reports in the respective human rights instruments. The extension to interpretive or even law-making functions was undoubtedly beyond the original expectation. Yet it has been happening for more than a decade. (Nowak, 2005: 748; Steiner et al., 2007: 886-888; Black, n,d,; 33-34) These evolving functions of general comments and general recommendations hence pose new challenges to the international human rights community in construing their legal status and legal effects.

1. The futile debate

The debate on the legal status and legal effects of general comments or general recommendations is easily divided. One traditional view is accorded with the initial function of general comments –facilitating submission of state reports– and hence gives these comments no legal effects and nonbinding to member states. (Black, n.d.: 33-34) However, the other view quickly points out self-contradicting logic in the traditional view and the evolving functions of general comments and general recommendations to support their legal authority.

For, if general comments are issued to facilitate submissions of state reports, to the extent these comments involve the understandings of the Covenants whereby states are obligated to comply and even submit in writing the extent to which of their compliance, these general comments insofar as clarifying and interpreting the commands of the Covenants and obligations states must bear cannot be deemed as without legal authority or completely non-binding. Hence, the evolving functions of general comments from facilitation to interpretation or even to interpretive law-making is only a natural development and in no way surprising.

In this view, these comments and recommendations are of legal authority and binding so long as states are binding to the respective instruments. Even if these comments or recommendations are to be defined as of no formal legal authority, in this view, they continue to possess de facto legal authority and binding to states that are obligated under the respective Covenants or human rights conventions. (Black, n.d.: 33-34)

Another important development to render the debate on legal status and effects of general comments futile is the normative superiority of the ICCPR and its general

comments articulated in General Comment No. 24, 26 and 31. Most important is General Comment No. 24, in which the human rights committee makes a reservation that rejects the interpretive authority of the committee as contrary to the object and purpose of the ICCPR and thus impermissible![37] As the human rights committee, cescr and cedaw are accorded with supervisory functions to the implementation of the respective human rights instruments, they are likely to assert their interpretive authority over normative nature of their supervised instruments, rendering their interpretive products either de jure or de facto binding to their member states. (Black, n.d.: 26)

2. The Authoritative Interpretation

Notwithstanding various stands on their legal status and legal effects, general comments and general recommendations have over time earned and been confirmed with their superior interpretive authority across jurisdictions. When interpreting rights enshrined in these respective human rights instruments, many international or domestic courts have become accustomed to consulting these general comments or recommendations issued by the human rights committee, cescr and cedaw. (Black, n.d.: 16-23) Among those courts, most renowned were the European Court of Justice (Black, n.d.: 17) and the Inter-American Court of Human Rights. (Black, n.d.: 18) General comments issued by the human rights committee have been cited by the special tribunals on international humanitarian law. (Black, n.d.: 19) Domestic courts such as Canada, England, United States or even our neighboring jurisdictions such as India and Hong Kong also constantly referred to general comments or general recommendations in course of application or interpretation of relevant rights. (Black, n.d.: 20) As a result, general comments and general recommendations as authoritative interpretations of the rights enshrined in the respective Covenants and conventions have firmly established.

V. Concluding Remark: More than Reference

Article 3 of our Implementation Act on the two Covenants demands their applications to be made reference to interpretations by the Human Rights Committee. Based upon the above discussion, references demanded by this article include not only general comments made by the human rights committee but also those issued by

[37] GC/CCPR No. 24, para.11.

the committee on economic, social and cultural rights.[38]

The interpretations by the respective committee are present at mostly their general comments or general recommendations as well as their legal opinions in concluding observations and in individual communications. These legal opinions are authoritative interpretations of the respective instruments and should be made reference to by our government especially our courts in course of their implementation and applications. Given the superior normative status of the two Covenants and the respective general comments, our government and especially courts should not only make reference to these authoritative interpretations but more importantly directly apply them.[39]

[38] Article 3 of the Implementation Act may have committed a legislative error in writing down only the interpretations by the human rights committee. Yet, as most scholars in Taiwan agree, this mistake should not bar the references to general comments made by the cescr.

[39] The same can be said to the Implementation Act on CEDAW.

References

Blake, Conway. 2011. Normative Instruments in International Human Rights Law: Locating the General Comment. Working Paper Series, Center for Human Rights and Global Justices, New York University School of Law. 2011/11/28.

Economic and Social Council resolution 1985/17, available at http://www2.ohchr.org/english/bodies/cescr/. 2011/11/28.

Economic and Social Council resolution 1987/5, available at http://www.radioradicale.it/exagora/resolution-1987-5. 2011/11/28.

ICCPR, http://www2.ohchr.org/english/bodies/hrc/comments.htm.

ISESCR, http://www2.ohchr.org/english/bodies/cescr/comments.htm.

Nowak, Manfred. 2005. U.N. Covenant on Civil and Political Rights: CCPR Commentary 748. 2nd Revised Edition.

Office of the United Nations Huigh Commissioner for Human Rights, http://www.ohchr.org/.

Steiner, Henry J., Philip Alston & Ryan Goodman. 2007. International Human Rights in Context: Law, Politics and Morals 875. 3rd ed.

兩公約與其施行法之適用與解釋—並評論我國實務運作之幾個事例

高涌誠

（兩公約施行監督聯盟 召集人）

摘要

我國於 2009 年經立法院審議通過兩公約及其施行法，以特殊模式使兩公約具有國內法效力後，對於國內法制產生一定衝擊。

依據兩公約施行法第 3 條之規定，適用兩公約時需參照立法意旨及條約專門機構之解釋，這讓國際人權法與國內法從此全面接軌，而解釋方法也必須以國際見解為據。再依據施行法第 4 條、第 8 條等規定，各級政府機關除了必須優先適用兩公約保障人權外，還必須於二年內檢討修正改進不符兩公約之法令與行政措施。從而兩公約及其施行法生效近二年來，國內「各級政府機關」到底運作如何？對於兩公約是否有正確的認識、適用與解釋？有無與如何適用一般性評議？本文特別列舉事例，認為行政與立法機關未依限完成法令檢討修正、總統府人權諮詢委員會錯解人權事務委員會之解釋、最高法院之裁判違反人權事務委員會之解釋意旨等等，足供政府引為殷鑑。

關鍵字

兩公約、兩公約施行法、法規檢討

壹、前言

我國於 1967 年簽署《經濟社會文化權利國際公約》及《公民與政治權利國際公約》（以下簡稱兩公約），而在 42 年之後的 2009 年 3 月 31 日，立法院正式議決通過兩公約，同時訂定《公民與政治權利國際公約及經濟社會文化權利國際公約施行法》[1]（以下簡稱兩公約施行法），以特殊的國內立法模式使兩國際人權公約具有國內法效力（廖福特，2010：45），也讓我國法制自此與國際人權法接軌。

兩公約除了依據兩公約施行法第 2 條之規定取得內國法效力外，由施行法第 8 條：「各級政府機關應依兩公約規定之內容，檢討所主管之法令及行政措施，有不符兩公約規定者，應於本法施行後二年內，完成法令之制（訂）定、修正或廢止及行政措施之改進。」可知，兩公約關於人權保障之規定，有優於國內法律之效力，其他任何規範不得抵觸兩公約規定。

另外，由兩公約施行法第 4 條：「各級政府機關行使其職權，應符合兩公約有關人權保障之規定，避免侵害人權，保護人民不受他人侵害，並應積極促進各項人權之實現。」[2]與第 3 條：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」之規定觀之，所謂「各級政府機關」，立法者既無特別保留之表示，自然應當包括總統、行政、立法、司法、考試、監察等所有政府機關，而其在行使職權時，與兩公約所保障之人權有關的事項，都必須從國際人權法的角度切論，並應參照兩公約人權事務委員會之解釋（尤其是一般性評議 General Comments），不能再以慣用的法制思維處理。

上述這種全新的國際公約內國法化模式，勢必對國內的法制運作產生重大影響。但兩公約施行法生效近二年來[3]，國內「各級政府機關」到底運作如何？對於兩公約是否有正確的認識、適用與解釋？有無與如何適用一般性評議？都頗值得國內學界深入研究與提出論述，讓實務界得以參酌，才能真正讓臺灣與國際人權接軌，落實人權保障。本文意在拋磚引玉，謹就筆者觀察到的一些實務運作，提出分析意見。

---

[1] 請參照立法院立法紀錄。http://lis.ly.gov.tw/ttscgi/lgimg?@981401;0518;0526。

[2] 兩公約施行法第 4 條所揭示國家有不侵害（不干涉）人權、保護人權不受私人侵害與積極促進實現人權的義務，與《公民與政治權利國際公約》第 2 條規定國家有尊重和保證《公約》權利的義務具有相同旨趣，Manfred Nowak 教授稱之為「國家義務的三重性」。

[3] 兩公約於 2009 年 3 月 31 日立法院審議通過，總統於同年 5 月 14 日簽署批准書，後請友邦送交聯合國秘書長存放而遭退回，但兩公約施行法卻係在同年 12 月 10 日才生效，則在總統簽署批准書後至兩公約施行法生效之期間，兩公約究竟有無國內法效力？學者廖宗聖採肯定說。廖宗聖。2010。〈我國刑事裁判如何適用公民與政治權利國際公約—以最高及高等法院刑事裁判實證研究為中心〉。陳運財主編《刑事司法與國際人權公約學術研討會實錄》：134-136。台中：東海大學法律學院。

貳、兩公約之適用與解釋

一、兩公約於國內應如何適用

國際公約應如何在國內適用，向來有所謂包容模式（Incorporation）與變型模式（Transformation）二種不同之類型。採包容模式的國家一般是在憲法中直接承認公（條）約的國內效力，不需透過特別的轉換程序，即可直接適用公約於國內法秩序中；採變型模式的國家，則認為公約規定不能直接或自行適用於國內，必須經過「變型」（transformation）程序，轉化為國內法後，國內才能適用（許慶雄、李明峻，2009：31）。

而在我國，依據憲法第 38 條、第 58 條第 2 項與第 63 條之規定，國際條約經總統簽署後，再由行政院會議議決，並送至立法院審議通過，最後再由總統批准締結，經過此一程序後，依據大法官釋字第 329 號解釋所示「依上述規定所締結之條約，其位階同於法律」，是可推認我國應是採包容模式的國家。然而我國在退出聯合國後，國際地位甚為特殊，已無法依照國際多邊公約之規定存放批准書，在國際法上之生效要件不無爭議[4]，有必要另以法律規定公約在我國法律體系上之定位及效力[5]。因此，我國在批准兩公約後，另由立法院制定兩公約施行法明文使兩公約取得國內法效力，則此種模式又較近似於變型模式[6]。換言之，我國係採特殊之模式使公約取得國內法效力[7]，而這也衍生了接軌磨合的一些問題，本文將於後再為詳述。

---

[4] 學者廖宗聖以 1974 年國際法院法國核子試爆案件中指出：「當作出宣言的國家意圖賦予該宣言法律承諾的特性…如果承諾公開的，而且意圖被拘束…在此種情況下，宣言生效不需憑藉條件交換，對宣言的接受或他國的反應…」之見解，認為我國對兩公約予以批准而受拘束的意圖，已符合「具體」、「公開」要件，亦當然產生國際法上的拘束力。同前註。

[5] 同前揭註 1 之立法說明。另法務部曾提出對《「國際公約內國法化之實踐」委託研究報告》之對案建議，就我國失去聯合國代表權後常面臨條約批准書、加入書、接受書無法完成存放程序，致條約效力遭受質疑之問題，提出二種處理建議：1、於「條約締結法」(草案)」中明定解決，因外交部 98 年修正版之「條約締結法」(草案)」第 11 條第 1 項規定「定有批准、接受、贊同或加入條款之條約案，經立法院審議通過，咨請總統批准時，主辦機關應即送外交部報請行政院轉呈總統頒發批准書，完成批准手續或任何其他同意方式後，並互換或存放批准書、接受書、贊同書或加入書生效後，由總統公布施行。但情況特殊者，得由總統完成批准手續或其他同意方式後公布施行。定有接受或加入條款之條約案，亦同」依上開但書規定，不必完成存放即可公布施行，再配合同條第 4 項「條約經總統公布後，除條約另有規定其生效日期，於公布之日起算至第三日起發生國內法效力」之規定，已可解決上開無法存放及條約國內法效力之問題。2、隨所締結之條約制定施行法，於施行法中規定解決，上揭「條約締結法」(草案)」規定，未完成立法前，我國參加之條約，如有上述無法存放之困難，建議參考「兩公約施行法」第 2 條明定「兩公約所揭示保障人權之規定，具有國內法律之效力」之模式，逐約制定施行法，並於施行法中明定該公約之規定，具有國內法律之效力。http://www.humanrights.moj.gov.tw/lp.asp?ctNode=30747&CtUnit=10724&BaseDSD=7&mp=200。

[6] 真正的變型模式，是要由簽署國的立法機關將條約內容重新制定成相關的法律，但我國的兩公約施行法並非此種模式之立法。

[7] 英國在 1998 年通過人權法（Human Rights Act 1998）用以接軌歐洲人權公約（ECHR），其模式近似於我國用施行法銜接，但其後還是透過法院判決促進國會修正國內法以符合 ECHR，詳論請參照翁國彥。2010。〈兩公約在我國法庭適用的潛能兼論李明璁教授被控違反集會遊行法事件〉。《THAR 報/THAR Pas》10 Spring：58。

二、兩公約的法律位階

兩公約施行法第 2 條固然解決了公約內國法化的問題，但兩公約除了效力問題外，還有法律位階上的問題。因為國際公約常常會與國內既有法令抵觸，此時公約與國內法應如何適用，是必須要解決的問題。雖然憲法第 141 條：「中華民國之外交，應本獨立自主之精神，平等互惠之原則，敦睦邦交，尊重條約及聯合國憲章，以保護僑民權益，促進國際合作，提倡國際正義，確保世界和平。」規定中之「尊重條約」之意義，曾有臺灣高等法院 79 年度上更（一）字第 128 號判決認為「...依憲法第 141 條『尊重條約』之規定，條約之效力應優於國內一般法律（參照最高法院 23 年上字第 1074 號判決）而居於特別規定之地位，故條約與內國一般法律抵觸時，依特別法優於普通法之原則，自應優先適用條約之規定」，而民國 72 年 2 月 21 日法務部（72）律字第 1813 號函也指出：「...復從憲法第一百四十一條精神以觀，條約與法律衝突時，似宜優先適用條約」，然而前述大法官釋字第 329 號解釋卻又明示「依上述規定所締結之條約，其位階同於法律」，是我國通說之見解固然認為條約在我國屬於特別法而應優先適用，但學者廖宗聖基於第 329 號解釋，主張亦應同時採後法優於前法之原則，也就是讓立法機關在認為必要時有權通過新的法律，解決與先前締結條約所發生之衝突（廖宗聖，2010：143-144）。

不過，兩公約施行法第 8 條：「各級政府機關應依兩公約規定之內容，檢討所主管之法令及行政措施，有不符兩公約規定者，應於本法施行後二年內，完成法令之制（訂）定、修正或廢紙及行政措施之改進。」之規定，似又明定了公約之優位性，因其立法說明為：「**兩公約所揭示之規定，係國際上最重要之人權保障規範**。為提升我國人權之標準，重新融入國際人權體系及拓展國際人權互助合作，自應順應世界人權潮流，確實實踐，進而提升國際地位，爰明定各級政府機關應依兩公約規定之內容，檢討所主管之法令與行政措施，有不符兩公約規定者，應於本法施行後二年內，完成法令之制（訂）定、修正或廢紙及行政措施之改進。」[8]且如前述所謂「各級政府機關」應包括立法院本身，亦即立法院所制定之法律，不得有不符兩公約之情形，而這正是立法說明所稱之「人權之標準」。換言之，兩公約之位階依據兩公約施行法第 8 條已有如同「人權基本法」之優位性（廖福特，2009：226）。

不惟如此，學者張文貞更主張，依據國際人權法界及人權事務委員會之觀點[9]，兩公約的部分權利內容，已構成強行國際法或絕對法，而於國內法律體系的位階應等同於憲法。[10]因此，兩公約的法律位階應高於一般法律殆無疑義。

---

[8] 同前揭註 1。

[9] 依據兩公約施行法第 3 條：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋」之規定，人權事務委員會之解釋亦有國內法效力。

[10] 張文貞。2009。〈國際人權法與內國憲法的匯流—臺灣實施兩大人權公約之後〉。《臺灣法學會 2009 年學術研討會》。

三、兩公約之解釋與一般性評論

兩公約除了依據憲法第 38 條、第 58 條第 2 項與第 63 條規定之程序，以及立法院訂定兩公約施行法之模式，獲得優於一般國內法律之內國法效力外，更重要的是因此與國際人權法接軌，而必須從國際角度反向將國際人權思維灌注於國內法之中[11]。也因此，國際人權公約的適用，勢必對國內既有的法律體系產生重大的影響，而首要面對的就是如何正確理解（解釋）公約。

一般在國內法體系中，最後的解釋判定者，是具有仲裁權威的司法機關，但在國際法上，多邊國際公約的權威解釋者，可能是條約專門機構。以兩公約而言，各自依據不同公約分別設有「經濟社會及文化權委員會」（Committee on Economic, Social and Cultural Rights）與「人權事務委員會」（Human Rights Committee）二聯合國專門機構，因此，關於兩公約條文的解釋，當然必須先參考這二個委員會的見解，也就是說這二個委員會所做的決定和其他決議在兩公約的解釋方面具有權威的地位（Manfred Nowak，2008：10）。

在解釋的方法論上，依據人權事務委員會在 Alberta Union v. Canada 一案中之見解，《公民與政治權利國際公約》的解釋應遵循《維也納條約法公約》中所規定的一般解釋原則（Manfred Nowak，2008：8）。有學者就《維也納條約法公約》第 31 條至第 33 條之規定參酌其他國際法解釋原則，整理出以下各原則，足供參考（趙明義，2011：344）：

- 不需要解釋者，不予解釋。
- 依善意及互信原則解釋。
- 依據字義及締約國的意旨解釋。
- 依據條約的目的與上下文義解釋。
- 依據合理與一致的原則解釋。
- 依據有效原則解釋。
- 依條約以外的補充資料解釋。

另外，在國際人權法上被普遍承認的人權條文解釋原則還有：對「權利」應作廣義的解釋（in dubio pro libertate），對「限制性規定」則應作狹義解釋（Manfred Nowak，2008：9-10）等等，均是兩公約解釋重要的參考原則。

在解釋的實際運作上，以人權事務委員會形成《公民與政治權利國際公約》之一般性評論[12]為例，通常是由四位委員組成一個工作小組，根據《議事規則》第 62 條規定，在委員會召開之前即開會一星期，除了對報告程序的其他職能預

[11] 從國內法的角度以觀，是「引進」國際人權思維，但依據兩公約施行法第 6 條及兩公約之國家報告制度，顯然會有國際關（灌）注的面向。
[12]即《公民與政治權利國際公約》第 40 條第 4 項之一般評議。

作準備外，還會依據前述解釋原則起草一般性評論形成規則，並為這些一般性評論的具體表述提出建議。而經委員會決議通過後，即在各年度報告中發表（Manfred Nowak，2008：777）。截至 2011 年 9 月 20 日止，《公民與政治權利國際公約》有 34 則一般性評論，《經濟社會文化權利國際公約》有 21 則一般性評論[13]。而因為一般性評論是由委員會大會通過，也就是經過不同傳統、文化、宗教、意識型態和法律制度背景的委員們討論協商而一致通過的，這增強了一般性評論的權威性與普遍性（Manfred Nowak，2008：778）。

參、兩公約施行法之適用與解釋

如前所述，我國因國際地位特殊，必須另採用訂定兩公約施行法的模式，才能讓兩公約取得國內法效力。從而，除了兩公約條文本身的適用與解釋外，對於具有「橋樑法」性質的兩公約施行法，如何予以適用及正確理解，也應該有同樣的重要性。

一、兩公約施行法的效力

一般國內法律另定有施行法者，多在解決母法如何適用的問題，尤其是時的效力、是否溯及既往或適用範圍等等，而其亦遵循法律適用的一般原則，並具有強行法與普遍法等性質，乃屬當然。然而，兩公約施行法雖亦名為施行法，也確有兩公約應如何適用的條文，但自第 4 條起至第 8 條，均是以「政府」為規範對象，是則兩公約施行法另有其異於一般施行法之特性，對於「各級政府機關」而言，尤其有特別的強制規範效力，也就是說，「各級政府機關」應受兩公約施行法之特別拘束，以符合將兩公約作為人權基本標準之立法精神。

因此，「各級政府機關」原應依據兩公約施行法第 4 條之規定行使職權，則當司法機關未適用兩公約而為判決時，自屬判決違背法令（廖福特，2010：45）；而行政機關未依據兩公約行使職權時，其行政處分應屬違法，該公務員則屬違法失職，應受懲戒處分。換言之，兩公約施行法雖未特別規定違反時之效果，但其屬於強行法無庸置疑，故「各級政府機關」於違反時應受制裁。

二、兩公約施行法的一些疑義與解釋

兩公約施行法的最主要目的，是要讓兩公約具有國內法之效力，然而當其成為橋樑後，兩公約在國際人權法上之一些基本概念，也會衝擊我國既有的法律體系與觀念[14]，尤其兩公約施行法部分條文文義並不明確[15]，在接軌國際人權法概

[13] 請參照兩公約施行監督聯盟網頁。http://covenants-watch.blogspot.com/2010/12/3.html。

[14] 法務部為符合《公民與政治權力國際公約》及《消除對婦女一切形式歧視公約》規定，將民法第 973 條及第 980 條現行條文所定之男女訂婚最低年齡 17 歲及 15 歲、結婚最低年齡 18 歲及 16 歲，修正為男女最低訂婚皆為十七歲，結婚皆為十八歲，卻引來立法委員群轟，即為一例。http://news.chinatimes.com/focus/50109892/112011110100101.html。

[15] 此外，亦有立法用語與公約文本不一致的情形。例如兩公約施行法第 3 條稱「人權事『務』委員會」，但《公民與政治權力國際公約》第 28 條則是稱為「人權事『宜』委員會」。

念後，究竟應如何理解與適用，實有待學界與實務界繼續研究。

例如，兩公約施行法第 2 條係規定：「兩公約所『揭示保障人權之規定』，具有國內法效力。」則兩公約條文中，與實體權利無關的規定[16]，是否也依該條而具有國內法效力？若謂「兩公約所揭示保障人權之規定」不包括「與實體權利無關的規定」，則顯然又與兩公約本身將「與實體權利無關的規定」作為「制度性保護」重要一環（Manfred Nowak，2008：4）之見解矛盾。何況，依據兩公約施行法第 6 條之規定，政府的人權報告制度必須依據「兩公約規定」，是第 2 條所謂「揭示保障人權之規定」應無限制上[17]之意義，也就是說第 2 條應理解為：兩公約係保障人權之規定，而其全部具有國內法效力。

又兩公約施行法第 3 條規定：「適用兩公約規定，應參照其立法意旨及兩公約人權事務委員會之解釋。」而所謂「兩公約人權事務委員會」，應有錯誤，因為如前所述兩公約各自有監督之專門機構，一般稱之「人權事務委員會」僅監督《公民與政治權利國際公約》部分，

《經濟社會文化權利國際公約》係另有「經濟社會及文化權委員會」負責，而該二委員會針對各國提出之報告審查後，形成一般性評議之決議，固然為本條所稱「解釋」無疑，但在國際人權法一般概念上，人權事務委員會的權威解釋不僅含括一般性評議（General Comments），至少還包括審查各國報告之結論性意見（Concluding Observation）與個人來文之案例法[18]二者（廖福特，2010：45）（Manfred Nowak，2008：10），故如認為兩公約施行法第 3 條所稱之「解釋」僅指一般性評議（General Comments），即與兩公約之國際運作不符。

再者，兩公約施行法第 4、5、7、8 條所稱之「各級政府機關」究為何義，學者已多有討論（廖福特，2010：45），而本文除了如前所述認為立法者既無特別保留之表示，自然應當包括行政、立法、司法、考試、監察等所有政府機關外，主要還是基於《公民與政治權利國際公約》第 2 條第 1 項之規定，對於國家應尊重與確保人權之義務，依據國際人權法的普遍觀念，認為包含國家「採取積極的立法、行政、司法和實際措施實施人權的義務」（Manfred Nowak，2008：3），則我國法制下之行政、立法、司法、考試、監察等機關自然亦涵蓋在國家應尊重與確保人權義務之下，而此種解釋方法，即是從兩公約國際人權法之角度反向解釋國內法（所稱「各級政府機關」）之例，這也正是前述反向灌注與接軌磨合的問題，仍有待國內各界持續研究。

此外，還有一些不同語言文本翻譯及法律用語之問題，亦頗生困擾。例如依據我國中央法規標準法第 8 條規定，「條」下係先分「項」，然而國際人權法所使用的中文標準文本是簡體字版，而其用法是「條」下係先分「款」，又如「一般

[16] 如《公民與政治權利國際公約》第 28 條以下關於聯合國人權事務委員會運作相關規定或《經濟社會文化權利國際公約》第 16 條以下關於國家報告之規定。

[17] 即依前述「限制性規定作狹義解釋」之原則。

[18] 所謂「個人來文之案例法」，即加入「第一任擇議定書」國家之人民向委員會申訴個案之決定。

性評議」簡體版稱為「一般性意見」，而其內容之簡體版翻譯用語亦與繁體字用語頗有差異，此一問題亦有待權責機關解決。

綜言之，兩公約經兩公約施行法賦予國內法效力後，就理解與解釋的範圍，不再僅侷限於國內法慣用概念上，還包括反向解釋的可能，而不僅兩公約在翻譯與文本的選擇上，還有待決定，兩公約施行法本身也有諸多疑義尚待釐清，惟不論如何，都必須依國際人權標準做合宜的處置。

肆、我國實務運作案例之觀察與檢討

兩公約及其施行法自 2009 年 12 月 10 日生效施行至今，將近二年。兩公約施行監督聯盟曾於 2010 年 12 月 10 日提出《一年又七個月來政府落實兩公約及其施行法之檢討》[19]報告，筆者於附錄 2 中撰有〈兩公約施行一年來司法判決之觀察〉，就兩公約施行一年時，各級法院對於兩公約應用之情形，提出觀察心得，當時之結論為各級法院對於國際人權法相當陌生，適用兩公約之比例極低。如今又經過將近一年，法院適用兩公約作為判決理由之情形已逐漸提高，但仍未見有在判決書中論述一般性評論者[20]，是法院實務運用還未盡如人意，司法實務界應持續開展兩公約的論述。本文不擬再全面檢視各級法院適用兩公約之判決，而將挑選明顯違反兩公約或其施行法的行政、立法、司法作為（或判決）事例，檢討其對於兩公約及施行法適用與解釋之錯誤。

一、行政機關與立法機關並未依兩公約施行法第 8 條完成法令之檢討修正

行政院為因應兩公約及其施行法之施行，曾核頒「人權大步走計畫」，並依據兩公約施行法第 8 條：「各級政府機關應依兩公約規定之內容，檢討所主管之法令及行政措施，有不符兩公約規定者，應於本法施行後二年內，完成法令之制（訂）定、修正或廢止及行政措施之改進。」之規定，清查不符兩公約規定之法令及行政措施後，認為有 219 項不符兩公約，而製作清冊追蹤管考[21]，要求於 2011 年 12 月 10 日前修正或改進完畢。然而，由法務部向立法委員所提之報告統計[22]，已確認有編號第 53 號之「監督寺廟條例第 8 條」、第 65 號之「集會遊行法第 9 條」、第 70 號之「人民團體法」、第 75 號之「工業團體法」、第 107 號之「商業團體法」、第 147 號之「集會遊行法第 4 條」、第 177 號「監督寺廟條例第 12 條」、第 190 號「消防法第 19 條」、第 196 號「建築師法第 4 條」與第 197 號「消防法第 7 條第 3 項」等應修正之法律，無法依限在 2011 年 12 月 10 日前修正完成而

[19] http://www.tahr.org.tw/files/2010report.pdf。

[20] 台北高等行政法院 100 年度停更一字第 1 號裁定，係由律師引用一般性評論作為論述理由之第一個案件。

[21] http://www.humanrights.moj.gov.tw/lp.asp?ctNode=27273&CtUnit=8930&BaseDSD=7&mp=200。

[22] 法務部 2011 年 8 月 19 日提交立法院之「219 則違反兩公約未修正完成之【法律案】、【命令案】及【行政措施案】檢討進度評估」參照。

確定跳票[23]。

惟如前所述，兩公約施行法第 8 條所指之「各級政府機關」，應包含總統、行政、立法、司法、考試、監察機關，然而行政院在清查不符兩公約規定之法令及行政措施時，並未見立法或監察機關同時清查不符兩公約規定之法令及行政措施[24]。何況所謂「完成法令之制（訂）定、修正或廢止」，並非僅依靠行政機關提出法律修正草案即完事，還須待立法機關審議通過，故上開無法依限完成法律修正之責任，應由行政與立法機關共同承擔。

二、總統府人權諮詢委員會 2011 年 4 月 12 日第三次委員會案三之會議結論錯解人權事務委員會之解釋

我國自 2006 年停止死刑執行 4 年後，於 2010 年 4 月 30 日再次執行張俊宏等四人之死刑，對此，臺灣廢除死刑推動聯盟質疑各該死刑犯均已向總統提出赦免或減刑之請求，法務部長在總統未駁回其赦免或減刑之請求前即執行死刑，已違反《公民與政治權利國際公約》第 6 條第 4 項，係屬違法執行[25]。總統府人權諮詢委員會委員黃默、李念祖與李永然三人也針對我國現行《赦免法》對於死刑犯請求赦免時，未有權利行使與回應程序之相關規定，認為該法是否符合《公民與政治權利國際公約》第 6 條第 4 項不無疑義，乃提請總統府人權諮詢委員會討論。案經總統府人權諮詢委員會 2011 年 4 月 12 日第三次委員會作成案三之決議：「一、聯合國人權事務委員會既認為公民與政治權利國際公約第 6 條第 4 項並未指定行使寬赦特權的模式，而賦予締約國廣泛自由裁量權，則我國赦免法已提供被告尋求赦免之機會，且未排除受死刑宣告者請求赦免之權利，並無抵觸公民與政治權利國際公約第 6 條第 4 項之規定。二、惟兩公約施行後，是否應參考德、日、美立法例，設置赦免審議委員會或其他機制，請法務部邀請學者專家審慎研議，檢視赦免法有無進一步修正之必要。」[26]然而其中所謂「聯合國人權事務委員會既認為公民與政治權利國際公約第 6 條第 4 項並未指定行使寬赦特權的模式，而賦予締約國廣泛自由裁量權...」顯有誤解人權事務委員會解釋之情事，茲分析如下：

1、聯合國人權事務委員會在肯尼迪 v. 特立尼達和多巴哥（Kennedy v. Trinidad and Tobago）一案中，就申訴人之辯護律師主張《公民與政治權利國際公約》第 14 條所規定的程序保障，應適用於尋求赦免和減刑的程序，委員會就此則認為第 6 條第 4 款的措辭並沒有指定行使寬赦特權的模式，因此締約國在這方面具有自由裁量權（Manfred Nowak，2008：152）。 然細譯其全文而前後對照，可知人權事務委員會的意思是指尋求赦免和減刑的程序不必與訴訟審判程序有

[23] 此為政府機關自認不符兩公約之法律而確定跳票之部分，並不包含民間團體認為不符兩公約之集會遊行法、勞資爭議處理法、刑事訴訟法等等，均確定無法於 2011 年 12 月 10 日前檢討修正。

[24] 見前揭註 19。

[25] 《抗議法務部違法執行》。2010。http://www.taedp.org.tw/index.php?load=read&id=683。

[26] http://www.president.gov.tw/Default.aspx?tabid=1328&itemid=24784&rmid=3655。

相同的保障密度，而可由締約國自由裁量，但委員會從未宣稱：尋求赦免和減刑的程序可以任由國家決定是否回應，縱不回應也不違反《公民與政治權利國際公約》第 6 條第 4 項。

2、人權事務委員會反而是在穆本哥 v. 扎伊爾（Mbenge v. Zaire）一案中，就《公民與政治權利國際公約》第 2 條第 3 項第 1 款之情形指出，如果一個締約國所提供的補救辦法是無效的，如在決定是否赦免方面給予政治機構無限制的自由裁量權，那麼它就沒有實現其根據第 2 條所承擔的義務（Manfred Nowak，2008：66）。 從這項人權事務委員會解釋可以清楚瞭解，當死刑犯請求赦免或減刑時，如果政府可以自由決定不予回應，其所提供之救濟就是無效的，當然也就違反《公民與政治權利國際公約》第 2 條與第 6 條第 4 項之規定。

3、聯合國經濟社會及文化權委員會於 1984 年 5 月 25 日第 1984/50 號決議通過《關於保護死刑犯權利的保障措施》，其中第 8 項規定：「在上訴或採取訴訟程序或與赦免或減刑有關的其他程序期間，不得執行死刑」（盧建平等，2010：412），由此可知，不論人權事務委員會或經濟社會及文化權委員會都認為：在尋求赦免或減刑之程序未獲任何回應之程序進行間，不得執行死刑。

因此，我國赦免法未就死刑犯尋求赦免或減刑之權利救濟程序為較詳盡之規定，而任由總統決定是否回應，確已違反《公民與政治權利國際公約》第 2 條與第 6 條第 4 項規定，總統府人權諮詢委員會未確實瞭解人權事務委員會在肯尼迪 v. 特立尼達和多巴哥一案中之解釋真意，不僅斷章取義也未參照其他解釋文獻，而誤認我國政府可自由裁量是否回應赦免或減刑之請求，其錯大矣！

三、最高法院 100 年台抗字第 113 號刑事裁定[27]與《公民與政治權利國際公約》第 9 條第 3 項所定之「候訊人通常不得加以羈押」之原則不符

最高法院在司法院大法官作成釋字第 665 號解釋就刑事訴訟法第 101 條第 1 項第 3 款予以限縮後，對於審理中之重罪羈押案件，多採取「重罪常伴逃亡」之

[27] 其裁定要旨為：「按基於憲法保障人民身體自由之意旨，被告犯刑事訴訟法第一百零一條第一項第三款所示之罪，嫌疑重大者，且有相當理由足認其有逃亡、湮滅、偽造、變造證據或勾串共犯或證人之虞，亦無不得羈押之情形，法院斟酌能否以命該被告具保、責付或限制住居等侵害較小之手段代替羈押後，仍認非予羈押，顯難進行追訴、審判或執行者，方得羈押，始符合憲法第八條保障人民身體自由及第十六條保障人民訴訟權之意旨，司法院釋字第六六五號解釋著有明文。依上述解釋及其理由書綜合以觀，其並非逕宣告刑事訴訟法第一百零一條第一項第三款重罪羈押原因係屬違憲，而係要求附加考量被告除犯重罪外，是否有相當理由認為其有逃亡、湮滅、偽造、變造證據或勾串共犯或證人等之虞。而依法條之體系解釋，該等附加考量與單純考量同條第一項第一款、第二款之羈押原因仍有程度之不同。基此，伴同重罪羈押予以考量之逃亡之虞，與單純成為羈押原因之逃亡之虞其強度仍有差異，亦即伴同重罪羈押考量之逃亡之虞，其理由強度可能未足以單獨成為羈押原因，然得以與重罪羈押之羈押原因互佐。又重罪常伴有逃亡、滅證之高度可能，該高度可能性乃本於趨吉避凶、脫免刑責及不甘受罰之基本人性，是若依一般正常人之合理判斷，可認為該犯重罪嫌疑重大之人具有逃亡或滅證之相當或然率存在，即已該當於前述解釋之認定標準，不以達到充分可信或確定程度為必要。又上開解釋已對同法第一百零一條第一項第三款為限縮解釋，應可認係對公民與政治權利國際公約第九條第三項規定之具體落實，法院審酌應否羈押被告時，若依一般人合理判斷涉犯重罪之被告有逃亡之相當或然率存在，即非不得依同法第一百零一條第一項第三款規定羈押被告。」另最高法院 99 年度台抗字第 1 號亦同其旨。

見解，而用第 101 條第 1 項第 1 款之規定，繼續維持重罪案件審理中被告之羈押。觀諸最高法院 100 年台抗字第 113 號刑事裁定之理由，即係用犯重罪嫌疑重大之人具有逃亡或滅證之「相當或然率」為標準，認為不以達到充分可信或確定程度為必要，並自認為係「對公民與政治權利國際公約第九條第三項規定之具體落實」。

然而，人權事務委員會在希爾 v.西班牙（Hill v. Spain）一案中重申：「審前拘禁應該作為例外，除非存在著被告潛逃或毀滅證據、影響證人或逃出締約國管轄範圍的可能情況，否則應該准允保釋。被告是外國人的這一單純事實本身並不意味著可以在待審期間拘禁他。締約國的確主張說，他們有充分理由擔心提交人一旦取保開釋，就將離開西班牙領土。然而，締約國沒有提供任何資料說明這種擔心的基礎是什麼，以及為何不能通過設定適當的保釋金額和開釋的其他條件來處理這種擔心的原因。締約國只是推測如果一個外國人取保開釋，他就可能離開它的管轄範圍，這種推測不能作為對《公約》第 9 條第 3 款確立的規則作出例外的正當合理理由。在這些情況下，委員會認定就提交人而言，這一權利已經被違反了。」（Manfred Nowak，2008：244）足見國家不能僅用「相當或然率」而缺乏充分可信之證據或資料，就剝奪個人受《公民與政治權利國際公約》第 9 條第 3 項保障之「候訊人通常不得加以羈押」之權利。

最高法院很明顯未依據兩公約施行法第 3 條之規定，參照兩公約之立法意旨及人權事務委員會之解釋，並引用國際案例作論證、說明與闡述，其判決自屬違背法令。

伍、結語

我國在退出聯合國後，離開國際人權體系長達四十年，國內法制對於國際人權公約之運作與發展甚為陌生，在兩公約及兩公約施行法於二年前施行生效後，理論上應對國內法制產生重大影響。然而，由本文所舉各級政府機關動輒違反或錯解兩公約之事例可知，政府對於落實兩公約一事，似未全力以赴。依本文之見解，兩公約經由兩公約施行法之特殊模式，已與我國法制接軌，而因其具有「最低人權標準」之定位，國內法與之抵觸者無效，且該所謂「最低人權標準」係隨國際人權法之變化而發展，各級政府機關本應透過條約專門機構之權威解釋瞭解國際人權標準。再者，依據兩公約施行法第 3 條，對於我國人權法制之解釋，將有全新的面向，積極與國際人權社群溝通，將是無法避免的趨勢。然而，二年來我國之實務運作頗令人失望，不僅司法判決仍然故步自封，甚至沒有引用一般性評論之案例；行政與立法機關對於兩公約施行法第 8 條之二年修法與改進之期限要求，視而未見，監察院對於政府違法跳票亦完全不見追究責任，令人懷疑政府落實兩公約之決心。

因此，政府既然當初已決心和國際人權重新接軌，自應參照國際標準與兩公

約施行法第 6 條之規定，建立具有國際監督機制的人權報告制度，透過國際人權專家定期檢視並引進最新國際人權標準，才能真正提升臺灣的人權。不過，更重要的還是國內學界與實務界必須開始重視兩公約與施行法，唯有透過不斷研究論述，兩公約人權法制才能不斷進步，而真正適用於臺灣社會。

參考文獻

Manfred Nowak。2008。U.N. Covenant on Civil and Political Rights CCPR Commentary 2nd revised edition，《公民權利和政治權利國際公約評注 修訂第二版》孫世彥 華小青 譯。北京：生活・讀書・新知 三聯書店。

許慶雄、李明峻。2009。《國際法概論》。台南：泉泰實業股份有限公司。

趙明義。2011。《當代國際法導論》。台北：五南圖書出版股份有限公司。

盧建平等。2010。《國際人權公約與中國刑事法律的完善》。北京：中國人民公安大學出版社。

廖福特。2009。〈批准聯合國兩個人權公約及制訂施行法之評論〉。《月旦法學》174：223-229。

廖福特。2010。〈法院應否及如何適用公民與政治權利國際公約〉。《臺灣法學雜誌》163：45-65。

廖宗聖。2010。〈我國刑事裁判如何適用公民與政治權利國際公約—以最高及高等法院刑事裁判實證研究為中心〉。陳運財編《刑事司法與國際人權公約學術研討會實錄》：113-163。台中：東海大學法律學院。

張文貞。2009。〈國際人權法與內國憲法的匯流—臺灣實施兩大人權公約之後〉。《臺灣法學會 2009 年學術研討會》。

翁國彥。2010。〈兩公約在我國法庭適用的潛能兼論李明璁教授被控違反集會遊行法事件〉。《THAR 報/THAR Pas》10 Spring：58。

法務部對《「國際公約內國法化的實踐」委託研究報告》之對案建議。http://www.humanrights.moj.gov.tw/lp.asp?ctNode=30747&CtUnit=10724&BaseDSD=7&mp=200。

The Application and Interpretation of Two Human Rights Covenants: Some Examples from Taiwan

Yung-Cheng Kao

(Convener, Covenants Watch)

Abstract

The passage by Taiwan`s national legislature in 2009 of two human rights covenants, namely the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[101], and the use of an extraordinary method to allow the two covenants to have effect in domestic law is having a major impact on our legal system.

According to Article Three of the "Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights" promulgated in April 2009, applications of the two covenants should make reference to their legislative purposes and interpretations by the specialized agency governing the covenants and the method of interpretation must be based on international perspectives. In addition, according to Articles Four and Eight of the same act, all levels of governmental institutions, besides placing priority on applying the human rights protections of the two covenants, must review and revise or improve all laws or administrative measures that are incompatible with the two covenants within two years. How much have "all levels of governmental institutions" in Taiwan really done during the past two years since the two covenants and their implementation act were approved and promulgated? Have government agencies correctly understood, applied and interpreted the two covenants? How have they utilized the General Comments of the United Nations Human Rights Committee? This paper will use concrete examples to illustrate that executive and legislative agencies have not fulfilled the requirement to review and revise laws or administrative measures incompatible with the two covenants within two years, that the Presidential Office Human Rights Consultative Committee has misunderstood the Human Rights Committee`s interpretations of the two covenants, and that judgements of the Supreme Court have clashed with the interpretations of the Human Rights Committee.

Keywords

Human Rights Covenants, Implementation Act, Review of Laws and Regulations

[101] Refer to the Legislative Yuan`s Legislative Record (http://lis.ly.gov.tw/ttscgi/lgimg?@981401;0518;0526).

I. Preface

In 1967, Taiwan signed the "International Covenant on Economic, Social and Cultural Rights" and the "International Covenant on Civil and Political Rights" (which will be referred to as the "two covenants"). Forty-two years later on March 31, 2009, the Legislative Yuan, Taiwan`s parliament, officially ratified the two covenants and also approved the "Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights" (which will be referred to below as the "Implementation Act") and thereby employed an extraordinary method to grant application in domestic law to the two human rights covenants and bring our country`s legal code in line with international human rights law. (Liao Fu-teh, 2010: 45)

According to Article Two of the Implementation Act, the provisions for human rights protections in the two covenants have domestic legal status. In addition, Article Eight of the same act mandates: "All levels of governmental institutions and agencies should review laws, regulations, directives and administrative measures within their functions according to the two Covenants. All laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters force by new laws, revisions of laws, abolition of laws and improved administrative measures." From these two articles, it is clear that the provisions of the two covenants regarding human rights protections have effect above ordinary domestic law and that none of the provisions of other laws can conflict with the provisions of the two covenants.

In addition, Article Four of the Implementation Act mandates: "Whenever exercising their functions, all levels of governmental institutions and agencies should conform to human rights protections in the two Covenants; avoid violating human rights; protect the people from infringement by others; and, positively promote realization of human rights."[102] Article Three states "applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee." Since the legislators did not make any special reservations during the passage of the two covenants, the term "all levels of governmental institutions" naturally should encompass the Office of the President and

[102] Article Four of the Implementation Act for the two covenants mandates that the state has the obligations tp "avoid violating human rights; protect the people from infringement by others; positively promote realization of human rights." This provision is similar to the provision in Article Two of the ICCPR that each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the covenant. Manfred Nowak terms these obligations as the "triple obligation of the State."

all five branches of government, namely the Executive Yuan (the Cabinet), the Legislative Yuan, the Judicial Yuan, the Examination Yuan and the Control Yuan. In the implementation of their operations with regard to items relating to the human rights protection provisions of the two covenants, these governmental institutions must all consider their actions from the perspective of international human rights law and should respect the interpretations (especially the General Comments) of the United Nations Human Rights Committee and no longer simply rely on customary legal concepts in handling such affairs.

The above-mentioned brand-new model of the domestication of the international covenants undoubtedly will have a major impact on the operation of Taiwan`s legal system. However, a critical question is how have "all levels of governmental institutions" actually operated during the nearly two years since the Implementation Act took effect.[103] Have they displayed correct understanding, applications and interpretations of the two covenants? How have they utilized the General Comments of the Human Rights Committee? These questions merit serious study and discourse by academics as reference for agencies and persons involved in actual legal and administrative practice in order to genuinely bring Taiwan in line with international human rights practice and realize human rights guarantees. This paper aims to "toss out a rock in hopes of finding jade" and spark wider and more profound study and will consist of the author`s observations and analysis of some actual implementation experiences.

The Application and Interpretation of the Two Covenants

1. Domestic application of the two covenants

The issue of how international covenants should be applied domestically has involved two distinct models of "incorporation" and "transformation."

Countries that have adopted the "incorporation" model usually directly acknowledge in their constitutions that the covenants (or some of their articles or provisions) have domestic effect and therefore can directly applied to domestic legal procedures without a particular legislative process. Countries which adopt the

[103] The two covenants were approved in third readings by the Legislative Yuan on March 31, 2009 and were signed by President Ma Ying-jeou on May 14, 2009 and submitted through the agency of an allied country to the United Nations Secretariat, but was rejected by that body. However, the two covenants and the Implementation Act officially took effect on December 10, 2009. Therefore, there is a question as to when the Implementation Act had actually taken effect after the president signed the ratification document and whether the two covenants were effective in domestic law during this period. Professor Liao Tsung-sheng firmly believes that this was the case. (Liao Tsung-sheng, 2010: 134-136).

"transformation" model maintain that the covenants cannot be applicable to domestic law directly or by their own accord but must go through a process of "transformation" through the legislative process and become part of domestic law before their content can take domestic effect. Hsu Ching-hsiung and Lee Ming-chun, 2009:31.

According to Article 38, Article 58 Paragraph Two and Article 63 of our Constitution, international treaties that are signed by the premier or responsible ministers must be referred by the Executive Yuan to the Legislative Yuan for review before being concluded by the president. Interpretation 329 issued by the Constitution Court on December 24, 1993 stated that "treaties concluded according to the above procedures hold the same status as laws." From these stipulations and interpretations, it can be deduced that our country is one which should adopt the "incorporation" model. Nevertheless, after withdrawing from the United Nations (in October 1971), our country`s international status has been extraordinary. Taiwan can no longer deposit a copy of ratified international or multilateral treaties with the United Nations Secretariat. Since the conditions of the validity and effectiveness of such ratifications in international law is by no means undisputed[104], it is necessary to use another law to endow domestic legal effect for the covenants in our legal system.[105] Therefore, after

[104] Professor Liao Tsung-sheng cites the statement made by the International Court in 1974 regarding French nuclear bomb tests: "

[105] Please refer to the legislative explanation mentioned in Footnote (1). In addition, the Ministry of Justice issued a report in 2009 entitled "The Proposals of the Ministry of Justice Regarding the `Commissioned Research Report on `the Practice of the Incorporation of International Treaties into Domestic Law"` which reviewed the problems faced with regard to the instruments of ratification, accession and approval or acceptance of treaties and the deposit of such instruments with the United Nations Secretariat after our country lost its representation rights in the United Nations and the resulting doubts on the effectiveness of such treaties. The MOJ put forward two proposals:
(1) clearly state in the draft "Law on the Conclusion of Treaties" because in the Article 11 Paragraph One of the draft revisions for "Law for the Conclusion of Treaties" submitted by the Ministry of Foreign Affairs mandated that "when bills for the ratification, acceptance, approval or accession of treaties approved by the Legislative Yuan are submitted to the President, the initiating agencies should immediately send the Ministry of Foreign Affairs a request to ask the Executive Yuan to submit a request to the President to issue an instrument of ratification and should be promulgated by the President after the ratification or other procedures for the approval of the treaty are completed and the instruments of ratification, acceptance, approval or accession are mutually exchanged or deposited and take effect. However, in extraordinary situations, the President can promulgate and implement treaties after the completion of the ratification or other approval procedure. Treaties of acceptance or accession are also to be treated in the same manner."
From the above document, it can be seen that treaties do not have to be deposited for them to be promulgated and implemented. Moreover, the provision of Article Four of the same bill that "unless a separate date is determined, treaties will take effect on the third day after the day of promulgation by the President" also can be used to resolve the question of whether treaties can be effective in domestic law if they are not deposited; or, (2) If, before the completion of the legislation of the afore-mentioned "Law for the Conclusion of Treaties," treaties concluded by our country experience the difficultly of being unable to be deposited, the model utilized in Article Two of the "Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights" to the effect that "(h)uman rights protections provisions in the two covenants have domestic legal status" can be proposed in which an implementation act is legislated and a provision included in the implementation act to the effect that covenant has domestic legal status.
<http://www.humanrights.moj.gov.tw/public/Data/16193214581.doc>

our country ratified the two covenants, the Legislative Yuan approved the Implementation Act which clearly mandated that the two covenants have domestic legal status. This method would appear to be closer to the transformation model.[106] In other words, our country has adopted an extraordinary model to allow the two covenants to have domestic legal status.[107] This state of affairs has in turn given rise to problems in the adaption process which this paper will discuss.

2. The legal level of the two covenants

Article Two of the Implementation Act for the two covenants resolved the question of their incorporation into domestic law, but there is the matter of their level of status or ranking in our legal system. Because the provisions of the two covenants conflict with numerous existing laws and regulations, the issue of how the two covenants and domestic law should be applied is a problem that urgently needs to be resolved.

Article 141 of the Constitution states: "The foreign policy of the Republic of China shall, in a spirit of independence and initiative and on the basis of the principles of equality and reciprocity, cultivate good-neighborliness with other nations, and respect treaties and the Charter of the United Nations, in order to protect the rights and interests of Chinese citizens residing abroad, promote international cooperation, advance international justice and ensure world peace."

The meaning of the phrase "respect treaties" was defined in the judgement No. 128 (revision 1) issued by the Taiwan High Court in its judgment Number 128 in 1990 which maintained that ".....based on the requirement in Article 141 of the Constitution to `respect treaties,` the effect of treaties should be higher than ordinary domestic law (refer to Supreme Court Judgement Number 1074 in 1934) and should be endowed with an extraordinary status. Therefore, when treaties conflict with ordinary internal law, priority should naturally be granted to the requirement of the treaty based on the principle that special laws have higher rank than ordinary laws." In addition, the Ministry of Justice, affirmed in its Statement No. 1813 issued in 1983 that ".....in light of the spirit of Article 141 of the Constitution, priority should be applied to the treaty when treaties conflict with law." Nonetheless, despite the position adopted statement in the afore-mentioned Interpretation 329, the Constitutional Court

[106] The genuine transformation model would consist of the direct incorporation of the content of the covenants into new legislation of related laws by the ratifying legislature, but the Implementation Act for the two covenants in our country is not that type of legislation.

[107] England`s Human Rights Act of 1998 brought the English legal system in line with the European Covenant of Human Rights (ECHR) through a method similar to that adopted in Taiwan`s Implementation Act. However, court judgments later pressed the Parliament to revise domestic law to be in line with the ECHR. Details can be found in Weng Kuo-yen (2010).

that "treaties concluded according to the above procedures hold the same status as laws," the commonly held view in our country undoubtedly is that treaties belong to special law and should take precedence in their application. However, with regard to Interpretation 329, Professor Liao Tsung-sheng advocates that the principle that a later law should take precedence over an earlier law would thus allow legislative agencies the power to approve new laws if they believed it was necessary to resolve conflicts between previously concluded treaties. (Liao Tsung-sheng, 2010: 143-144)

However, Article 8 of the Implementation Act for the two covenants states: "All levels of governmental institutions and agencies should review laws, regulations, directives and administrative measures within their functions according to the two Covenants. All laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters force by new laws, revisions of laws, abolition of laws and improved administrative measures." This requirement seems to clearly mandate the superiority of the covenants. Indeed, the accompanying legislative explanation for the Implementation Act noted with regard to Article Eight states that "the requirements manifested in the two covenants constitute the most important international framework for human rights guarantees. In order to raise the human right standards, return to the international human rights system and expand international human rights mutual assistance and cooperation, our country should follow world human rights trends and genuinely put these covenants into practice and thereby enhance our international position. Therefore, this article clearly mandates that governmental institutions at all levels should review laws and regulations within their scope of responsibility based on the content of the two covenants and should complete needed changes within two years after this Act enters force through by the legislation of new laws, revisions of existing laws, the abolition of laws and the improvement of administrative measures".[108] The afore-mentioned "all levels of governmental institutions" should include the Legislative Yuan itself. The principle that the laws that the Legislative Yuan approves do not themselves violate the two covenants should constitute the "human rights standard" delineated in the legislative explanation of the Implementation Act. In other words, the legal rank of the two covenants based on Article Eight of the Implementation Act should be that of a superior nature equivalent to a "human rights basic law" (Liao Fu-teh, 2009: 226).

In addition, National Taiwan University Professor of Law Chang Wen-chen advocates that, based on the positions in the international human rights community

[108] See Footnote 1.

and the Human Rights Committee[109], some of the content of the two covenants already comprise required or mandatory international law which has a rank in the domestic legal system that would be equal to the Constitution.[110] Therefore, there should be no room for doubt that the legal ranking of the two covenants should be higher than ordinary law.

3. The two covenants and the General Comments

Besides having been approved through the required procedure laid out in Article 38, Article 58 Paragraph Two and Article 63 of the Constitution, the two covenants have received a rank that transcends ordinary domestic law through the means of the passage of the Implementation Act. Even more important is the fact that due to the linkage with international human rights law, Taiwan must examine its domestic legal system from an international perspective and incorporate international human rights concepts into domestic law.[111] The application of the human rights covenants is therefore bound to have a considerable impact on the existing domestic legal system. The first issue that will be encountered in this process is the question of how to correctly understand and interpret the two covenants.

In ordinary legal systems, the final arbiters of legal interpretations are the judicial agencies or courts which possess the authority of arbitration. However, in international law, the authority to interpret multilateral covenants lies in the hands of the specialized agencies created by such treaties. The two covenants have distinct specialized U.N. agencies which govern such interpretation, namely the Committee on Economic, Social and Cultural Rights for the "International Covenant on Economic, Social and Cultural Rights" and the Human Rights Committee for the "International Covenant for Civic and Political Rights." Therefore, any interpretation of articles of the two covenants must first consider the positions of these two committees. In other words, the decisions and other resolutions made by these two committees with regard to the two covenants have an authoritative status (Manfred Nowak, 2008: 10).

In terms of methodology, the Human Rights Committee`s decision in the case of "Alberta Union versus Canada" indicates that the interpretation of the International Covenant on Civil and Political Rights should respect the principle of general

[109] Article Three of the Implementation Act states: "Applications of the two Covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee." Based on this provision, interpretations by the Human Rights Committee have force in Taiwan`s domestic law.
[110] Chang Wen-chen (2009).
[111] From the standpoint of domestic law, the concepts of international human rights law are "imported." However, it should be clear from the human rights reporting system mandated by Article Six of the Implementation Act, and the state party reporting system in the two covenants that the direction is actually from international "concern" (or "irrigation").

interpretation in the "Vienna Convention on the Law of Treaties" (Manfred Nowak, 2008: 8). Scholars have pointed out that Articles 31 through 33 of the "Vienna Convention on the Law of Treaties" take into consideration the interpretation principles of other international laws and have sorted out the following principles for reference (Chao Ming-yi, 2011: 344)

- λ no interpretation when no interpretation is needed;
- λ interpretation based on good faith and mutual trust;
- λ interpretation based on the ordinary definition of the terms of the treaty and the intention of the countries concluding the treaty;
- λ interpretation based on the purpose of the treaty and its context;
- λ interpretation based on reason and consistency;
- λ interpretation based effect; and,
- λ interpretation based on supplementary material in addition to the treaty itself.

In addition, interpretative principles for human rights statutes commonly accepted in international human rights law include the broad "general freedom right" of "in dubio pro libertate" or "when in doubt favor liberty" and the narrow "restrictive definition" Manfred Nowak, 2008: 9-10), both of which can be important references for interpretation of the two covenants.

In the actual operation of interpretation, taking the General Comments for the "International Covenant for Civil and Political Rights" formulated by the Human Rights Committee as an example[112], usually four commissioners form a task force. Based on Rule 62 of the "Rules of Procedure of the Human Rights Committee, one week before the Human Rights Committee meets, in addition to preparations for the reporting system procedures and other functions, it must formulate General Comments based on the previously mentioned interpretation principles which after passage by the committee are published in annual reports. (Manfred Nowak, 2008: 777)

As of September 20, 2011, a total of 34 General Comments have been issued by the Human Rights Committee regarding the "International Covenant for Civil and Political Rights" and 21 General Comments have been approved for the "International Covenant for Economic, Cultural and Social Rights".[113] Moreover, since the General

[112] See Article 40 Section Four of the International Covenant on Civil and Political Rights regarding General Comments.
[113] See Covenants Watch`s web page. <http://covenants-watch.blogspot.com/2010/12/3.html.

Comments have been approved by plenary sessions of the respective committees and thus have been approved through debate and consultations followed by unanimous vote by commissioners from different backgrounds in traditions, cultures, religions, ideologies and legal systems. This aspect enhances the authority and universality of the General Comments. (Manfred Nowak, 2008: 778)

II. The Application and Interpretation of the Implementation Act

As mentioned above, our country`s international status is extraordinary led to the adoption of a special model of the legislation of an Implementation Act for the two covenants before they could have effect in domestic law. Therefore, the question of how to apply and correctly interpret the "bridging" Implementation Act has equal importance with the question of the application and interpretation of the two covenants themselves.

1. The status of the Implementation Act

Ordinary domestic laws are also often accompanied by implementation acts which are usually added to resolve questions concerning the implementation of the mother law, such as the time when the mother law will take effect, the question of whether it will have retroactive application, the scope of its application and other issues, and the issue of whether the new statute will possess mandatory and universal character just as other ordinary laws. Although this law is referred to formally as an "implementation act" and certainly has articles regarding how the two covenants should be applied, the fact that Articles Four through Article Eight are all aimed at "government institutions" indicate that this Implementation Act is different in character from ordinary implementation acts. Moreover, this Implementation Act possesses a mandatory effect, which is to say that "all levels of governmental institutions" should be subject to the particular constraints of the "Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights" and must comply with its legislative intent and take the two covenants as fundamental human rights standards.

Moreover, since "all levels of governmental institutions" should abide by Article Four of the Implementation Act in exercising their functions, judgments by judicial agencies which do not apply the provisions of the two covenants can also be considered as violations of the law (Liao Fu-teh, 2010). Actions taken by administrative agencies which do not abide by the two covenants in their operations should also be considered as illegal, and civil service personnel who violate the law

and are derelict in their duty to abide by the covenants should be subject to sanctions. In other words, although penalties for violations are not specified, the Implementation Act is nonetheless has mandatory application and "all governmental institutions" should be subject to sanction when they violate its provisions.

2. Some doubts and interpretations regarding the Implementation Act

The most important purpose of the Implementation Act is to ensure that the two covenants have domestic legal effect and, since it has become a bridge, the some of the basic human rights concepts in the two covenants are already having impact on our existing legal system and concepts.[114] Since some of the language in the articles of the Implementation Act is not very rigorous or precise[115], the question of how actually its provisions should be understood and applied in the process of coming into compliance with international human rights concepts truly merits continued study by scholars and practitioners.

For example, Article Two of the Implementation Act mandates: "Human rights protections provisions in the two covenants have domestic legal status." Therefore, the question arises articles in the two covenants which are not related to specific rights[116] have effect in our domestic law. If "human rights protections provisions in the two covenants" do not include "provisions which are not related to substantial rights," such an interpretation will obviously contradict the perspective of the two covenants which treats "provisions which are not related to substantive rights" as important elements of "institutional protection". (Manfred Nowak, 2008: 4) Even more to the point, Article Six of the Implementation Act mandates that the government should set up a human rights reporting system in accordance with the two covenants, but this provision would appear not to fall within the scope of what Article Two defines as "provisions which manifest human rights protections".[117] Actually, Article Two should be understood as meaning that the two covenants themselves are

[114] One example of this trend was the decision in November 2011 by the Ministry of Justice to propose revisions to the Civic Law in order to be in compliance with provisions of the "International Covenant on Civil and Political Rights" and the "Convention on the Elimination of All Forms of Discrimination against Women." The MOJ proposed to revise Article 973 and Article 980, respectively, in the Civil Code to change the current minimum ages for engagement for men at 17 years and for women at 15 years of age and for marriage from 18 years of age for men and 16 years of age for women to new minimums of 17 years of age for engagement for both men and women and 18 years of age for marriage for both sexes. This proposal was bombarded by many legislators. <http://news.chinatimes.com/focus/50109892/112011110100101.html>

[115] In addition, there are also inconsistencies in the use of legal terminology in the legislation and the covenants. For example, the Chinese translation of the term "Human Rights Committee" in Taiwan`s Implementation Act is "renquan shiwu weiyuanhui" while the official United Nations translation in Article 28 of the ICCPR is "renquan shiyi weiyuanhui."

[116] Examples include the provisions in Article 28 of the ICCPR with regard to the operations of the Human Rights Committee or the provisions of Article 16 in the ICESCR for reports by state parties.

[117] This is based on the afore-mentioned "restrictive regulation and narrow interpretation" principle.

provisions for the protection of human rights and should entirely have effect in domestic law.

In addition, Article Three of the Implementation Law states: “Applications of the two covenants should make reference to their legislative purposes and interpretations by the Human Rights Committee.” The phrase “Human Rights Committee” for the two covenants should be seen as an error since, as noted above, each covenant has its own distinct specialized monitoring organization.

The term “Human Rights Committee” actually only refers to the agency charged with monitoring the “International Covenant for Civil and Political Rights.” The Committee on Economic, Social and Cultural Rights bears responsibility for monitoring the implementation of the “International Covenant for Economic, Social and Cultural Rights.” The two respective committees do formulate general comments after review the reports submitted by signatory countries which undoubtedly comprise “interpretations” as noted in Article Three. However, the authoritative interpretations of the Human Rights Committee are not limited to its “General Comments” but also include both the “Concluding Observations” issued by the HRC after reviewing the reports submitted by each signatory country and decisions on individual complaints submitted to the HRC.[118] (Liao Fu-teh, 2010: 45; Manfred Nowak, 2008: 10). Therefore, the position that the term “interpretations” in Article Three only refers to “General Comments” is not in accordance with the actual international operation of the two covenants.

In addition, scholars have engaged in considerable debate regarding the actual meaning of the term “all levels of government institutions” in Articles Four, Five, Seven and Eight in the Implementation Act. (Liao Fu-teh, 2010: 45). Since legislators did not make any special reservations during the passage of the two covenants, this term should naturally include all governmental agencies within the Executive, Legislative, Judicial, Examination and Control branches of government. Moreover, based on the provisions of Article Two, Section One of the “International Covenant for Civil and Political Rights,” each state party to the covenant has the obligation to respect and ensure human rights based on the universal concepts of international human rights law. Scholars generally maintain that this requirement includes the obligation by each state party to “adopt active legislative, administrative, judicial and other substantive measures to carry out its human rights obligations” (Manfred Nowak, 2008: 3). Hence, the Executive, Legislative, Judicial, Examination and Control agencies under our country`s legal system naturally should all be included in

[118] The so-called “individual communications” method through which individual citizens can file complaints against their state to the Human Rights Committee which is included in the First Optional Protocol to the ICCPR.

the scope of the obligation of the state to respect and ensure human rights. This type of interpretation is an example of interpreting domestic law (the so-called "all levels of governmental institutions") from the reverse angle of international human rights law and is an example of the previously mentioned reverse flow and adaption problem that awaits further study by scholars in our country.

In addition, there are some troublesome issues concerning translations from different languages and legal terminology. For example, according to Article Eight of our country`s Central Regulation Standard Act, the code of a regulation should be written under the sequence from "articles" (tiao) and divided into "paragraphs" (xiang) or "subsections" (kuan) subsequently, but international human rights laws translated into Chinese with simplified characters such as in the United Nations system employ a regulation standard that uses lists first "articles" (tiao) but then uses the term "sections" (kuan). Another example concerns the "General Comments," which in Chinese using simplified characters is rendered into "yibanxing yijian" or the equivalent of "ordinary opinions." From these two examples, it is evident that there is a considerable gap in the use of terminology in Chinese written in simplified characters (as used in the People`s Republic of China) and complex characters (as utilized in Taiwan). This problem also awaits resolution by the authorities in the responsible agencies.

In general, the Implementation Act has given domestic legal status to the two covenants and regarding the scope of understanding and interpretation is no longer restricted to the accustomed conceptions in domestic law but also include the possibility of reversed interpretation from international to domestic concepts. Moreover, problems remain that concern both choices of translated or original versions of the two covenants which need to be resolved and numerous doubts regarding the Implementation Act which require clarification and suitable handling based on the international human rights standards.

III. Observations on Applications in Taiwan

Two years have passed since the two covenants and their Implementing Act took effect on December 10, 2009. On December 10, 2010, Covenants Watch published a report entitled "An Re-examination of the Government`s Implementation of the Two Covenants and their Implementing Act during the Past 19 Months".[119] The second appendix to this report was a paper by this author entitled "Observations on Judicial Judgments during the Past Year of Implementation of the Two Covenants" which

[119] http://www.tahr.org.tw/files/2010report.pdf.

reviewed how courts of all levels had applied the two covenants during the first year in which they had effect and offered some observations based on his experiences. At that time, the author`s conclusion was that courts at all levels were still rather unfamiliar with international human rights law and that the degree to which the courts applied the two covenants was extremely low. After another year, the degree to which courts have applied the two covenants as justification for judgments has gradually risen, but so far we have not seen any court judgments which have made reference to any of the General Comments in their discourse.[120] The degree of application in the courts is still not satisfying and judicial practitioners should continue to develop their discourse regarding the two covenants. This article will not conduct a comprehensive review of the application of the two covenants in their judgments, but will select some obvious examples of violations of the two covenants or the Implementation Act in actions (or judgments) in the Executive, Legislative and Judicial branches as case examples and review their errors in the application and interpretation of the two covenants or their implementation act.

1. The failure by Executive and Legislative agencies to complete fulfill the review and revisions of laws required by Article Eight

In order to implement the two covenants and the Implementation Act, the Executive Yuan approved and promulgated a "Big Step Forward for Human Rights Program." Moreover, the Executive Yuan conducted a review of existing laws, regulations and measures in compliance with the directive of Article Eight of the Implementation Act that all levels of governmental institutions and agencies should review laws, regulations, directives and administrative measures within their functions according to the two Covenants and that all laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters force by new laws, revisions of laws, abolition of laws and improved administrative measures.

The Executive Yuan found that 219 items were not compatible with the two covenants and drafted a list of items for liquidation, tracking and control and evaluation and required the completion of related revisions or improvements by December 10, 2011.[121] Nevertheless, statistics provided in a report presented by the Ministry of Justice to legislators in August 2011[122] acknowledged that the revisions

[120] The No. 1 judgment issued in 2011 by the Taipei District High Administrative Law Court was the first case in which lawyers cited a General Comment in their discourse.

[121] http://www.humanrights.moj.gov.tw/lp.asp?ctNode=27273&CtUnit=8930&BaseDSD=7&mp=200

[122] On August 19, 2011, the Ministry of Justice submitted to the Legislative Yuan for the latter`s reference a "Re-examination and Progress Report on the "219 `Laws,` `Decrees` and `Administrative Measures` that Violate the Two Covenants Whose Revision has yet to be Completed."

of numerous laws that should be revamped will not be completed by the deadline of December 10, 2011. These bills include Number 53 (Article Eight in the Statute for Temple Registration), Number 65 (Article Nine of the Assembly and Parade Act), Number 70 (the Civil Associations Act), Number 75 (the Industrial Group Law), Number 107 (the Commercial Group Law), Number 147 (Article Four of the Assembly and Parade Act), Number 177 (Article 12 of the Temples Registration Act), Number 190 (Article 19 of the Fire Act), Number 196 (Article Four of the Architects Act) and Number 197 (Article 7, Paragraph Three of the Fire Act). Hence, the government will fail to meet the deadline of December 10, 2011.[123]

As mentioned above, the phrase "all governmental institutions" in Article Eight of the Implementation Act should encompass the president and the Executive, Legislative, Judicial, Examination and Control branches.

However, while the Executive Yuan was checking the checking compatibility of laws and administrative measures with the requirements of the two Covenants, there were no signs that the Legislative Yuan or the Control Yuan were similarly inspecting laws or administrative measures under their scope of responsibility for compatibility with the two covenants[124], not to mention "completing the legislation, revision or abrogation of laws" incompatible with the provisions of the covenants. In addition, the fulfillment of the obligations of the Legislative Yuan and the Control Yuan also cannot simply depend on the Executive Yuan agencies to propose draft revisions but must await legislative review and passage. Therefore, the responsibility for the failure to meet the deadline for these revisions in the legal code should be shared by both the Executive Yuan and Legislative Yuan.

2. The erroneous interpretation of the Presidential Office Human Rights Consultative Committee on Case No. 3 in the conclusions of its third meeting on April 12, 2011.

Over four years after our country ceased carrying out death sentences in December 2006, the government resumed the implementation of death sentences on April 30, 2010 with the execution of Chang Chung-hung and three other convicts. In response, the Taiwan Alliance for the End of the Death Penalty (TAEDP) expressed doubts as to whether the decision by the justice minister to carry out these executions

[123] This statement refers to the portion of laws which government institutions themselves believe do not comply with the two covenants but which the government will fail to revise before the December 10, 2011 deadline and does not include laws which civil society organizations believe also conflict with the two covenants but will not be revised by the deadline set in the Implementation Act, including the Assembly and Parade Act, the Law for the Settlement of Labor-Management Disputes and numerous articles in the Code of Criminal Procedures.

[124] See Note 19.

while the president had yet to reject petitions submitted by the prisoners for pardons or reduction of sentences violated Article Six Section Four of the "International Covenant for Civil and Political Rights" and were thereby illegal executions. [125] Presidential Office Human Rights Consultative Committee (POHRCC) members Huang Mo, Lee Nien-tzu and Lee Yuan-ran maintained that there was room for doubt that the "Amnesty Law" violated Article Six Section Four of the ICCPR due to its lack of regulation of the exercise of the right of petition for commutation and the absence of a detailed procedure for response when death row prisoners were petitioning for pardons and therefore proposed that the issue be discussed by the POHRCC.

On April 12, 2011, the POHRCC approved a resolution on Case No. 3 during its third meeting which stated: "(1) Since the United Nations Human Rights Committee advocates that Article Six Section Four of the ICCPR does not designate a model for the exercise of the right of commutation or amnesty, the HRC thereby endows state parties with a wide range of discretionary freedom. As our country`s Amnesty Act already provides the opportunity for defendants to seek amnesty and does not preclude pleas by persons subject to death sentences for amnesty, it does not conflict with Article Six Section Four of the ICCPR. (2) Since the two covenants have been implemented, we request the Ministry of Justice to invite scholars and professionals to carefully study whether we should consider the legislative precedents of Germany, Japan and the United States and establish a committee to review pleas for commutation or amnesty or another equivalent institution and to review the necessity for further revisions of the Amnesty Act."[126]

However, the resolution`s statement that "(s)ince the United Nations Human Rights Committee advocates that Article Six Section Four of the ICCPR does not designate a model for the exercise of the right of commutation or amnesty, the HRC thereby endows state parties with a wide range of discretionary freedom" evidently misunderstands the facts regarding the interpretation of the Human Rights Committee as can be seen from the following analysis:

(1) In the case of Kennedy v. Trinidad and Tobago reviewed by the Human Rights Committee, the defense counsel for the author of the complaint advocated that the procedural guarantees mandated by Article 14 of the ICCPR should be applied to the procedure for the procedure for application for commutation or reduction of sentence. The Human Rights Committee maintained that the language of Article

[125] "Protest Against The Ministry of Justice`s Illegal Executions," the Taiwan Alliance to End the Death Penalty (TAEDP), May 1, 2010 <http://www.taedp.org.tw/index.php?job=tags&seekname=EN%2BVersion&page=7>.
[126] http://www.president.gov.tw/Default.aspx?tabid=1328&itemid=24784&rmid=3655

Six Section Four did not designate a model for the exercise of the special power of commutation and therefore the state party possessed freedom of discretion. (Manfred Nowak，2008: 152) However, a careful reading of the context of the entire text shows that the HRC`s intention was to indicate that the lack of the procedure to plead for commutation or a reduction of sentence did not necessarily have to have the same intensity of protection as a trial process and could be freely decided at the discretion of the state party. Nevertheless, the Committee did not state that the state party could decide whether or not to respond to a request for commutation or a reduction of sentence or even that the lack of response to such a petition did not violate Article Six Section Four of the ICCPR.

(2) In the case of Mbenge v. Zaire, the Human Rights Committee pointed out with regard to Article Two Section Three Subsection One that if the remedial measures provided by a state party are ineffective and if political institutions are given unlimited discretionary power to decide on commutation, then that state party is not realizing its obligations under Article Two of the ICCPR. (Manfred Nowak, 2008: 66) From this interpretation by the Human Rights Committee, we can clearly understand that if a government can have the freedom to refuse to respond when a death row prisoner is applying for commutation or a reduction of sentence, the remedies that such a government is providing are not effective and that state party is therefore in violation of Article Two and Article Six Section Four of the ICCPR.

(3). Article Eight of Resolution 1984/50 entitled “Safeguards guaranteeing protection of the rights of those facing the death penalty” approved by the UN Committee on Economic, Social and Cultural Rights on May 25, 1984 states: “Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence”. (Lu Jianping et al, 2010: 412) From this resolution it can be seen that both the HRC and the ESCRC believe that capital punishments must not be carried out if there has not been any response to any appeals or recourse procedures relating to pardon or the commutation of sentences.

Therefore, the fact that the Amnesty Act in our country does not contain relatively detailed regulation on remedial procedures for petitions for commutations or reductions of sentences and that it permits the president to decide not to respond to such petitions marks a clear violation of the provisions of Article Two and Article Six Section Four of the “International Covenant for Civil and Political Rights.” The mistaken understanding of the Presidential Office Human Rights Consultative Committee to correctly understand the true meaning of the Human Rights

Committee`s interpretations in "Kennedy v. Trinidad and Tobago" and "Mbenge v. Zaire" took its core statements out of context and failed to refer to other interpretation documents and thereby arrived at the mistaken belief that our government has the discretionary power to decide to respond or not to respond to petitions for commutation or pardons. This was indeed a huge mistake.

3. The Supreme Court`s criminal appeal judgment No. 113 in 2011[127] and is incompatible with the principle embodied in Article Nine Section Three of "International Covenant for Civil and Political Rights" that "it shall not be the general rule that persons awaiting trial shall be detained in custody."

In the wake of Interpretation 665 by the Constitutional Court which restricted the application of Article 101 Paragraph One Section Three of the Code of Criminal

[127] The judgment`s key point was the following: "Based on the constitutional guarantee for personal freedom of the people, defendants who are strongly suspected of having committed offenses indicated in Article 101 Paragraph One Subsection Three of the Code of Criminal Procedures and it is apparent that there are grounds s sufficient to justify an apprehension that he may abscond, or destroy, forge, or alter evidence, or conspire with a co-offender or witness and also no reason not to detain, the court can exercise its discretion on whether to order that the accused be released on bail, or to the custody of another, or with a limitation on his residence or other methods less infringing on rights to substitute for detention. However, if it is apparent that there will be difficulties in prosecution, trial, or execution of sentence unless the detention of the accused is ordered, the judge can order the detention of the accused. Interpretation 665 of the Judicial Yuan has indicated that such detention is not in contravention of the constitutional guarantees of people`s s personal freedom and of the people`s right to institute legal proceedings under Articles 8 and 16 of the Constitution, respectively. Based on the above interpretation and its reasoning, it is not necessary to declare that Article 101 Paragraph One Subsection Three of the Code of Criminal Procedures regarding the reasons for the detention of suspects for major offenses contravenes the Constitution, but that it can be considered to request the addition of considerations, besides simply whether the defendant is under strong suspicion of having offense, there is considerable reason to justify an apprehension that he may abscond, or destroy, forge, or alter evidence, or conspire with a co-offender or witness. Moreover, based on the interpretation of the structure of the law, there is still a considerable difference between such additional considerations and the simple consideration of the reasons for detention under Paragraph One Section One and Section Two of the same article. Based on this reasoning, there is a considerable difference between the granting of detention out of consideration of an apprehension that a suspect of a serious crime may abscond and the degree of intensity of the apprehension of flight that by itself becomes the justification for detention. In addition, the strength of the reasons for the possibility of abscondment may not be sufficient by itself to become justification for detention of a suspect in a serious offense but nonetheless can be considered with other reasons for detention. In addition, serious offenses are often accompanied by high possibilities of abscondment or destruction of evidence. Such a possibility also may be associated with the tendency in basic human nature to try to seek for good luck and avoid calamity, to avoid responsibility for crimes and not suffer punishment. It would be a reasonable judgement of the part of ordinary and normal persons that a person who is under strong suspicion of having committed a serious offense would have a strong possibility or near certainty of absconding or destroying evidence. Since the above mentioned interpretation sets such a standard, there is no need for the degree of full confidence or certainty.
In addition, the above interpretation also provides a restrictive interpretation on Article 101 Paragraph One Subsection Three which should be seen as a concrete realization of Article Nine Section Three of the International Covenant on Civil and Political Rights since when the court considers whether to detain a suspect, if based on the reasonable judgement by an ordinary person that there is a considerable possibility or near certainty that a suspect may abscond, then there would be no choice but to act based on Article 101 Paragraph One Subsection Three of the same law and detain the suspect." The judgment by the Supreme Court in the Number 1 Appeal Case in 2010 contains the same reasoning.

Procedures, the Supreme Court in its review of cases involving the detention of defendants on trial in major criminal cases has frequently adopted the view that "major criminals often flee" and used Article 101 Paragraph One Subsection One`s provisions to continue to uphold the detention of defendants who are in trials for major crimes. Looking at the explanation for the Supreme Court`s No. 113 judgement in 2011, we can see that it utilizes the assertion that suspects in major criminal cases have an "extremely high probability" of fleeing or destroying evidence as the foundation for its belief to uphold the practice of detaining defendants under trial in major criminal cases unless there is full confidence or certainty that they will not flee or destroy evidence. The Supreme Court itself believes that its position is "a concrete realization of Article Nine Section Three of the International Covenant for Civil and Political Rights."

Nevertheless, the Human Rights Committee in its communication on the case of "Hill v. Spain" reaffirmed: "The Committee reaffirms its prior jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial. The State party has indeed argued that there was a well-founded concern that the authors would leave Spanish territory if released on bail. However, it has provided no information on what this concern was based and why it could not be addressed by setting an appropriate sum of bail and other conditions of release. The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant. In these circumstances, the Committee finds that this right in respect of the authors has been violated". (Manfred Nowak, 2008: 244)

From this communication, it can be seen that a state party cannot simply use reference to "an extremely high probability" without convincing evidence or data to abrogate the right to his or her protection under Article Nine Section Three of the ICCPR that "it shall not be a general rule that persons awaiting trial shall be detained in custody." The Supreme Court has evidently failed to act on the requirement of Article Three of the Implementation Act that applications of the two covenants should make reference to their legislative purpose and interpretations by the Human Rights Committee and make reference to international cases as evidence or proof in the explanation or exposition of judgements and therefore its judgment is in violation of the law.

IV. Conclusion

Our country withdrew from the United Nations and has left the international human rights system for over 40 years and our domestic legal institutions are very unfamiliar with the application and development of international human rights covenants. After being in effect for two years, the two covenants and their Implementation Act theoretically should already have had considerable influence on domestic legal institutions. However, as illustrated by the examples raised in this paper concerning the violations or mistaken interpretation of the two covenants, the government has apparently not done its best to implement the two covenants. This paper maintains that the special method adopted by through the passage of the Implementation Act has already incorporated the two convents with our domestic legal system and therefore have the status of "minimum human rights standards." Domestic laws that conflict with this "minimum human rights standards" should be invalid. Moreover, this "minimum human rights standard" should further develop in step with the transformation of international human rights law and all levels of governmental institutions should learn about and understand the nature of international human rights standards through the authoritative interpretations of the specialized treaty organizations.

In addition, based on Article Three of the Implementation Act, our country will inevitably be compelled have entirely fresh directions for the interpretation of our country`s human rights laws and should actively engage in dialogue with the international human rights community.  Nevertheless, the actual record of our country`s application of the two covenants in the past two years has been most disappointing. Judicial judgments have remained conservative and closed minded and have even failed to make reference to precedents in the General Comments; the Executive Yuan and the Legislative Yuan have ignored the two-year deadline set in Article Eight of the Implementation Act to complete necessary revisions to laws or administrative measures; and, the Control Yuan has entirely failed to pursue the question of responsibility for the government`s illegal failure to meet these legal requirements. These trends unavoidably give rise to doubts regarding the government`s resolve to implement the two covenants.

Therefore, if the government truly possessed the will to bring our domestic legal code in line with international human rights standards, it should have promptly established a human rights reporting system including international monitoring mechanisms based on the international standards and the provisions of Article Six of the Implementation Act and thereby endeavor to genuinely enhance Taiwan`s human rights through regular review and monitoring by international human rights experts

and the importation of the newest changes in international human rights standards. What is most important now is for domestic scholars and legal practitioners to begin to pay serious attention to the two covenants and their implementation act since only through continuous research and discourse will allow the two human rights covenants be truly practiced in Taiwan society.

Reference

Nowak, Manfred. 2008. *U.N. Covenant on Civil and Political Rights CCPR Commentary* 2nd revised edition. (Quotations based on a translation by Sun Shiyen and Hua Xiaoqing entitled "Gongmin quanli he zhengzhi quanli guoji gongyue pingzhu" published in Beijing by the Sanlien Publishing Company in 2008)

Ching-hsiung, Hsu and Lee Ming-chun. 2009. "General Concepts of International Law." (Guojifa gailun). Tainan: Quantai Enterprises.

Ming-yi, Chao. 2011. "An Introduction to Contemporary International Law." (Dangdai guoji gailun). Taipei: Wu-Nan Book Inc.

Jianping, Lu et al. 2010. "International Human Rights Covenants and the Improvement of China`s Criminal Law." (Guoji renquan gongyue yu Zhongguo xingshi falu de wanshan). Beijing: Chinese People`s Public Security University Press.

Fu-the, Liao. 2009. "Comments on the Ratification of the Two United Nations Human Rights Covenants and the Implementation Act." (Pijun Lianheguo liangge renquan gongyue ji zhiding shixingfa zhi pinglun). *Yuehdan Monthly* 174: 223-229. Taipei, Taiwan.

Fu-the, Liao. 2010. "Whether and How Courts Should Apply the International Covenant on Civil and Political Rights." (Fayuan yingfou ji ruhe shiyung gongmin yu zhengzhi quanli guoji gongyue). *Taiwan Law Journal* 163: 45-64. Taipei, Taiwan.

Tsung-sheng, Liao. 2010. "How Our Country`s Criminal Judgments should apply the International Covenant for Civil and Political Rights B- Taking Supreme Court and High Court Criminal Judgments as the Center for Empirical Research." (Woguo xingshi caipan ruhe shiyong gongmin yu zhengzhi quanli guoji gongyue - yi zuigao ji kaodeng fayuan xingshi caipan shizheng yanjiu wei zhongxin) in Chen Yun-tsai ed "Proceedings of the Academic Conference on the International Covenant for Civil and Political Rights" (Xingshi sifa yu gongmin yu zhengzhi quanli guoji gongyue xueshu yantaohui shilu):113-163. Taichung: Tung Hai University School of Law.

Wen-chen, Chang. 2009. "The Inflow of International Human Rights Law into the Domestic Constitution - After Taiwan Implemented the Two Human Rights

Covenants." (Guoji renquanfa yu neiguo xianfa de huiliu - Taiwan shishi liangda renquan gongyue zhi hou). Conference of the Taiwan Law Society, 2009.

Kuo-yen, Weng. 2010. "The Potential for Application of the Two Human Rights Covenants in Our Courts and the Incident of the Accusation Against Professor Lee Ming-tsung for Violating the Assembly and Parade Law." (Lianggongyue zai woguo fating shiyong de qianneng jianlun Lee Ming-tsung jiashou beikong weifan jihuiyouxingfa shijian). THAR Pas(Taiwan Association for Human Rights Quarterly) Spring 2010/5/8.

Ministry of Justice. 2009. "The Proposals of the Ministry of Justice Regarding the `Commissioned Research Report on `the Practice of the Incorporation of International Treaties into Domestic law." November 26, 2009. (Fawubu dui <"Guoji gongyue neiguofahua de shijian" weituo yanjiu baogao> de duian jianyi.) <http://www.humanrights.moj.gov.tw/lp.asp?ctNode=30747&CtUnit=10724&BaseDSD=7&mp=200>