the United Nations in the UN Charter.[157] Although a similar attempt to include an article on self-determination in the UDHR came to nothing,[158] the idea gained more support in the drafting of the Covenant.

Pressure for inclusion of a provision on self-determination came both from the "Socialist bloc" and the developing countries[159] in the General Assembly. Consequently the General Assembly instructed the Commission to study the ways and means to ensure the right to self-determination[160] then specifically directed it to include an article on the subject.[161] There was a significant amount of debate on the subject not

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Helsinki Accord, 137, at 138 (1979).

[157] Article 1(2) of the UN Charter was adopted unanimously and declares one purpose of the United Nations as being "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". A similar reference to self-determination is to be found in article 55(1) of the Charter.

References are made in Chapters XI and XII regarding Non-Self-Governing and Trusteeship Territories to self-government. Although no direct reference is made to self-determination, Bowett argues that it is permissible to consider the entirety of those chapters as "reflections on the basic idea of self-determination". Bowett D., "Problems of Self-Determination and Political Rights in Developing Countries", Proc.Am.Soc.I.L., 134 (1966).

[158] See USSR proposal UN Doc.A/784, (1947). However article 28 reads:

"Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

Similarly article 21(3) stipulates that "the will of the people shall be the basis of the authority of government" and shall be expressed in periodic and genuine elections.

[159] UN Doc.A/C.3/L.186 and Add.1, (1951). Morphet comments however that the positions of these two groups were not identical. Morphet S., "Article 1 of the Human Rights Covenants: Its Development and Current Significance", in Hill D.(ed), Human Rights and Foreign Policy, 67 (1989).

The influence of the "newly awakened" developing states was perhaps crucial, their political cohesiveness can be estimated by the continual references to the Bandung Conference of April 1955 which inter alia recognised the right to self-determination.

The role of the Western States however is also considered to have been influential, particularly in broadening the scope of the article. *See* Cassese A., "The Self-Determination of Peoples", in Henkin L.(ed), International Bill of Rights, 92, at 93 (1981).

[160] GA Resn.421 (V) D, *supra,* note 72, at 42-43.

[161] The General Assembly, following a thirteen power Arab-Asian proposal, adopted resolution 545 (VI) on February 5th 1952 in which it stipulated that an article on self-determination should be included which read "All peoples shall have the right of self-determination". It further required that note should be made of the duty of Administering States to promote the right in relation to Non-Self-Governing Territories. GA Resn. 545 (VI), (Feb.5 1952), 6 UN GAOR, Resns, Supp.(No.20), at 36 (1952).

only in the Commission at its eighth session but also later in the General Assembly's Third Committee.[162]

Those who opposed the inclusion of an article on self-determination[163] put forward the following arguments:[164]

i) That the inclusion of such a politically controversial subject might jeopardise the future of the Covenants by making it impossible for some states to ratify them.[165]

ii) That self-determination as stated in the UN Charter, was a political principle but not a legal right let alone a human right.[166]

iii) That the exact nature of the right to self-determination was subject

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[162] *See*, UN Doc.A/3077, *supra*, note 88, at 30-40. UN Docs.A/C.3/SR.642-646, 10 UN GAOR, C.3, (642-646 mtgs.), (1955).

[163] Opposition was primarily from the Western "colonialist" powers. It must be recognised however that this was not entirely coherent as the opposition of the Western powers faded somewhat towards the end of the drafting process. Humphrey comments in this light that by 1958 "so many dependent territories were becoming independent that the political implications of the articles on self-determination seemed less important", *supra*, note 21, at 252.

[164] See generally UN Docs.A/2929, *supra*, note 67.

[165] That a certain suspicion of the concept of self-determination existed is well reflected by the Belgian representative who stated that it was "tantamount to an incitement to insurrection and separatism", Belgium, A/C.3/SR.643, at 94, para.10 (1955). *See also*, Emerson R. "Self Determination" 60 Proc.Am.Soc.I.L., 135, at 136 (1966). It was later argued upon this basis that the US should refrain from ratifying the Covenants. *See*, Haight G., "Human Rights Covenants", 62 Proc.Am.Soc.I.L., 96, at 98 (1968).

Most of the Western States that opposed the article have nevertheless signed and ratified the Covenants. It would seem that this is at least partially due to the anti-colonialist bent of the UN notion of self-determination which has made the issue of marginal importance on the attainment of independence of the former colonies. It is interesting to note that the UK has submitted an "understanding" of its interpretation of article 1, *see*, Schwelb E., "The United Kingdom Signs the Covenants in Human Rights", 18 I.C.L.Q., 457 (1969).

[166] *See* United Kingdom, A/C.3/SR 642, at 90, para.12 (1955). The UN Charter only speaks of the "principle" of self determination in articles 1(2) and 55(1). Pomerance maintains in this respect that self-determination was merely a "deciderata" in interpretation of the Charter rather than a legal right. Pomerance M., Self-Determination in Law and Practice, 9 (1982). That it was not a right prior to this seems implicit in the decision of the Committee of Jurists in the Aaland Islands Case (1920) LNOJ, Spec. Supp.(No.3) at 5. However it could be argued that this decision was confined to the right to secede and not to self-determination as a whole.

The question of whether it has evolved into a legal right since, is also subject to controversy. *See*, Sinha, "Is Self-Determination Passé?", 12 Columb.J.Trans.L., 260 (1973). He concludes that practice shows the principle to be one of political expediency rather than international law. *See also*, Emerson R., From Empire to Nation, (1960).

to many interpretations and involved the complex issues of minority rights and secession.[167]
iv) That the term "peoples" was incapable of precise definition.[168]

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[167] Thoughts as to how a people might "determine" themselves have ranged from taking full independence to the institution of democratic elections. *See generally*, Cassese, *supra*, note 156. For example the socialist concept of self-determination confined its operation to colonial peoples, *see* Tunkin G., Theory of International Law, 60-69 (1974). Western states however thought the right should be more generally applicable not to become redundant merely on the attainment of independence. *See*, Umozurike U., Self-Determination in International Law, 185 (1972). In this light, socialist states can be seen to prefer the "external" aspect of self-determination, and western states the "internal", *see* Cassese, *ibid.*

The most complex debate centred around the question of whether the right to self-determination included the right to secede. *See generally*, Buchheit L., Secession-The Legitimacy of Self-Determination, (1978); White R., "Self-Determination: Time for Reassessment", 28 Neth.I.L.J., 147 (1981). Fear was expressed that if such a right was established for minorities it would lead to the disintegration of states and a threat to international peace, *see*, Thornberry P., "Self-Determination, Minorities, Human Rights: A Review of International Instruments", 38 I.C.L.Q., 867 (1989).

[168] *See e.g.*, Emerson, *supra*, note 165, at 136. In this respect Jennings commented that "the people cannot decide until somebody decides who are the people". Jennings I., The Approach to Self-Government, 56, (1956).

The debate as to the exact meaning of the term "peoples" goes back to the San Francisco Conference in 1945. A Belgian amendment was proposed (and ultimately rejected) to avoid any confusion of the term "peoples" with "states". UN Doc.374 I/I/17 at 1, 6 UNCIO, at 300, (1945). The UN Secretariat concluded that "'nations' is used in the sense of all political entities, States and non-States, whereas 'peoples' refers to groups of human beings who may, or may not, comprise States or nations", UN Doc.W.D.381 CO/156, 18 UNCIO, at 657-58 (1945). *See generally*, Swan G., "Self-Determination and the UN Charter", 22 Ind.J.I.L., 264 (1982). The confusion over terms is amply illustrated by Kelsen who concludes that "the term 'peoples'... means probably states, since only states have 'equal rights' according to general international law". Kelsen, *supra*, note 34, at 52.

Although the Commission Draft originally stated that the right should belong to all peoples and all nations, the latter was excluded on the grounds that the term "peoples" was more comprehensive. Chen L-C., "Self Determination as a Human Right" in McDougal M., Lasswell H. and Chen L-C.(eds), Human Rights and World Public Order, 198, at 217 (1980). The right was deemed to be universal: applying not only to non-self-governing territories but also to fully independent states. Cassese, *supra*, note 156, at 94. Its purpose is to define the population as distinct from a particular government. *Cf.*, Falk R., "The Rights of Peoples", in Crawford (ed), The Rights of Peoples, 17 (1988).

It would seem logical that any claim of self-determination is ultimately based upon the subjective conviction that the governmental rule is either alien or colonial, *see* Pomerance, *supra*, note 166, at 14. The question is therefore whether an objective criterion can be elucidated, *see*, Buchheit, *supra*, note 167, at 10; Dinstein Y., "Collective Human Rights of Peoples and Minorities", 25 I.C.L.Q., 102, at 104 (1976). This is especially crucial given the general desire to exclude the operation of the principle from minorities. In practice it would seem that the United Nations has applied the right solely to colonial peoples, *see e.g.* Pomerance, *supra*, note 166, at 14-23.

v) That the internal aspect of self-determination was ignored in favour of the external aspect[169] in that it was promoted merely as a tool for independence.
vi) That the UDHR, which was intended to cover all human rights, contained no reference to self-determination.[170]
vii) That self-determination was a right of a collective nature and therefore it was inappropriate to include it in a covenant which was devoted to the rights of individuals.[171]

On the other hand those who wanted to include an article on self-determination put forward the following arguments:
i) That states had undertaken under the UN Charter to respect the right

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[169] Cassese succinctly outlines the two aspects of self-determination: "External self-determination refers to the ability of a people or a minority to choose in the field of international relations, opting for independence or union with other States. Internal self-determination usually means that a people in a sovereign State can elect and keep the government of its choice".
*Supra*, note 156, at 137.

Pomerance has noted in this respect that UN practice "consists of decolonization as an end result rather than "self-determination" as a technique or method". *Supra*, note 166, at 28. At the time of drafting the Soviet States and the Developing States tended to emphasise the colonial (external) aspect of self-determination at the expense of questions of representative government and periodic elections.Ironically those states that opposed inclusion of the article (Western States) were the ones that advocated the human rights aspect of the concept most strongly. *Cf.* Cassese, *supra*, note 156, at 140.

The forthright statement of Afghanistan that self-determination "will have to be proclaimed even in a world from which colonial territories have vanished" however became the majority view, Afghanistan, A/C.3/SR.644, para.10 (1955).

[170] The UDHR however did make reference to the internal aspect of self-determination, namely, representative government.

[171] *See e.g.* Shann (Australia), A/C.3/SR.400, at 320, para.19, (1952). Sieghart argues that such peoples rights form an entirely distinct category separate from human rights. He asks:

> "How then can the rights of a 'people' ever form part of human rights- that is, precisely the rights that the individual may invoke against the claims of those who exercise power over him, and which they only too often assert in the name of the people".

Sieghart P., The Lawful Rights of Mankind, 164 (1986).

Similar problems might have also been raised in connection with article 27 ICCPR relating to the rights of minorities, *see* Rousseau C., "Droits de l'Homme et Droit des Gens", in Cassin R.(ed), Amicorum Discipulorumque, Liber IV, 315 (1969). However the drafters were concerned with excluding minorities from the ambit of article 1, thus they would be conceived of as individual rights primarily, *see*, Thornberry, *supra*, note 167, at 880.

of self-determination.[172]
ii) That the realisation of the right to self-determination was essential to the maintenance of peace. In reaffirming that right in the Covenants the United Nations would create the necessary conditions for the establishment of peaceful relations and international cooperation.[173]
iii) That the intended article was not concerned with the rights of minorities or the right of secession and therefore fears of such an interpretation were unfounded.[174]
iv) That it had already been decided by the General Assembly to include such an article and to reverse such a decision would call into question the authority of that body.
v) That although self-determination was a collective right it was the "source" or "prerequisite" for the enjoyment of all other individual human rights.[175]

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[172] In the USSR's view, the distinction between self-determination as a right and a principle was artificial, USSR, A/C.3/SR.646, para.23 (1955). Some commentators argue that the principle was established as a legal right even before the Charter, *see* Lachs M., "The Law in and of the United Nations- Some Reflections on the Principle of Self-Determination", 1 Ind.J.I.L. 429, at 432 (1960-1). Whether or not this is the case it would seem that it has emerged as a legal right since that time, *see* Higgins R., The Development of International Law Through the Political Organs of the United Nations, 103 (1963).

[173] *See e.g.* Panama who felt that the right was essential to the maintenance of peace, as otherwise such peoples would resort to force to ensure their claims, Panama, A/C.3/SR.827, at 322, para.32 (1957).

[174] *See e.g.*, D'Souza (India), A/C.3/SR.399, at 311, paras.5-6 (1952); Greece declared that the issue "was that of national majorities and not of minorities", Acritas (Greece), A/C.3/SR.369, at 134, para.13 (1951). Buchheit concludes that "article 1 of the covenants appears in spite of its possible secessionist interpretation, rather than as a confirmation of that interpretation". *Supra*, note 167, at 83-84.
Article 27 of the ICCPR protects the cultural, religious and linguistic rights of persons belonging to minorities. *See*, Sohn L., "The Rights of Minorities", in Henkin L.(ed), International Bill of Rights, 270 (1982); Thornberry, *supra*, note 167, at 877-884; Capotorti F., Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Groups, UN Doc. E/CN.4/Sub.2/384/Rev.1. (1979).

[175] *See*, Cassese, *supra*, note 159, at 101-2. Such a view has been termed the "contextual approach" by Van Boven. Van Boven T., "The Relations Between Peoples' Rights and Human Rights in the African Charter", 7 H.R.L.J., 183 (1986). It might also be contended that the inclusion of an article on self-determination is merely an example of the development of a "collective" approach to human rights already manifest in economic, social and cultural rights. Marie J-B., "Les Pactes Internationaux Relatifs Aux Droits De L'Homme Confirment- Ils L'Inspiration De La Déclaration Universelle?", 3 H.R.J. 397 (1970); *also* "Relations Between Peoples' Rights and Human Rights: Semantic and Methodological Distinctions", 7 H.R.L.J., 195, (1986). This argument, however, can be criticised on the basis that all the other rights in the covenants (including that of minorities) relate to the individual.
The Yugoslavian representative attempted to establish an individual facet to the

A certain number of suggestions were made to reconcile the two conflicting camps of opinion. For example proposals were made for a declaration on self-determination, or that it should be contained in a protocol and annexed to the covenants, or even that a third covenant should be drafted on the subject to be opened for signature at the same time as the other covenants.[176] The lobby preferring to include an article on self-determination were however not to be dissuaded and forced the issue by sheer weight of numbers.[177]

Following a proposal from the Chilean representative in 1952, the Commission added a clause to the article stating that the right to self-determination "shall also include permanent sovereignty over their natural resources".[178] The reasoning was that states should be able to exercise control over their own natural resources albeit through a process of expropriation. Such a provision was deemed to be necessary since political independence was considered to depended to an extent upon economic independence.[179] This provision which finally became article 1(2)[180] forged a link between self-determination and development issues and can be seen as a forerunner of the later moves

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concept, he proposed an amendment stating that "the right of peoples to self-determination shall include the right of every person to participate in action to assure or maintain the free exercise of that right", UN Doc.E/CN.4/L.22/Rev.1, at 7-8, para.65, 14 UN ESCOR, Supp.(No.4), (1951). This was rejected by the slightest margin of six votes to six with six abstentions. There seems to have been considerable support therefore for individual remedies, *see* Buchheit, *supra*, note 167, at 81.

Cassese contends that "internal self-determination... is the synthesis and summa of civil and political rights," *ibid*. However it has been argued that it is more than just a collection of the other rights in that "it goes one step further than individual human rights in that it grants to a group those rights necessary to the preservation of a group identity". White, *supra*, note 167, at 168. Nevertheless it is stressed that this must not imply any form of hierarchy in the rights, *see* Triggs G., "Peoples' Rights and Individual Rights: Conflict or Harmony?" in Crawford J.(ed) The Rights of Peoples, 141 (1988).

176 UN Doc.A/3077, *supra*, note 88, at 34, paras.41-44.

177 Article one of both Covenants was finally adopted by 33 votes to 12, with 13 abstentions.

178 UN Doc.E/CN.4/L.24, (1952). This aspect of self-determination has been termed "economic self-determination", *see* Umozurike, *supra*, note 167, 205-224. Green has commented that the inclusion of this provision "clearly reflected the historic conflict between the underdeveloped and developed countries over the issue of expropriation of private property", *supra*, note 21, at 689.

179 UN Doc.E/2256, at 5-6, paras.45-46, 14 UN ESCOR, Supp.(No.4), (1952). Umozurike comments in this vein that "political self-determination is...incomplete without economic self-determination". *Supra*, note 167, at 224.

180 The General Assembly acknowledged this aspect of the right to self-determination in, GA Resn.1314 (XII), (Dec.12 1958), 13 UN GAOR, Resns, Supp.(No.18), at 27 (1958).

to create a New International Economic Order (NIEO)[181] and a right to development.[182]

It was argued however that the term "permanent sovereignty" was meaningless as states were free to limit their sovereignty as they wished. Moreover the developed States contended that the provision would sanction unwarranted expropriation or confiscation of foreign property without just compensation and might jeopardise international agreements.[183] Accordingly a general limitation clause[184] was included stating that the principle should operate "without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law". Thus the intention seems to have been to subject expropriation under this provision to the current rules of international law.[185]

However Article 25 ICESCR was subsequently adopted which states that "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources".[186] This seems to merely restate the principle found in article 2(1) without the concomitant reference to international law. It has been suggested nevertheless that this does not alter the requirements of article 1 in any substantial way.[187]

The provision on self-determination was finally adopted by the Third Committee by 33 votes to 12 with 13 abstentions and included as article 1 in both Covenants. The question had been raised whether the

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[181] GA Resn.3201 (S-VI), (May 1 1974), 13 I.L.M. 715 (1974). A series of General Assembly Resolutions have dealt with the international economic issues related to development, beginning with the resolution on the Permanent Sovereignty Over Natural Resources in 1962, GA Resn.1803 (XVII), (Dec.14 1962), 17 UN GAOR, Resns, Supp.(No.17), at 15 (1962). Most recently is the Charter of Economic Rights and Duties of States, GA Resn.3281 (XXIX), (Dec.12 1974), 29 GAOR, Resns, Supp.(No.31), at 50 (1974). On the status of these resolutions see Texaco v.Libya (1977) 53 I.L.R. 389.

[182] Declaration on the Right to Development, GA Resn.41/128 (Dec.4 1986) *supra*, note 142. *See*, Baxi U., "The New International Economic Order, Basic Needs and Rights: Notes Towards Development of the Right to Development", 23 Ind.J.I.L., 225 (1983).

[183] UN Doc.A/2929, *supra*, note 67, at 15, paras.19-21.

[184] It is interpreted by Cassese in this light. *Supra*, note 159, 103-4.

[185] It is thought that the current standard at the time was for "prompt, adequate and effective" compensation. These traditional elements of compensation were not challenged until the 1960's.

[186] *Cf.*Article 47 ICCPR.

[187] Dinstein, *supra*, note 168, at 110-111.

provision should have been included in both Covenants or only one of them. If in both, it was further asked whether its meaning differed between them.[188]

E) PROPOSED ADDITIONAL CLAUSES

In considering the draft Covenant, ECOSOC asked the General Assembly to make a policy decision on the desirability of including a special article on the application of the Covenant to Non-Self-Governing and Trust Territories.[189] The General Assembly adopted a resolution directing the Commission to include a territorial provision or "colonial clause" in the Covenant extending application of the Covenant to Trust and Non-Self-Governing Territories.[190] Although such a provision was drafted, the Third Committee decided in 1960 that the suggested territorial clause ("colonial clause") should be deleted from the final draft on the basis that the concept of colonial subjugation had been declared illegal by the Declaration on the Granting of Independence to Colonial Countries and Peoples.[191] This contrasts strongly with the fate of the "federal clause" which eventually became article 28 of the Covenant. Although it was agreed that the absence of a "territorial clause" did not relieve an administering state from the duty to extend the provisions of the Covenant to all its dependent territories, by failing to stipulate that fact means that the obligation is deprived of any effective legal force. It is highly likely nonetheless that even with a territorial clause, States would be prepared to enter reservations as to the application of the Covenant to dependent territories.

Proposals for the inclusion of a reservations clause suffered a similar fate. Although the question was discussed by the Commission, no agreement was possible. The matter was referred to the General

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[188] UN Doc.E/CN.4/649, (1952). Chile for example argued that if self-determination was included in the ICCPR it would apply to countries that had lost their independence; alternatively if it was included in the ICESCR "it would relate to under-developed countries that did not have full control over their natural resources". The majority position finally was that the article should apply equally to all peoples.

Equally that there was no reference to different meanings for each of the two articles it is assumed that they are identical in this respect. The comments of the Human Rights Committee on the subject are of relevance then to the ICESCR.

[189] ECOSOC Resn.303 I (XI), *supra*, note 103.

[190] GA Resn.422 (V), (Dec.4 1950), 5 UN GAOR, Resns, Supp.(No.20), at 42 (1950). This was included in the text of the Covenant, despite the vigorous opposition of the administering powers, by the Commission at its tenth session in 1954. However it was subsequently deleted by the General Assembly Third Committee in 1966, UN Doc.A/6546, 21 UN GAOR, C.3, Annexes, (Ag.Item 62), (1966).

[191] GA Resn.1514 (XV), (Dec.14 1960), 15 UN GAOR, Supp.(No.16), at 66 (1960).

Assembly. After some debate in the Third Committee, it was considered that the general principles of international law were sufficiently clear that it was unnecessary to include an article on reservations.[192]

At certain points in the drafting of the Covenant, a proposal to include an article on the right of property was discussed. A draft article based upon article 17 of the Universal Declaration of Human Rights was put forward,[193] but serious disagreement arose over the issues of expropriation and compensation. After the rejection of a working group proposal, it was decided to postpone *sine die* consideration of the question.[194] Perhaps the most interesting aspect of the proposal was that, despite having strong roots in the Western natural rights tradition, the article should be proposed for inclusion in the Covenant on Economic, Social and Cultural Rights. Had it been included, it might have been associated more with claims for land rights than with the idea of freedom from expropriation.

F) GENERAL OR SPECIFIC PROVISIONS

During the drafting process, an argument that underlay much of the Commission's and Third Committee's debates, was whether or not the provisions of the ICESCR should be outlined in general or specific terms. Broadly speaking there was awareness that provisions should not be so general as to deprive the instrument of any coherent obligation, and not be so specific as to limit the scope of the instrument and render it obsolete a few years thereafter. However, there was considerable difference of opinion over the amount of detail to be included in each provision.

Those States that advocated more general provisions (the Western States) often argued that specific provisions might restrict the scope of the articles,[195] and may well conflict with the standards established by the specialised agencies (particularly the ILO).[196] Indeed, it seems to have been assumed that the specialised agencies would be central to the supervision system, and would themselves provide more detailed

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192 See UN Doc.A/C.3/L.1353/Rev.1 and 2, (UK proposal for an additional article relating to the question of reservations).

193 Proposal of the US: UN Doc.E/CN.4/L.313, (1949).

194 Although the constituent parts of the Sub-Committee proposal were agreed upon, the text as a whole was rejected by seven votes to six with five abstentions.

195 *See e.g.* opposition to the proposal to include a partial definition of article 9, Simarsian (USA), E/CN.4/SR.282, at 13 (1952); Juvigny (France), *ibid.*

196 *See e.g.* Elliot (UK), A/C.3/SR.710, at 143, para.26 (1956); *see also*, Pickford (ILO), E/CN.4/SR.282, at 8 (1952).

standards at a later stage.[197] Other States however, whilst not disputing the putative role of the specialised agencies, argued that the Covenant, as a binding human rights instrument, should at least provide more detailed and precise standards than those found in the Universal Declaration.[198] If otherwise, the Covenant would be open to conflicting and subjective interpretations which would undermine its effectiveness.[199]

Whilst the Covenant is considerably more detailed than some States desired, it still remains fairly general in its terms. On certain occasions, this was merely a result of a failure to agree on appropriate terminology. On other occasions, there was a tendency to discuss questions of implementation at the expense of more detailed consideration of the normative content. It is noticeable moreover, that even where agreement was achieved as to the inclusion of more detailed standards they were accompanied by more restrictive limitations.[200]

## G) MEASURES OF IMPLEMENTATION[201]

The question of implementation was seen as being of primary importance as early as 1946. Following the recommendation of the Nuclear Commission, ECOSOC expressed the view that the purposes of the United Nations "can only be fulfilled if provisions are made for the implementation of human rights and of an international bill of rights".[202] The Commission accordingly began to consider the question

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[197] This is indicated in particular, by the inclusion of article 8(3) which refers to ILO Convention No.87.

[198] *See e.g.* Abdel-Ghani (Egypt), A/C.3/SR.710, at 143, para.20 (1956).

[199] *See e.g.* Shoham-Sharon (Israel), A/C.3/SR.728, at 235, para.1 (1957).

[200] *See e.g.* the inclusion of article 8(2). *Below*, Chapter 7.

[201] See generally Sohn, *supra*, note 21, at 120-169; Schwelb E., "Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants", in Mélanges Modinos, 270 (1968); Schwelb E., "Some Aspects of the International Covenants on Human Rights of December 1966" in Eide A. and Schou A.(eds), International Protection of Human Rights, 103 (1968); Schwelb E., "Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights", 1 H.R.J., 363 (1968); Capotorti F., "The International Measures of Implementation Included in the Covenants on Human Rights Proceedings" in Eide A. and Schou A.(eds), International Protection of Human Rights, 132 (1967); Starr R., "International Protection of Human Rights and the United Nations Covenants", 4 Wisc.L.Rev., 862 (1967).

[202] ECOSOC Resn.9 (II), (June 21 1946), 2 ESCOR, 400-2, (1946).

of implementation in its first session,[203] and formed a working group on implementation to discuss the matter at its second session.[204] At the adoption of the UDHR the General Assembly implicitly endorsed this view by deciding that the drafting of the covenant and measures of implementation should be given priority in the Commission's work.

At the Commission's fifth session in 1949, a number of suggestions were made on the question of implementation. Proposals were put forward, *inter alia*, for the establishment of an International Court of Human Rights, a special Commission with authority to receive petitions from individuals, and a panel of experts to review inter-state complaints on an *ad hoc* basis.[205] The USSR in particular objected to such international implementation mechanisms which it considered to undermine the sovereignty of states. It suggested instead a system of measures to ensure that human rights are guaranteed by the state itself. Nevertheless a majority of the Commission agreed upon the necessity of some form of international supervision with the possibility of inter-state petitions. Opinion was divided however over the issue of individual complaint procedures. In light of the disagreements, the Commission decided to submit a questionnaire on implementation[206] and the proposals to governments for their comments.

At its sixth session[207] in 1950 the Commission continued with its consideration of the mechanisms of implementation. It decided on the establishment of a permanent human rights committee with provision for inter-state (but not individual[208]) complaints.[209] It would seem however that such machinery was considered to be applicable primarily

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[203] The Commission had before it at this stage proposals from a number of states including one from Australia suggesting the establishment of an International Court of Human Rights with original and appellate jurisdiction, UN Doc.E/CN.4/15, 1-2, (1947).

[204] The Working Group on Implementation drafted a proposal for a Standing Committee with power to collect information, receive petitions, and submit unresolved disputes to the ICJ, UN Doc.E/CN.4/53, (1947), UN Doc.E/600, *supra*, note 49, at 33-53.

[205] In addition to these proposals from Australia, France and the UK, Guatemala suggested the establishment of a Commission within each state and a Conciliation Committee mandated with the review of individual petitions with final recourse to the International Court of Justice. *Ibid,* Annex III.

[206] The questionnaire was drafted by the Secretary-General and then amended by the Commission before referral to governments. *Ibid.* Annex III, pt.II.

[207] UN Doc.E/1681, *supra*, note 71.

[208] The suggestion for NGO petitions was rejected by 7 votes to 4 with 3 abstentions; that of individuals by 8 votes to 3 with 3 abstentions.

[209] *Supra*, note 71.

to civil and political rights, as the issue of whether economic, social and cultural rights should be included in a single covenant had not been resolved.[210]

This view was reinforced when, despite being instructed by the General Assembly to draft a single covenant including the whole range of rights, the Commission proceeded to draft a number of articles outlining a system of state reporting under UN supervision[211], which appeared to appertain solely to economic, social and cultural rights.[212] Faced with the unwieldy prospect of having a "covenant within a covenant"[213] (in the sense of having two separate implementation systems), it became somewhat inevitable that the provisions be separated into two covenants. It was primarily the question of implementation that induced ECOSOC to request in resolution 384 C (XIII)[214] that the draft Covenant be divided into two separate instruments. As has been noted above, this recommendation was eventually endorsed by the General Assembly.

Nevertheless discussion of whether the Human Rights Committee procedure should apply to economic, social and cultural rights continued despite the division of covenant. Two proposals were submitted at the Commission's tenth session for the application of such a procedure to selected economic, social and cultural rights.[215] Doubts were expressed about the capability of the Committee to exercise its quasi-judicial functions with regard to rights that were of a programmatic nature.[216] The suggestions were also opposed by the

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[210] Schwelb, "Notes", *supra,* note 201, at 275, n.19.

[211] For a discussion of the rejection of the ILO proposal *see below*, text accompanying notes 232-235.

[212] Much of the discussion centred around the role of the specialised agencies in the reporting process suggesting that it was tailor-made for economic, social and cultural rights, E/CN.4/SR.218, 237-8, 241-3, 236-7, (1951). Similarly the question of whether the petition procedure should apply to only the civil and political rights was to be decided at a later stage, *ibid*, Annex 1, pt.IV.

[213] Humphrey, *supra*, note 21, at 144.

[214] UN Doc.E/2152, at 36, 13 UN ESCOR, Supp.(No.1), (1952).

[215] For the French proposal *see*, UN Doc.E/CN.4/L.338 (1954), 18 ESCOR, Supp.(No.7), UN Doc.2573, para.216, (1954). It was suggested that the States Parties might be given the opportunity of accepting the Human Rights Committee's complaints procedure for specific economic, social or cultural rights as they so desired. Such a procedure would be subject to reciprocal agreement by the States concerned.

[216] Not only was it considered that there was a lack of criteria to evaluate state compliance, it was argued that:

> "Complaints relating to that covenant could only refer to insufficient programmes in the attainment of certain goals and it would be

Specialised Agencies who considered that they were technically better qualified to implement economic, social and cultural rights, and such a procedure would only lead to duplication of work.[217] As with the proposal to authorise ECOSOC to receive individual petitions,[218] the suggestions were withdrawn before being taken to vote.[219]

The Third Committee then turned to the question of the implementation of the Covenants in the following year at the eighteenth session.[220] To aid it in this task, the Secretary-General had compiled an explanatory paper on measures of implementation as directed by the General Assembly.[221] The review continued at the twenty-first session where there was general agreement as to the system of implementation suggested by the Commission on Human Rights.[222]

At this late stage the US and Italy put forward amendments providing for the establishment of an expert committee to review the State reports.[223] These were largely based upon the measures recently adopted for the International Convention on the Elimination of All

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impossible for the committee to determine what the rate of progress in any particular case should be."
UN Doc.A/2929, *supra*, note 67, at 124, para.41.

[217] *Ibid*, para.40. However it was stressed by the proponents of the suggested mechanism that in case of overlap the Specialised Agencies would have priority. Moreover not all the rights in the Covenant were covered by the Specialised Agencies, nor would all States Parties to the Covenant be members of the Agencies, *ibid*, para.42.

[218] The proposal was subsequent to a General Assembly draft resolution submitted to the Commission by resolution 737 B (VIII) proposing that the Commission draft provisions recognising the right of petition of groups of individuals and NGOs.

[219] *See,* UN Doc.E/2573, *supra*, note 83, at 21-22.

[220] UN Doc.A/5365, *supra*, note 92, at 14-25.

[221] GA Resn.1843 B (XVII), (Dec.19 1962), 17 UN GAOR, Resns, Supp.(No.17), at 35 (1962). For the Explanatory Paper *see*, UN Doc.A/5411 and Add.1-2, 18 UN GAOR, C.3, Annexes, (Ag.Item 48), 1-13 (1963).

[222] UN Doc.A/6546, *supra*, note 190, at 7-26.

[223] For the US proposal *see*, A/C.3/SR.1401, at 9-10, paras 13-14 (1966). It proposed that the reports should be considered by a "Committee on Economic, Social and Cultural Rights" consisting of independent experts elected by States Parties. It is considered that the independence of the proposed Committee and the fact it would have drawn on expert individuals from States Parties and not ECOSOC as a whole, were matters that recommended the proposal, *see* Alston P., "The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights", 18 Columb.J.Trans.L, 91 (1979).

Forms of Racial Discrimination.[224] To an extent the opposition to the US proposal was a reaction to the recent opinion of the International Court of Justice in the South West Africa Cases.[225] Following that decision, in the developing world at least, such "expert" bodies were to some extent discredited. The majority resisted the proposal on the grounds that it would unduly restrict ECOSOC's discretion as the main supervisory body and that it would encroach upon the work of the Specialised Agencies in the area of economic, social and cultural rights. In light of the disagreement the proposals were subsequently withdrawn before going to the vote. It was specifically recognised nevertheless that the withdrawal of the amendments would not prevent ECOSOC establishing in future "such other Commissions as may be required for the performance of its functions".[226] This might include the establishment of such an expert committee if it was considered necessary for the administration of the reporting system.[227]

H) THE ROLE OF THE SPECIALISED AGENCIES.

The ILO, UNESCO, the World Health Organisation (WHO) and the Food and Agriculture Organisation (FAO) played an important role in the drafting of the International Bill of Human Rights and particularly the International Covenant on Economic, Social and Cultural Rights.[228] This was in part due to the effectiveness of their lobbying system[229] and to the natural part they played in the implementation of human rights.[230] Each of the organisations submitted

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[224] GA Resn.2106, (Dec.21 1965), 20 UN GAOR, Supp.(No.14), (1965). 660 U.N.T.S. 195.

[225] South West Africa Cases, Second Phase, (1966) ICJ Rep. 6. The ICJ decided that individual members of the League of Nations had no legal standing to enforce the terms of South Africa's mandate over South West Africa.

[226] Article 68 UN Charter.

[227] *Cf.* Rumbos (Venezuela), A/C.3/SR.1399, at 126, para.12 (1966).

[228] *See generally*, Alston, *supra*, note 223, at 79-92; Humphrey, *supra*, note 21, at 141-149.

[229] *See,* Humphrey, *supra*, note 21, at 85.

[230] "Human Rights are not a separate part of the activities of the International Labour Organisation (ILO), but lie at the very heart of its mission". Wolf F., "Human Rights and the International Labour Organisation", in Meron T.(ed) Human Rights in International Law, 273 (1985); *see also*, Jenks C., "The International Protection of Trade Union Rights" in Luard E.(ed), The International Protection of Human Rights, 210 (1957); Landy E., The Effectiveness of International Supervision: Thirty Years of ILO Experience, (1966); Valticos N., "The Role of the ILO: Present Action and Future Perspectives", in Ramcharan B.(ed), Human Rights Thirty Years After the Universal Declaration, 211 (1979). The 1944 Declaration of Philadelphia as incorporated into the

detailed proposals for articles within their respective fields of operation and attended the relevant drafting sessions.[231]

The ILO, being somewhat resistant to any interference in the scope of its jurisdiction, initially resisted the inclusion of economic and social rights in the Covenant.[232] When this became an inevitable outcome, it argued that the provisions should be drafted only in a general form.[233] Again with regard to implementation, it stressed the necessity of preserving the primacy of the ILO procedures in relation to economic and social rights. In 1951, it actually proposed an implementation system in which the ILO itself would review the state

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ILO Constitution (annex II(a)) recognises the principle that "all human beings, irrespective of race, creed or sex, have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity." 15 UNTS.35; amended 7 UST.245.

The Constitution of UNESCO similarly states that the purpose of the Organisation is to:

> "contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world... by the Charter of the United Nations."

UNESCO Constitution Art.1(1), 4 UNTS 275. *See generally*, Saba H., "UNESCO and Human Rights" in Vasak K. and Alston P.(ed), The International Dimensions of Human Rights, 401 (1982); Marks S., "UNESCO and Human Rights: The Implementation of Rights Relating to Education, Science, Culture and Communication" 13 Tex.I.L.J., 35 (1977); UNESCO Secretariat, "UNESCO and the Challenges of Today and Tomorrow: Universal Affirmation of Human Rights" in Ramcharan B.(ed), Human Rights Thirty Years After the Universal Declaration, 197 (1979); Alston P., "UNESCO's Procedures for Dealing with Human Rights Violations", 20 Santa Clara L.R., 665 (1980).

Paragraph 3 of the preamble to the WHO Constitution states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being". The constitution of the FAO makes no direct reference to human rights, but paragraph 1 of its preamble envisages the improvement of the "common welfare" through higher nutrition levels and living standards. 14 UNTS 185.

[231] From the records of the Commission sessions it is apparent that the ILO was initially the most involved (having attended from the first Commission session), UNESCO became involved at a later stage. The WHO and FAO, despite submitting proposals, seemingly did not become significantly involved in the debate at any stage.

[232] Alston, *supra*, note 223, at 84. It has been argued that the ILO was motivated by a desire to be the principle organ in the promotion of economic and social rights. *See*, Humphrey, *supra*, note 21, at 12 and 141.

[233] The ILO in this respect fell into one of two schools of thought:

> "One school held that each article should be a brief clause of a general character; another school was of the opinion that each right, its scope and substance, its limitations, as well as the obligations of the State in respect thereof, should be drafted with the greatest precision."

UN Doc.A/2929, *supra*, note 67, at 8, para.13. It would seem that the ICESCR contains a mixture of these approaches. Compare for example Article 9 and Article 13.

reports.[234] Given that the Covenant deals with issues that extend beyond the competence of the ILO, it is appropriate that this proposal was rejected in favour of the Secretariat draft.[235]

The other Specialised Agencies did not share the view of the ILO in this respect. Not only did they actively encourage the addition of certain provisions[236] but also desired that they be given sufficient specificity.[237] However as regards implementation, like the ILO, they also expressed concern about their jurisdiction.[238] Thus although in principle UNESCO called for the "speediest and fullest possible implementation of human rights in matters of education and culture",[239] it was opposed to the creation of an expert committee to review state reports.

The role of the Specialised Agencies in the drafting of the Covenant was thus extremely mixed. The duality of their position in supporting the human rights initiatives at the same time as attempting to preserve their exclusive jurisdictional competence, meant that full cooperation was never possible.[240]

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[234] UN Doc.E/CN.4/AC.14/1, (1951).

[235] The Secretariat plan for implementation was inspired by the technical assistance program and "the idea that it was better to help governments to fulfil their obligations than to penalise them for violations", Humphrey, *supra*, note 21, at 143.

[236] *See e.g.* the fact that UNESCO favoured the inclusion of an article on compulsory primary education was considered influential in its adoption. UN Doc.A/2929, *supra*, note 67, at 114, para.51.

[237] The Secretary-General commented with regard to Article 13 on the right to health:

> "In the drafting of the text of article 13, which is more detailed than the preceding articles, consideration was given to the attitude of the World Health Organisation (WHO), which favoured the inclusion in the article of a certain degree of detail."

UN Doc.A/2929, *supra*, note 67, at 111, para.33. A similar comment was made on article 14 in relation to UNESCO, ibid, at 112, para.36.

[238] The ILO, FAO, WHO and UNESCO all had existing reporting procedures in their respective fields. For a comparison of the different agency reporting mechanisms *see*, UN Doc.A/5411 and Add.1-2, *supra*, note 221, paras.1-82.

[239] UN Doc.A/2907, 10 UN GAOR, C.3, Annexes, (Ag.Item 28), Pt.1, at 2, (1955).

[240] The respect given to the Specialised Agencies with regard to their work is well reflected in the ICESCR. Not only do they figure substantially in the provisions on implementation (articles 16-23), but article 24 provides that "Nothing in the present Covenant shall be interpreted as impairing the provisions ... of the constitutions of the specialised agencies... in regard to the matters dealt with in the present Covenant."

## I) APPROACHES TO HUMAN RIGHTS DURING THE DRAFTING PROCESS

Many of the disputes that arose during the drafting of the Covenant were underpinned by political and ideological conflicts. To a great extent, the whole question of human rights was used as a means of pursuing the controversies between East and West, and between North and South. This is evidenced by the quite discrete approaches to human rights displayed by the different political groupings.

Broadly speaking, three main groupings of States have been identified: the Western States, the Socialist States and the Developing States. Categorisation of States into these three groups is something of a generalisation as it assumes an ideological homogeneity over a wide range of issues. It also has to be noted that States' policy did not remain consistent over the period of the drafting. During that twenty year period, both domestic changes (such as changes in government) and external changes (such as the shifts in the balance of power within the United Nations[241]) affected the external policies of most States.

It is difficult to identify a coherent approach as regards the developing States (or Third World States[242]). Not only did the majority of such states only emerge onto the international scene during the second decade of drafting, but it is by definition a heterogenous body.[243] However, there is no doubt that the newly-independent African and Asian States did exercise a certain amount of influence in the development of human rights. This is seen particularly by the emphasis on problems of colonialism and racism[244] which manifested itself, in human rights terms, in the inclusion of an article on self-determination in the Covenants and the Convention on Racial Discrimination.[245] Such States generally supported the inclusion of economic, social and cultural

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241 *See*, Green J., "Changing Approaches to Human Rights: The United Nations, 1954 and 1974", 12 Tex.I.L.J., 223 (1977).

242 The use of the term the "Third World" is not without its problems. Gros Espiel comments that the ambiguity of the term "complicates to a high degree all analysis of the evolution of human rights classified under this term". Gros Espiel H. "The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches", in Ramcharan B.(ed) Human Rights Thirty Years After the Universal Declaration, 41, at 48 (1979).

243 Tyagi Y., "Third World Response to Human Rights", 21 Ind.J.I.L., 119, at 137 (1981).

244 Vincent R., Human Rights and International Relations, 80 (1986).

245 GA Resn.2106 (XX), *supra*, note 224.

rights within the Covenant, and as such associated themselves with the position of the socialist States.[246]

The Latin American States however, took a view distinct from that of their African and Asian counterparts.[247] They were strong advocates of including human rights provisions in the UN Charter[248] and pushed for the drafting of a bill of rights. They are said to have had a "fully-fledged" natural rights conception which made no distinction between civil and political rights and economic, social and cultural rights.[249]This is illustrated by their insistence on the inclusion of economic, social and cultural rights in the UDHR and the Covenant. Similarly they argued for the retention of a single Covenant[250] implicitly necessitating identical implementation procedures.

The Western States in comparison advocated a "liberal-democratic" conception of human rights emphasising individual liberty and governmental restraint. In the drafting process they accordingly argued for a minimum catalogue of "traditional" civil and political rights. When faced with the inevitable fact of economic, social and cultural rights they pushed for the separation of the rights into two covenants. Opposition to "new" rights also manifested itself in the Western Powers objections to an article on self-determination. This was particularly apparent in relation to the old colonial powers such as Belgium and the UK. Their position however shifted during the period of drafting, from one of outright opposition to acceptance of the idea in so far as it underlined the necessity for representative and democratic government.[251]

On the question of implementation the Western States varied quite widely in their views. Although the majority supported in principle strong international implementation procedures, they were not willing to go as far as the establishment of an International Court of Human Rights as proposed by Australia.

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[246] Cassese sees this as being the position as far as Self-Determination is concerned. *Supra*, note 156; Vincent, *supra*, note 244, at 77. *Contra*, Morphet, *supra*, note 159, at 69.

[247] Gros Espiel, *supra*, note 242, at 49.

[248] *Supra* text accompanying note 29.

[249] Morsink, *supra*, note 9; Tolley, *supra*, note 21.

[250] De Alba (Mexico), A/C.3/SR.360, at 81, para.44 (1951); Valenzuela (Chile), A/C.3/SR.362, at 93, para.49 (1951). This was not the view of the Third World as a whole however. D'Souza (India), E/C.3/SR.361, at 86, para.31 (1951), and Malik (Lebanon), E/C.3/SR.370, at 139, para.36-40 (1951), both took the Western view and advocated the separation of the rights into two covenants.

[251] *See*, Pomerance, *supra*, note 166, at 38-39.

The position of the US, although generally similar to that of the European States, was dominated by internal politics. Although the US was at the forefront of international concern over human rights during the Presidency of Roosevelt and up to the adoption of the UDHR,[252] in the early 1950's, internal political pressures[253] spearheaded by the Bricker Amendment movement[254] lead to a change in US Policy regarding the Human Rights Covenants. Accordingly in 1953, J.F. Dulles announced that the US government "did not intend to become a Party to any such covenant or present it as a treaty for consideration by the Senate".[255] In the following period until about 1960, the US became

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[252] Falk R., "Ideological Patterns in the United States Human Rights Debate: 1945-1978", in Hevener (ed), The Dynamics of Human Rights in US Foreign Policy, 29, at 33 (1981).

[253] It is thought that a substantive and an institutional concern were operative here. The substantive concern was about the increasing US involvement internationally. The onset of the Cold War marginalised human rights issues and increased concern about the US domestic jurisdiction. The institutional concern was over the distribution of power between the federal government and the constituent States. *See,* Kaufman N. and Whiteman D., "Opposition to Human Rights Treaties in the US Senate: The Legacy of the Bricker Amendment", 10 Hum.Rts.Q., 309, at 312-318 (1988). This issue had recently been brought to life by the decision of the lower court in Sei Fujii v. California, 217 P.2nd 481 (Cal.Dist.Ct.App. 1950) where it was found that the UN Charter was equal in rank to any federal statute and therefore superseded state legislation. *See,* Buergenthal T., "The US and International Human Rights", 9 H.R.L.J., 141 (1988).

[254] The Bricker Amendment sought to amend the US Constitution to make it impossible for the US to adhere to the Covenants. Principally it would have eliminated self-executing treaties so that an Act of Congress would be necessary for the provisions to become part of domestic law. This would entail that Congress would be unable to implement a treaty unless that legislation would have been within the powers of Congress in absence of a treaty. Implicitly then the decision of the Supreme Court in Missouri v. Holland, 252 U.S. 416 (1920) which maintained executive treaty-making power over State concerns, would be reversed. *See*, Henkin "'International Concern' and the Treaty Power of the United States", 63 A.J.I.L., 272, (1969). Buergenthal, *supra*, note 253, at 145-152.

It is sometimes suggested that the Bricker Amendment was the result of a general fear that eventually human rights treaties would deal with the condition of blacks in the US. Ferguson C., "The United Nations Human Rights Covenants: Problems of Ratification and Implementation", 62 Proc.Am.Soc.I.L, 83, at 91 (1968).

[255] Dulles J., Hearings, Subcom., Senate Judiciary Comm., 83rd Cong., 1st Sess., at 824 (1953). *See* Blaustein J., "Human Rights: A Challenge to the United Nations and To our Generation", in Cordier A.(ed), The Quest For Peace, 315, (1962); Green, *supra*, note 21, at 699-705.

It was considered that a treaty was not the "proper and most effective way to spread throughout the world the goals of human liberty". The US committed itself to a policy of "persuasion, education and example rather than formal undertakings which commit one part of the world to impose its particular social and moral standards upon another part of the world community". As part of this new initiative the US outlined

overtly unwilling to compromise its domestic jurisdiction,[256] and its participation in the drafting process seriously decreased. It is thought that the disinterestedness of the US was instrumental in the acceptance of the USSR position on two provisions, the right to property and the federal state clause.[257] It was not until the early 1960's (an era of "expansive liberalism"[258]), that the US once again took up the human rights cause, by which time much of the drafting had already been concluded.[259]

The Socialist States (primarily of Central and Eastern Europe[260]) tended to view human rights in terms of the individual within society. That philosophy considered that rights are acquired not be reason of a person's humanity but as a citizen or social being. The individual in this sense is not in competition with the State but is endowed with rights and duties by the State.[261] The corollary of this philosophy is that emphasis is placed upon economic, social and cultural rights as being essential to

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what it termed a Human Rights Action Program. This consisted of three programmes: a reporting system for those rights found in the UDHR, a system of special studies, and a system of advisory services in the field of human rights. The action program was taken up by the UN and has formed part of its work in the field of human rights since.

[256] Its policy on implementation at the time was one of inter-state procedures. It had previously supported the idea of individual petitions, UN Doc.E/CN.4/21, at 95 (1947), and later returned to such a policy.

[257] Looper R., "Federal State Clauses in Multilateral Instruments", 32 B.Y.I.L., 163, at 197 (1955-6).

[258] Falk, *supra*, note 252, at 33.

[259] The US has nevertheless still failed to ratify either of the Covenants. Several human rights treaties have been submitted to the Senate for ratification including the Covenants but approval has not often been forthcoming. *See* McChesney A., "Should the US Ratify the Covenants? A Question of Merits, not of Constitutional Law" 62 A.J.I.L., 912 (1968); Buergenthal, *supra*, note 254, at 152-163. The US has however recently ratified the Genocide Convention, *see* 80 A.J.I.L., 612 (1986). It is thought that the constitutional issues that surrounded the Bricker Amendment are still alive presenting strong opposition to ratification of human rights treaties as a whole. *See*, Kaufman and Whitman, *supra*, note 253, at 309. In addition it is unlikely that there will be sufficient domestic support for the ICESCR given the ideological opposition to such rights within the US. *See*, Howell J., "Socioeconomic Dilemmas of US Human Rights Policy", 3 Hum.Rts.Q., 78 (1981); Good M., "Freedom From Want: The Failure of United States Courts to Protect Subsistence Rights", 6 Hum.Rts.Q., 335 (1984).

[260] Yugoslavia however quickly made clear its non-aligned position.

[261] *See generally*, Rees A., "The Soviet Union", in Vincent R.(ed), Foreign Policy and Human Rights, 61 (1986); Przetacznik, *supra*, note , at 239-251; Kartashkin V., "The Socialist Countries and Human Rights", in Vasak K. and Alston P.(eds), The International Dimensions of Human Rights, 631 (1982).

the establishment of the Socialist consciousness.[262] The Socialist States thus fought for the inclusion of economic, social and cultural rights in the Covenants and the UDHR, presenting an ideological opposition to the West at the level of human rights.

Following the US abstention from proceedings in 1953 the USSR exercised considerable influence over the drafting process. The overt effects of its policy can be seen in the position adopted regarding the Federal State and Colonial Clauses.[263] Similarly the inclusion of the provision on Self-determination was a matter strongly advocated by the Socialist States generally.[264]

With regard to implementation, the Socialist States' position was characterised by two propositions.[265] First they considered human rights as matters "essentially within the domestic jurisdiction" of States in accordance with article 2(7) of the UN Charter.[266] Secondly they considered that States were the only real subjects of international law. Thus although the Socialist States were willing to comply with a reporting procedure at a State level, they resisted any form of complaints procedure especially those relating to individuals.

## IV) A DISRUPTED DRAFTING PROCESS

Many of the imperfections in the final text of the Covenant may be put down to the confused and disrupted nature of the drafting process. The text of the Covenant was drafted first by the Commission

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[262] Rees, *ibid,* at 62.

[263] No exception is made in either Covenant for the application of the provisions to Federal States or Colonial Territories. It is interesting to note that the USSR itself was a federal state.

[264] The Soviet view on self-determination was to consider it as applying solely to colonial territories, *see above* note 167.

[265] *See*, Tedin K., "The Development of The Soviet Attitude Toward Implementing Human Rights Under the UN Charter", 5 H.R.J., 399 (1972); Korowicz M., "Protection and Implementation of Human Rights Within the Soviet Legal System", 53 Proc.Am.Soc.I.L., 248 (1959); Jhabvala F., "The Soviet-Bloc's View of the Implementation of Human Rights Accords", 7 Hum.Rts.Q., 461 (1985).

[266] The issue is one of general interest, *see e.g.* Fawcett J., "Human Rights and Domestic Jurisdiction", in Luard E.(ed), The International Protection of Human Rights, 286 (1957); Bossuyt M., "Human Rights and Non-Intervention in Domestic Matters" 35 Rev.I.C.J., 45 (1985); Bernhardt R., "Domestic Jurisdiction of States and International Human Rights Organs", 7 H.R.L.J. 205 (1986); Henkin L., "Human Rights and 'Domestic Jurisdiction'", in Buergenthal T.(ed), Human Rights, International Law and the Helsinki Accord, 21 (1977); Ermacora F., "Human Rights and Domestic Jurisdiction" 124 Hague Receuil, 371 (1968).

and then revised by the Third Committee.[267] The time-lag between the discussion of the provisions by each body did nothing to improve the quality of the final text. In many cases the same arguments and proposals were put forward in both bodies. Earlier decisions were often reversed and amendments deleted. In only a small number of cases did the Third Committee profitably extend the debate initiated in the Commission.

Perhaps the greatest obstacle in the drafting process was the ideological conflict that underlay many of the issues and debates. Provisions often had to be drafted in the face of direct opposition by certain States. Indeed it is perhaps only due to the fact that the two Covenants were linked in the drafting process, that agreement upon a final text was possible. However, this in itself was a problem. That both Covenants had to be completed for adoption at the same time meant that the drafting of each took on a piecemeal character and became unduly extended.

Despite the length of time taken in the drafting of the Covenants, certain provisions clearly suffered from being discussed too little.[268] At other times, although there was sufficient discussion, agreement was only possible when the provision was left as a very general statement or subjected to excessive limitations.[269] Moreover, even where there was agreement as to a certain wording, there was often no common understanding of the meaning.[270]

It was the expressed intention of the drafters that the Covenants should be subject to a "rationalising" process before being presented for adoption. This would have ironed out the inconsistencies within and between the two Covenants. That this did not take place has meant that the Covenant has been left with a number of provisions that the drafters intended to revise. In particular, the right to an adequate standard of living was retained in article 11 despite being thought to be so general as to be included in Part II of the Covenant.[271]

The disruptive effect of the drafting process is evident in the curious mixture of rights and obligations, the vastly different form of

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[267] *See above*, text accompanying notes 67-98.

[268] *See e.g.* article 7(b) on safe and healthy working conditions. *Below* Chapter 6.

[269] For example agreement on the right to strike was only possible with the limitations provided in article 8(2), which are more restrictive than those provided for by the ILO. *See below*, chapter 7.

[270] For example there was no final agreement as to the meaning of the term "workers" in article 7(a). *See below*, chapter 6.

[271] *See below*, chapter 8.

the various articles, and the excessively casual and inconsistent use of terminology. A few examples illustrate these points. First, whereas article 9 is relatively short, this is not the case with articles 11 or 13. Article 9 is restricted to a brief statement of the right concerned, whilst article 11 (like articles 6, 12, 13 and 15) contains in addition, an outline of steps that should be taken by States in the realisation of the right.

Secondly, although a number of articles demonstrate a clear pattern of wording, there a several unexplained exceptions. Thus, many articles begin with the phrase "The States Parties to the present Covenant recognize the right of everyone...". Articles 3 and 8, on the other hand, use the term "ensure", articles 13(3) and 15(3) use the term "respect", article 2(2) uses the word "guarantee" and there is no reference to rights at all in articles 10 or 14. This presents particular difficulties in so far as the main obligation clause (article 2(1)) envisages progressive realisation of the "rights recognised".

Finally, whereas most of the rights within the Covenant specifically relate to the individual, articles 8(1)(b) and (c) refer to the rights of trade unions. Whether or not the inclusion of collective rights is appropriate in a human rights instrument of this kind,[272] there was no need to state them in that manner. As is clear from the 1988 Additional Protocol to the American Convention on Human Rights,[273] such rights could have been inferred from the individual right to join and form trade unions. The inclusion of the rights as they stand, however, shows carelessness or lack of foresight on the part of the drafters.

## V) THE SCOPE AND LEVEL OF PROTECTION OFFERED

One of the most significant aspects of the Covenant is the material scope of the protection offered. Not only does the Covenant deal with labour rights traditionally associated with the ILO, but also offers protection in the social and cultural fields. It is primarily in the latter fields that the Covenant may be seen to stand out in comparison with the

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[272] For an argument against the inclusion of collective rights *see*, Sieghart, *supra*, note 171, at 164.

[273] P.A.U.T.S.69. Article 8(1) of the Protocol states:

"1. The States Parties shall ensure:

a. The right of workers to organise trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations of confederations, or to affiliate with those that already exist, as well as to form international trade union organisations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;"

European Social Charter.[274] In particular, it contains the right to education, the right to cultural life, the right to food and clothing, and a specific statement of the right to housing which are not to be found in the ESC. On the other hand it does suffer from failing to identify specific vulnerable groups (apart from women and children) who might be considered to need special protection. In particular, one might mention aliens, migrant workers, the elderly,[275] and those with physical or mental disabilities.

To some extent, these defects are remedied by the scope of the Covenant *ratio personae*. Whereas the ESC is restricted to nationals of Contracting parties, the Covenant explicitly relates to "everyone". This is apparently confirmed by article 2(3) which permits "developing states" to determine the extent to which they would guarantee the economic rights to non-nationals. The clear implication here is that aliens automatically have equal social and cultural rights in all cases, and equal economic rights in all developed states. It might be assumed in light of this fact, that articles on the rights of aliens and migrant workers did not need to be explicitly stated.

Whilst the Covenant certainly does have an impressive breadth of coverage, it is often framed in excessively general terms. For example, whereas the Covenant provides for a bare statement of the right to social security in article 9, this compares unfavourably with the three articles to be found in the ESC.[276] Whether or not article 9 is read to include the various elements found in the ESC is ultimately left to the vicissitudes of the supervision system.

The generality and breadth of the Covenant's terms, whilst allowing for a considerable amount of constructive and dynamic interpretation, does place a heavy burden on the supervisory body whose role inevitably becomes one of developing and defining the normative content. Whilst the drafters clearly envisaged a continuing process of standard setting (whether under the auspices of the ILO or otherwise), the fact that this must take place after ratification leaves the way open to conflicts in interpretation that might ultimately undermine the supervision process as a whole. The degree to which this may be

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274 The European Social Charter (1961), 529 U.N.T.S. 89. For the scope of the ESC *see*, Harris D., The European Social Charter, 192-199 (1986).

275 It was argued during the drafting of article 9 that the rights of the elderly should be provided for in a separate convention. *See e.g.* Mehta (India), E/CN.4/SR.282, at 10 (1952).

276 The European Social Charter provides for the right to social security (article 12), the right to social and medical assistance (article 13) and the right to benefit form social welfare services (article 14).

avoided depends upon the skill and commitment of the supervisory body.

Similar comments may be made about the level of protection afforded by the Covenant. The need for additional standard setting not only relates to defining the material scope of the provisions, but also the establishment of "benchmarks" or levels of compliance. Thus, although States are under a general obligation to realise the right to adequate housing in a progressive manner (under article 11), standards have to be set to ensure that the amount and quality of housing available is consonant with the level of development of the country concerned. In absence of concrete targets of achievement, the possibility of relying upon the Covenant as a means of protection becomes considerably more restricted.

An important comparison between the Covenant and the ESC may be made here. Whereas the Covenant provides for the progressive achievement of all the rights, the ESC allows States to contract into the realisation of selected rights. Each system has its benefits and disadvantages. The ESC benefits from allowing for (in theory at least) a single standard of achievement for each right but suffers from allowing a more restricted coverage of rights. The Covenant on the other hand, whilst allowing more lee-way in the level of protection, benefits from providing for a more immediately extensive coverage.

## VI) CONCLUSION

Although the International Bill of Rights was intended to form the backbone of an international human rights regime following the Second World War, the drafting process became a focal point of the political confrontation between East and West. Effectively the ideological dispute can be said to be responsible for the arbitrary division of the draft convention into two different Covenants, the weakening of the supervisory mechansisms envisaged for the ICESCR, much of the textual confusion that remains within the Covenant, and the unduly protracted nature of the drafting process.

# CHAPTER TWO: STATE OBLIGATIONS

*Article 2(1)*

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

## I) INTRODUCTION

Article 2(1) could be described as the linch-pin of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In describing the duties incumbent upon States Parties in the realization of the rights contained in the Covenant, it is of critical importance both as to the substance and implementation of the Covenant as a whole. Quite appropriately the Committee has produced a General Comment on the subject of article 2(1) which has formed the basis for the Committee's approach to the Covenant in general.

## II) THE NATURE OF THE OBLIGATIONS

Before examining the text of article 2(1) specifically, it is intended to consider the general nature of the obligations within the Covenant. Two particular methods of analysis have been mentioned in the Committee's work: one centring upon obligations of conduct and result, the other upon obligations to respect, protect and fulfil.

### A) OBLIGATIONS OF CONDUCT AND RESULT

Article 2(1) has been variously interpreted as imposing "obligations of conduct" or "obligations of result" upon the States Parties. An "obligation of conduct" as understood by the International Law Commission is one where an organ of the State is obliged to undertake a specific course of conduct, whether through act or omission, which represents a goal in itself. It is to be contrasted with an "obligation of result" which requires a State to achieve a particular result through a course of conduct (which again can be act or omission), the form of which is left to the State's discretion.[1] On this analysis, the International Law Commission came to the conclusion that Article 2(1) ICESCR imposed an obligation of result.[2]

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1 Report of the International Law Commission, 2 Yrbk.I.L.C., 11-30, (1977).

2 *Ibid*, at 20, para.8.

To a large extent the difference between the two forms of obligation is not as great as first appears. In cases of obligations of conduct, there will often be an objective towards which that conduct is aimed. On the other hand, obligations of result will invariably require a specific course of action.[3] The classification of a particular obligation within one category or the other will rest primarily upon whether or not the objective is spelt out and the degree of specificity given to the conduct required.

The obligation "to take steps" in article 2(1) is particularly ambiguous in this respect. It is arguable that it has to be read in the light of the requirement that the steps be taken "with a view to achieving... the full realization of the rights recognized" in the Covenant. As such, the reference to a clearly stated objective would seem to place the obligation in the category of an "obligation of result". However, to the extent that the steps to be taken are outlined both in article 2(1) and in the substantive provisions of the Covenant, it could also be said to incorporate an obligation of conduct.[4]

Article 2(1) is perhaps best explained, as the Committee has noted,[5] as incorporating a mixture of the two types of obligation.[6] The fundamental objective of the Covenant is undoubtedly the full realisation of the rights contained within. This itself may involve both obligations of conduct and result. For example, article 6, which provides for the right to work, requires steps to be taken towards the achievement of full employment (an obligation of result), but also prohibits forced labour (an obligation of conduct).[7]

In so far as the rights within the Covenant are not capable of immediate fulfilment, States are required to undertake certain obligations of conduct with a view to their progressive achievement. It is one of the anomalies of the Covenant that such obligations of conduct

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[3] This was readily recognised by the International Law Commission who commented that "every international obligation has an object or, one might say, a result...[c]onversely, every international obligation, even if it is of the type called an obligation "of result", requires of the obligated State a certain course of action". *Ibid,* at 13, para.8.

[4] It is worth noting that the realisation of article 8 is primarily an obligation of conduct. States are obliged to follow a course of conduct that ensures *inter alia* the right of everyone to form and join trade unions.

[5] General Comment No.3 (1990), UN Doc.E/1991/23, Annex III, UN ESCOR, Supp.(No.3), at 83 (1991). *See also*, Turk, E/C.12/1990/SR.21, at 4, para.7.

[6] *See e.g.* Alston P. and Quinn G., "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", 8 Hum.Rts.Q., 156, at 165 (1987).

[7] *See below*, Chapter 5.

are spelt out in the substantive articles themselves.[8] However, these obligations may themselves be presented as "sub-norms" or "intermediary goals" in their own right. For example, article 6 provides for the recognition of the right to work. Paragraph 2 of that article outlines the "steps to be taken" including *inter alia* "technical and vocational guidance". Although described as a "step", it is possible to view article 6(2) as providing for a right to vocational guidance as a sub-norm of the right to work itself.[9]

As will be seen below, the Committee has tended to concentrate upon obligations of conduct. In so far as it has never actually conceded that a State has achieved the full realisation of the rights (if indeed that were possible), the Committee has focused its attention upon the measures undertaken towards that objective. In doing so, the Committee has gone some way towards outlining certain principles that should govern States conduct in the implementation of the rights. In particular the Committee, in its early stages of work, concentrated upon the procedural adequacy of State action. Its initiatives centred, specifically, upon the establishment of norms associated with the reporting requirement of States Parties under article 16.[10] Theoretically the obligations incumbent upon States under article 16 are distinct from those found in article 2(1), in that they relate to the supervision process as opposed to the substantive realization of the rights. However, in so far as both the domestic implementation of the Covenant and its supervision involve similar monitoring obligations, this differentiation loses much of its force. Accordingly, a convergence between the procedural and substantive obligations of States Parties is evident, conditioned primarily by an approach that emphasises the process or conduct of State action rather than the result achieved.[11]

Although the approach of the Committee at this stage is legitimate it must not be lost from sight that the objective of the State obligation is clearly stated in article 2(1), namely the "full realization of the rights recognized" in the Covenant. The compliance of a State with its

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[8] This forces the conclusion that an analysis of the obligations within the Covenant cannot be achieved merely by looking at article 2(1).

[9] *See below*, Chapter 5.

[10] Article 16 ICESCR requires States Parties to submit reports on the measures adopted and the progress made in achieving observance of the rights recognised in the Covenant. This trend can be seen in the Committee's General Comment No.1 on the purpose of the reporting guidelines at its Third Session in 1989. UN Doc.E/1989/22, Annex III, UN ESCOR, Supp.(No.4), at 87-89, (1989).

[11] Thus a member of the Committee referred to obligations of conduct by way of reassuring the State Party concerned that the articles did not have to be implemented immediately in full. *See*, Alston, E/C.12/1988/SR.13, at 5, para.19.

obligations ultimately is to be measured not merely by the fulfilment of some procedure, but by the degree to which it has achieved the full realization of the rights.[12]

B) OBLIGATIONS TO RESPECT, PROTECT AND FULFIL

A more useful method of analysis adopted by members of the Committee[13] has been to view the obligations in terms of the tripartite typology utilised by a number of commentators, *viz* the obligations to respect, protect and fulfil.[14] This approach provides a detailed analytical framework describing obligations in the context of human rights,[15] and serves to counteract some of the traditional assumptions[16] that place economic, social and cultural rights at a lower level than the more civil and political rights.[17]

According to the tripartite typology, all human rights entail three forms of State obligation. The "obligation to respect" requires the State to abstain from interference with the freedom of the individual. The "obligation to protect" refers to the duty on the State to prevent other individuals from interference with the rights of the individual. The

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12 This has to some extent been recognised by members of the Committee. See for example the comment of Miss Taya in which she recognised that attention should be paid to the "ideal situation" in the achievement of economic, social and cultural rights. E/C.12/1990/SR.4, at 2, para.2.

The International Law Commission commented in this regard that "there is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation". *Supra,* note 1, at 11. Article 21 (1).

13 Although there is considerably concurrence in the Committee as to the utility of this method of analysis, there appear to remain a few doubts. It was commented, for example, at the Committee's fourth session that there was "no consensus within the Committee as to the very nature of economic, social and cultural rights". Alston, E/C.12/1990/SR.4, at 10, para.49.

14 The tripartite typology of obligations is to be found in Mr Eide's presentation on the Right to Food at the Committee's General Discussion at its Third Session. E/C.12/1989/SR.20. *Cf also*, Centre for Human Rights, Right to Adequate Food as a Human Right, (1989).

15 It would appear that the obligations to respect and protect tend to fall into the category of obligations of conduct. The obligation to fulfil relates more closely to an obligation of result.

16 A common contention subsists that whereas civil and political rights require "State abstention", economic, social and cultural rights require "State action". *See e.g.* Bossuyt M., "La Distinction Juridique entre les Droits Civil et Politique et les Droits Economiques, Sociaux et Culturels", 8 H.R.L.J., 783, at 790 (1975).

17 *See*, Alston, E/C.12/1990/SR.21, at 8, para.28 Concern has often been expressed about the disinterest shown in economic, social and cultural rights on the international plane. *See e.g.* General Comment No.2, UN Doc.E/1990/23, Annex III, para.4, (1990), ESCOR, Supp.(No.3), at 86-7 (1990).

"obligation to fulfil" requires the State to take the necessary measures to ensure the satisfaction of the needs of the individual that cannot be secured by the personal efforts of that individual.[18]

The characterisation of State obligations in such a manner has been explicitly accepted by members of the Committee,[19] and has been confirmed by the practice of the Committee as a whole. Although economic, social and cultural rights are often characterised as necessitating a "delivery system" for meeting basic needs, to conceive of State obligations with regard to the Covenant as merely requiring "State action" is somewhat superficial.

1) The Obligation to Respect.

It is clear that economic, social and cultural rights require State abstention in particular cases. This is primarily clear with regard to those rights that are considered to be of immediate application. Thus it has been commonly stated that the trade union rights found in article 8(1) require no substantial economic input on the part of the State and therefore can be implemented without delay merely through the exercise of State restraint.[20] Similarly, a number of articles contain references to "freedoms" and "liberty". Such phraseology implies that the State obligation in these areas is negative, involving self-restraint. For example, article 13(3) refers to the "liberty of parents... to choose for their children schools, other than those established by the public authorities".[21] The State here is obliged merely to refrain from placing obstacles in the way of parents wishing to exercise this right.

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[18] Some typologies have an additional fourth part: the duty to promote. *See,* Van Hoof G., "The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views", in Alston P. and Tomasevski K.(Eds), The Right To Food, 97 (1985). Alternatively Shue speaks of the duty to aid as it more clearly describes "having to go back and make up for failures in respect and protection", Shue H., "The Interdependence of Duties", in Alston P. and Tomasevski K.(Eds), The Right To Food, 85, at 86 (1985). At an earlier stage he characterised the three obligations as those to forbear, protect and aid. Shue H., "Rights in the Light of Duties", in Brown P. and Maclean D.(eds), Human Rights and U.S. Foreign Policy, 65, at 76 (1979).

[19] *See e.g.,* Simma, E/C.12/1990/SR.21, at 8, para.28.

[20] *See e.g.,* Sparsis, E/C.12/1989/SR.12, at 4, para.21. That article 8 also imposes a positive obligation on States to protect the exercise of the right (for example through prevention of arbitrary dismissal) is indicated by the use of the word "ensure" in that article. *Cf.* Buergenthal T., "To Respect and Ensure: State Obligations and Permissible Derogations", in Henkin L.(Ed), The International Bill of Rights, 72, at 77 (1981).

Article 15(1)(a), which refers to the right of everyone to take part in cultural life could also be seen as a matter for State restraint.

[21] Article 13(4) also refers to the liberty to establish such schools. The same principle could apply to the references to "freedoms" in articles 6(2) and 15(3).

The State is also required to refrain from acts which would serve to deprive individuals of their rights under the Covenant. It has been commented that "a systematic deprivation of certain sectors of the community through the action of the State would obviously constitute a violation of the rights derived from the Covenant".[22] Thus a law in Zaire, that required married women to request their husband's permission either to work outside the home or to open an individual bank account,[23] was criticised by the Committee for being in contravention of article 6 of the Covenant.[24]

It has been argued that State obligations with regard to the realization of the rights are in fact secondary to those of the individual. Thus Eide has commented that "the primary responsibility for the guarantee of economic, social and cultural rights lay with the individual, who must try first of all to satisfy his own needs by means of his own resources".[25] It is considered that this is overstating the point. Certainly, as in the context of the right to development, it is appropriate that individuals should be seen as the principal "subject" of development[26] in the sense of being given the opportunity to provide for their own needs without impediment. However, to argue that the individual is the primary duty-holder would provide States with a convenient excuse for not taking the action required of them.

A point that could be made, is that even where States are required to take positive action to realise the rights in the Covenant, they should

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[22] Rattray, E/C.12/1990/SR.20, at 11, para.48. *See also,* Tomasevski K., Development Aid and Human Rights, 126 (1989).

[23] Article 3(c) Zairian Labour Code. E/1986/3/Add.7, at 2.

[24] *See e.g.,* Texier, E/C.12/1988/SR.17, at 6, para.36. The same might be said for the eviction of 15,000 families from their homes by the Dominican Republic authorities. *See,* UN Doc.E/1991/23, at 64, para.249, UN ESCOR, Supp.(No.3), (1991).

[25] Eide, E/C.12/1989/SR.20, at 2, para.9.

[26] If individuals were seen merely as the "object" of development, their rights would then subsist merely at the level of entitlements to delivery of specific goods and services, or the fulfilment of certain "needs". The notion of the individual as a "subject" of development envisages an emphasis on self-reliance and participation in the development process which accords more closely to the concept of human dignity. *See e.g.* Tomasevski, *supra,* note 22, at 155. Article 2(1) of the Declaration on the Right to Development thus States:

> "The human person is the central subject of development and should be the active participant and beneficiary of the right to development".

GA Resn.41/128, (Dec.4 1986), 41 UN GAOR, Resns, Supp.(No.53), at 186 (1986).

nevertheless do so in a manner that preserves the individual's freedom of action. As has been explained by one member of the Committee:

> "One of the principles underlying the Covenant was to secure full development of the human personality, something that called for the element of free choice in the exercise of the rights set forth... [therefore] a fine balance had to be maintained between protective conditions and the need to make sure that they did not inhibit the development of the human personality".[27]

Although it might be argued that achievement of economic and social rights entails significant government intervention, this must not detract from the fact that the final goal is the improvement of the situation of the individual.

2) The Obligation to Protect

The obligation to protect the individual's rights from violation by third parties, similarly crosses the border between civil and political and economic, social and cultural rights.[28] Such an obligation implies the "horizontal effectiveness" of rights, often known as "drittwirkung der grundrechte". As a concept, "drittwirkung" has had considerable recognition both in national[29] and international jurisprudence.[30] However, we are concerned here, not so much with the ability of the individual to "enforce" his or her fundamental rights against another individual as, in absence of a petition procedure, that is primarily a question of national law,[31] but rather with the correlative State obligations that accompany a recognition of the horizontal effect of the rights.

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[27] Rattray, E/C.12/1987/SR.13, at 6, para.24.

[28] The obligation to protect in the field of civil and political rights would seem to require at minimum the provision of an effective police force and justice system. The problem that many jurists have with the concept of the obligation to protect is that it not only confers positive obligations upon States with regard to civil and political rights, but also that the extent of such an obligation is unclear. *See,* Sieghart P., The Lawful Rights of Mankind, 90-91 (1986).

[29] Starck C., "Europe's Fundamental Rights in their Newest Garb", 3 H.R.L.J., 103, at 111 (1982). The Netherlands mentioned to the Committee that its legal system envisages the horizontal effectiveness of certain human rights provisions. E/C.12/1989/SR.15, at 10, para.59.

[30] *See e.g.*, Van Dijk P. and Van Hoof G., Theory and Practice of the European Convention on Human Rights, 16-20 (2nd ed. 1990); Drzemczewski A., European Human Rights Convention in Domestic Law: A Comparative Study, 199-228 (1983); Buergenthal, *supra,* note 20, at 77.

[31] However, on the possibility of the "direct effect" of treaty provisions, *see below*, Chapter 3.

There is no indication that the drafters of the Covenant expressly intended the rights to have horizontal effect. That no mention was made of this aspect of State obligations is not sufficient evidence to conclude that the Covenant was not intended to impose an obligation upon States to protect the rights of the individual from violations by other individuals. There has to be an overriding assumption, given that the drafters were committed to ensuring the fundamental rights of every individual, that States would have obligations in this respect.

Indeed, the horizontal effectiveness of human rights is of particular importance in the field of economic, social and cultural rights. In the context of article 7, for example, if State obligations were limited to ensuring that public employees enjoyed fair conditions of work, the right would be largely deprived of effect (especially in the case of "mixed" or "market" economies). Similar considerations also apply in particular to the right to work (article 6) and the right to housing (article 11). It must be assumed that where the State is not in position to ensure the rights itself, that it must regulate private interactions to the extent that individuals are not arbitrarily deprived of the enjoyment of their rights by other individuals.[32]

Recognition of an obligation to protect can be found in the Covenant itself. First, it is clear that the rights pertain to "everyone". It would be contrary to this clearly worded obligation if a State were to declare, for example, that it could only secure the right to strike for those who worked in the public sector.[33] It is obvious that action must be taken for all sectors of the population.[34]

Secondly, article 10(3) expressly stipulates that "children and young persons should be protected from economic and social exploitation" and that certain practices should be punishable by law. There is a clear recognition here that the responsibility of the State goes beyond the actions of itself or its agents, and into positive protection from third party violations. A similar reference is made in article 13(3) and (4) to the role that the State may take in establishing minimum standards in private educational

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32 Such a proposition has been explicitly rejected by advocates of the "market principle" however. *See e.g.* Hayek F., The Constitution of Liberty, 230-232 (1960).

33 *See*, Marchan Romero, E/C.12/1989/SR.10, at 7, para.34. His question implied that the right to strike had to be secured in the private sphere.

34 This is also conditioned by the provision of article 2(2) whereby the State is under an obligation to take measures in a non-discriminatory fashion.

establishments. Although not stated in terms of an obligation, such provisions seem to envisage a role for the State in which obligations over individual relations are not outside the scope of its responsibility.

Finally, the preamble to the Covenant establishes that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant". Whereas the substantive portions of the Covenant do not refer to individual duties, the preamble may be seen to outline the philosophical context in which the realisation of the rights is to be undertaken. It can be assumed, as a result, that the State has a general obligation to regulate the private relations between individuals in so far as is necessary to ensure the enjoyment of the rights in the Covenant.

The Committee has both expressly and impliedly established an obligation upon States Parties to protect the individual's interests against third party interference. It has shown particular concern over the operation of the rights in the private sphere, especially with regard to employment. Questions have been asked *inter alia* as to the employment of women,[35] the right to strike,[36] retirement ages[37] and the provision of pensions[38] in the private sector.[39] As a corollary the Committee has looked towards the enactment of legislation as a means of regulation of the private sector,[40] the effective enforcement of those conditions,[41] and the establishment of mechanisms for the settlement of any private disputes.[42]

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[35] *See e.g.*, Butragueno, E/C.12/1989/SR.8, at 8, para.46.

[36] *See e.g.*, Marchan Romero, E/C.12/1989/SR.10, at 7, para.34.

[37] *See e.g.*, Butragueno, E/C.12/1988/SR.10, at 8, para.41.

[38] *See e.g.*, Simma, E/C.12/1989/SR.15, at 3, para.9.

[39] The Committee has also concerned itself with other aspects of the private sector like tenants' rights. *See e.g.* Sparsis, E/C.12/1988/SR.13, at 14, para.83; Mrachkov, E/C.12/1988/SR.10, at 7, para.27.

[40] *E.g.* The enactment of a Labour Code, *see* Texier, E/C.12/1987/SR.5, at 5, para.22.

[41] For example the provision of a Labour inspectorate and sanctions for enforcement of minimum conditions of work. *See,* Simma, E/C.12/1988/SR.5, at 7, para.29; Taya, E/C.12/1988/SR.12, at 8, para.34; Sparsis, E/C.12/1990/SR.10, at 14, para.82.

[42] *See e.g.*, Sparsis, E/C.12/1988/SR.7, at 5, paras. 30-31.

Thus far, the Committee has established in a diverse range of cases, that the State has a duty to protect the rights of individuals against interference by third parties. It has not directly stated this as a proposition that relates to every right, but it is difficult to imagine how a State could undertake its obligations in a realistic manner without regulating the private sector. Indeed, to the extent that it requires States to actively combat discrimination in inter-personal relations, it has to be assumed that the State has a duty to protect all the economic, social and cultural rights of the individual.

3) The Obligation to Fulfil.

The obligation to fulfil is central to the realization of economic, social and cultural rights, and is the principal concept upon which the terms of article 2(1) were built.[43] As was clear in the drafting of the Covenant,[44] in contrast to the ICCPR,[45] it was felt that States could not commit themselves to the full realisation of economic, social and cultural rights immediately. Accordingly, the wording of article 2(1) was specifically drafted to reflect the need to allow for greater flexibility in the fulfilment of the rights

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[43] It might be added that the positive role of the State has been particularly contentious in political philosophy. Nozick, for example, envisages "a minimal state limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on". Nozick R., Anarchy, State and Utopia, 26 (1974).

[44] *See above*, Chapter 1, text accompanying notes 44.

[45] Article 2(1) of the ICCPR requires States parties to "respect and to ensure" the rights. It is apparent, however, that civil and political rights do entail certain positive obligations upon States (outside those relating to the protection of individuals) such as the establishment of a court system and the provision of effective remedies. *See*, Airey v.Ireland, Eur.Court H.R., Series A, Vol.32, Judgement of Oct.9, 1979, (1979-80) 2 EHRR 305, where it was established that there was a right to legal aid for those who were unable to afford court costs in civil cases; Marckx v.Belgium, Eur.Court H.R., Series A, Vol.31, Judgement of June 13, 1979, (1979-80) 2 EHRR 330, where the Court found that the State had certain positive obligations to respect family life, particularly in the provision of legal safeguards to allow a child's integration in its family. *See also*, Berenstein A., "Economic and Social Rights: Their inclusion in the European Convention on Human Rights. Problems of Formulation and Interpretation", 2 H.R.L.J., 257 (1981).

The provision of legal remedies is specifically envisaged by article 2(3)(a) ICCPR which requires each State Party "to ensure that any person whose rights or freedoms... are violated shall have an effective remedy". However it must be recognised that although civil and political rights do not differ categorically from economic, social and cultural rights, their emphasis is without doubt more upon State restraint than State action.

in the Covenant. The intricacies of the obligation to fulfil as reflected in article 2(1) will be dealt with in the following sections.

## III) "UNDERTAKES TO TAKE STEPS"

The fundamental obligation in the ICESCR is for the States Parties to "take steps" towards the realization of the rights contained therein. The phrase "undertakes to take steps" itself however, merely appears to reflect the general rule of international law,[46] requiring States to take the necessary action to execute the provisions of the Covenant. The precise nature of that commitment, however, is to be drawn from the other phrases within article 2(1). As is apparent from the discussion above, the phrase "undertakes to take steps" may refer either to obligations of conduct or obligations of result according to its context.[47]

It has been argued that since the phrase "to take steps" was considered an alternative to "ensure" or "guarantee" in the preparatory work, it has progressive overtones.[48] An analysis of the phrase as used in other international instruments does not seem to bear out this conclusion though. The obligation to take steps or measures[49] is to be found in various other international human rights instruments. For example under article 2(2) of the ICCPR each State Party "undertakes to take the necessary steps" to adopt measures to give effect to the rights contained therein. Similarly the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[50] obliges States to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".[51] It

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46 This was the conclusion of the P.C.I.J. in its advisory opinion in The Case Relative to the Exchange of Greek and Turkish Populations Under the Lausanne Convention VI, P.C.I.J. (1925), Series B, No.10, at 20. It advised that a "State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken".

47 *See above*, text accompanying note 4.

48 *See*, Alston and Quinn, *supra,* note 6, at 165.

49 Whereas the term "measures" appears to be a narrower concept than that of "steps", implying merely legal action, the terms were used interchangeably. Whereas the English version of the phrase is "to take steps", the Spanish is "to adopt measures" ("a adoptar medidas") and the French "to act" ("s'engage à agir"). *See*, General Comment No.3, *supra*, note 5, at 83, para.2.

50 GA Resn.39/46, (June 26, 1987), 39 UN GAOR, Supp.(No.51), at 197, (1984). 24 I.L.M. 535.

51 Article 2(1), Torture Convention.

would seem that use of the phrase, occurring as it does in Conventions of immediate application,[52] in itself holds no progressive connotations.

Whilst the phrase "to take steps" does not make any stipulations as to the manner of implementation, it is not entirely redundant. As noted above, it signals the immediate assumption of legal commitments by the States parties upon ratification.[53] The Committee has commented:

> "...while the full realisation of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."[54]

It appears to be considered that all States, whether developing or developed, will need to take specific measures following ratification of, or accession to, the Covenant. Lack of resources in itself would not allow States to defer indefinitely taking the necessary action to give effect to the obligations under the Covenant.

## IV) "BY ALL APPROPRIATE MEANS"

In so far as the full realisation of the rights within the Covenant represents an obligation of result, States have a degree of discretion in the conduct they pursue to that end.[55] Thus in principle a State may choose between legislative, administrative,

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[52] With regard to the Torture Convention *see*, Boulesbaa A., "The Nature of the Obligations Incurred by States Under Article 2 of the UN Convention Against Torture" 12 Hum.Rts.Q., 53, at 80 (1990). For the ICCPR *see below*, notes 71-72.

[53] Robertson comments in contrast that the Covenant "does not set out obligations which contracting parties are required necessarily to accept immediately". Robertson A., Human Rights in the World, 230 (3rd Ed. 1992).

[54] General Comment No.3, *supra*, note 5, at 83, para.2. This conclusion was incidentally one which had been drawn in paragraph 16 of the influential Limburg Principles which declares that:

> "All States Parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant".

9 Hum.Rts.Q., 122, at 125 (1987). *See also* Eide's address to the Committee where he took this view. E/C.12/1989/SR.20, at 5, para.14.

[55] It was certainly the view of a number of governments during the drafting of the Covenant that this would be the case. Yugoslavia remarked that the text should "require governments to undertake to do everything to promote those rights, it being left to each to choose the measures it would adopt for the purpose". E/CN.4/AC.14, at 16 (1951).

judicial, social, educational, or other methods to undertake the realisation of the rights.[56] Given the variety of economic, social and legal systems that exist among the States Parties to the Covenant, and their different levels of development, it is natural that the approach of each State will vary according to the circumstances in which they find themselves. The Committee has commented in this respect:

> "...the phrase 'by all appropriate means' must be given its full and natural meaning. While each State party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the 'appropriateness' of the means chosen will not always be self-evident. It is therefore desirable that States parties reports should indicate not only the measures that have been taken but also the basis on which they are considered to be the most 'appropriate' under the circumstances. However, the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make".[57]

During discussion of the General Comment, one member stressed that the Committee could not require States to demonstrate why the measures taken were the most appropriate, as that was a task for the Committee itself to undertake.[58] However, the text of the General Comment does suggest that the States parties should make the initial decision as to what measures are considered appropriate. It appears that the Committee, quite correctly, considers that it is not in a position to prescribe to each State party the steps to be taken. In effect, the Committee might be seen to give the States parties a "margin of appreciation" in deciding the appropriate course of action to be taken.[59] Nevertheless, as the final sentence of the General Comment suggests, the Committee does have a

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[56] General Comment No.3, *supra*, note 5, at 85, para.7.

[57] *Ibid*, at 84, para.4.

[58] *See*, Konate, E/C.12/1990/SR.46, at 10, para.48.

[59] For the "margin of appreciation" doctrine in the context of the European Convention on Human Rights *see*, Van Dijk and Van Hoof, *supra*, note 30, at 585-606; MacDonald R., "The Margin of Appreciation in the Jurisprudence of the European Court of Human Rights", in International Law and the Time of its Codification: Essays in Honour of Robert Ago, 187 (1987); O'Donnell T., "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights", 4 Hum.Rts.Q., 474 (1982).

residual power to assess whether or not the measures taken were the most appropriate in the circumstances.[60]

There are two main limits upon the exercise of State discretion in determining what measures are considered to be appropriate in the realisation of the rights. First, certain provisions in the Covenant do provide indications as to the type of action required of States parties. Secondly, the Committee, in exercising its supervisory role, has established a number of obligations of conduct as regards the steps to be taken to implement the Covenant. Each will be dealt with in turn below.

## A) TEXTUAL REQUIREMENTS

### 1) Prescribed Means

As a result of the somewhat confused method of drafting, some of the substantive provisions of the Covenant contain details of the steps to be taken in implementation.[61] Thus articles 6(2), 11(2), 12(2), 13(2) and 15(2) all contain some indication of the methods by which the State should realize the rights. Article 13(2)(a) for example, stipulates that primary education should be made compulsory and freely available to all, as a method by which the right to education should be realized. In certain cases the steps are expressly stated to be illustrative rather than exhaustive.[62] The Committee has emphasised, nevertheless, the mandatory nature of these obligations.[63]

It is important to note that the steps, as spelt out in the substantive articles, highlight the interplay between the substance of the rights and their method of implementation. For example article 12(2) specifies as a step towards the achievement of the right to health, "the creation of conditions which would assure to all medical service and medical attention in the event of sickness". This has been considered "both a definition of what it might mean

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[60] *See e.g.*, Alston, E/C.12/1990/SR.48, at 8, para.40.

[61] During the drafting process it was not decided until 1951 to include a general "umbrella" clause on economic, social and cultural rights which is now found in article 2(1). E/CN.4/SR.233, at 21 (1951). Prior to this, some representatives had felt that the role of the State should be defined in each article. *See e.g.* Chile (Santa Cruz), E/CN.4/SR.216, at 22 (1951). *Generally,* UN Doc. A/2929, para.19, 10 UN GAOR, Annexes, (Ag.Item 28), Pt.II, (1955). The articles however were not amended sufficiently to conform entirely to the final view.

[62] For example articles 6(2), 12(2) and 15(2) all state that the steps taken "shall include" those stipulated.

[63] An example is the Committee's criticism of Zaire with regard to article 13(2)(a). E/C.12/1988/SR.17.

to realize a right to health and the outline of part of a health delivery strategy which stresses equal access to curative medical services".[64] As the Committee develops the normative content of the various rights contained in the Covenant, it will also implicitly be prescribing methods by which the States Parties should implement their obligations.

2) Appropriate Means

Article 2(1) further limits the scope of State discretion as to the means to be employed to those that are "appropriate". The appropriateness of the method employed can be determined by its relation to two desiderata. Not only must the method adopted make some progress towards the final objective *viz* the full realization of the right concerned, but it must also conform to the requirements of action prescribed by the nature of the rights themselves.[65]

That the measures undertaken conform to the achievement of the final objective in the Covenant is quite plain. Full realization requires that policies are not discriminatory *ratio loci*, or *ratio personae*. Thus a policy which fails to account for a sector of the population could be classed as inappropriate unless accompanied by safeguard measures.[66] Equally, measures should not promote one right at the expense of another,[67] nor should they apply to only selective parts of the territory.[68]

As far as the nature of the rights is concerned, it is appropriate that those rights that are capable of immediate implementation be realised in that manner. Thus States should not undertake to implement article 8, which merely calls for State restraint, in a progressive manner. On the other hand, however, it does remain open for States to implement "progressive" rights immediately.

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64 Trubeck D., "Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs", in Meron T.(ed), Human Rights in International Law: Legal and Policy Issues, 205 (1984).

65 *See above*, text accompanying notes 13-46.

66 The I.L.C. has noted that some obligations of result allow the State to achieve the required result subsequently by obliterating an earlier course of action that was incompatible with the achievement of the result. It cites as an example the provision for compensation for unlawful arrest in article 9(5) ICCPR. *Supra,* note 1, at 22, para.12.

67 *But see below*, text accompanying note 176.

68 This is subject to the possible positive measures taken to promote the rights of disadvantaged sectors of the population.

Article 2(1) itself does express a preference for legislative measures, the nature of which will be discussed below.[69] The International Law Commission concludes that legislative measures are therefore "the most normal and appropriate for achieving the purposes of the Covenant in question".[70] A similar provision in the ICCPR[71] has been described as being a "conditional" obligation of conduct.[72]

B) COMMITTEE REQUIREMENTS

Outside the question of specific rights-related comments as to the means for the fulfilment of the rights,[73] the Committee has elaborated certain general methodological requirements for the reporting process that have a bearing upon the approach to be taken by the States Parties in their implementation of the Covenant's obligations. Its approach has also suggested that certain substantive considerations should be borne in mind in the realization of the rights.

1) Methodological Requirements

In its General Comment No.1, the Committee outlined seven "objectives" to be served by the reporting procedure.[74] Some of these can be seen as having evolved into preconditions to the effective realization of the rights recognized in the Covenant.

As a first step, States are obliged to monitor and evaluate the actual situation with regard to each of the rights within its jurisdiction.[75] In particular, attention must be paid to the

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69 *See* text accompanying notes 125-145.

70 *Supra,* note 1, at 21, para.8. It also comments that the expression of a preferred means of implementation is entirely consistent with an obligation of result as there is no obligation to take this course of action.

71 Article 2(2) ICCPR. It reads:

"[E]ach State Party...undertakes to take the necessary steps...to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the present Covenant".

72 Schachter O., "The Obligation to Implement the Covenant in Domestic Law", in Henkin L.(ed), The International Bill of Rights, 311 (1981).

73 Such comments will be dealt with in subsequent chapters. *See below*, Chapters 5-8.

74 *Supra,* note 10.

75 In its General Comment No.1 the Committee stated that the first objective of the reporting process was "to ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and

proportion of citizens that do not enjoy a specific right.[76] In addition, where possible, those specific sectors of the population that appear to be vulnerable or disadvantaged should be identified.[77] Thus attention merely on aggregate national statistics, such as per capita G.N.P., is insufficient as it fails to reflect the position of the marginalised sectors of the population.[78] In practice

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procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant". Similarly the second objective "is to ensure that a State party monitors the actual situation with respect to each of the rights". *Supra,* note 10, at 88, para.2. *See also*, Alston, E/C.12/1989/SR.3, at 3, para.10; Sparsis, E/C.12/1989/SR.3, at 5, para.19.

[76] *See e.g.*, Alston, E/C.12/1988/SR.10, at 11, para.59.

[77] In its General Comment No.1, the Committee commented that in order to monitor the situation adequately "special attention (should) be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged". *Supra,* note 10, at 88, para.3. The Committee has long held that the "principal concern" of the ICESCR is the position of the vulnerable and disadvantaged. *See,* Alston, E/C.12/1987/SR.3, at 3, para.10.

Such an emphasis on "sectors" of the population suggests that the Committee takes a "structuralist" approach to the non-enjoyment of rights. Briefly, it identifies the structures of national and international organization as the main impediments to the full realization of human rights. *See,* Muchlinski P., "'Basic Needs' Theory and 'Development Law'", in Snyder F. and Slinn P.(Eds), International Law of Development: Comparative Perspectives, 237, at 238 (1987). This has been one of the views that has marked development thinking on the international plane. *See,* Eide A., "Developmentalism and Human Rights- Toward a Merger? Some Provisional Reflections" in Rehof L. and Gulmann C.(eds), Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries, 69, at 74 (1989). Alston argues that the structuralist approach tends to overemphasise the international aspect of development. Alston P., "Prevention Versus Cure as a Human Rights Strategy", in I.C.J., Development, Human Rights and the Rule of Law, 31 (1981).

[78] *See e.g.*, Alston, E/C.12/1987/SR.7, at 9, para.42; General Comment No.1, *supra,* note 10, at 88, para.3.

The use of statistics plays a crucial role in the realization of the rights in the Covenant, both as a means of monitoring on the part of the State Party concerned, and as a tool in assessment of governmental performance by the Committee. The Committee undertook a discussion on the use of statistical indicators at its sixth session in 1991, *see*, UN Docs.E/C.12/1991/SR.20-21. The problems involved in the use of statistics weigh heavily on the work of the Committee. As Tomasevski has noted:

> "Quantified results (data, indicators, tables) do not reflect reality but theoretical assumptions of reality, and they cannot be interpreted without an insight into the underlying assumptions".

Tomasevski K., "Human Rights Indicators: The Right to Food as a Test Case", in Alston P. and Tomasevski K.(eds), The Right to Food, 135, at 136 (1985). *See also,* Turk D., The New International Economic Order and the Promotion of Human Rights: Realisation of Economic, Social and Cultural Rights, UN

reports that fail to identify and analyze the relative position of such disadvantaged sectors of the population have been criticised.[79]

Given the somewhat vague and general wording of certain provisions in the Covenant, such as "an adequate standard of living" or "adequate food, clothing and housing", an essential step in the realization of the rights is for these provisions to be defined more closely. It has been the policy of the Committee to demand that State Parties establish national "yardsticks" or "benchmarks" by which it might evaluate the domestic situation.[80] In the words of one Committee member, he "failed to see how a State could meet the obligation specified in article 11 of the Covenant... if it had not itself decided what might be regarded as an adequate standard of living, in other words if it had not established what the poverty threshold was."[81] The use of such indicators must be seen

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Doc.E/CN.4/Sub.2/1990/19, at 3-37 (1990); Goldstein R., "The Limitations of Using Quantitative Data in Studying Human Rights Abuses", 8 Hum.Rts.Q., 607 (1986); Stohl M., Carleton D., Lopez G. and Samuels S., "State Violation of Human Rights: Issues and Problems of Measurement", 8 Hum.Rts.Q., 592 (1986); Claude R. and Jabine P., "Editors Introduction", 8 Hum.Rts.Q., 551 (1986).

[79] *E.g.* Concluding remarks on the report of Argentina, Report of the Committee's Fourth Session, E/1990/23, at 64, para.254, UN ESCOR, Supp.(No.3), (1990); and Philippines, E/C.12/1990/SR.11, at 11, paras.40-41. This is also suggested by the requirement under article 17 that States indicate the factors and difficulties encountered in fulfilling the obligations under the Covenant. *See,* Alston, E/C.12/1987/SR.12, at 8, para.34. This is by no means confined to developing States. *See*, Comments of the Committee on the Netherlands report, E/C.12/1987/SR.5-6.

[80] In its General Comment No.1 the Committee decided that an objective of the reporting process was:

> "to provide a basis on which the State Party itself, as well as the Committee, can effectively evaluate the extent to which progress has been made towards the realization of the obligations contained in the Covenant. For this purpose, it may be useful for States to identify specific bench-marks or goals against which their performance in a given area can be assessed. Thus, for example, it is generally agreed that it is important to set specific goals with respect to the reduction of infant mortality, the extent of vaccination of children, the intake of calories per person, the number of persons per health care provider, etc.".

Such bench-marks would seem to include both qualitative and quantitative data. General Comment No.1, *supra*, note 10, at 89, paras. 6-7. *See also* references to a poverty threshold: Butragueno, E/C.12/1989/SR.3, at 7, para.28; Alston, E/C.12/1990/SR.2, at 11, para.65; *ibid*, SR.21, at 7, para.22.

[81] Sparsis, E/C.12/1989/SR.17, at 8, para.35.

as an essential part of government policy-making whereby problem areas can be targeted and priorities established.[82]

The necessity of utilising national indicators, as opposed to international ones, is justified primarily by the variety of social and economic contexts in which the rights operate.[83] However, although it might be appropriate for States to be given a degree of discretion in determining the level at which a national benchmark should be set, it may be questioned whether the Committee should use national standards as the sole criterion of assessment of State compliance with the obligations under the Covenant. If the indicators for assessment vary from country to country, the universality of the rights may be undermined.[84] Indeed it might be said that this is tantamount to giving States Parties the power to decide the extent of their own obligations.[85]

Accordingly, the Committee established at its fourth session that it "cannot accept their (States') national indicators as a general criterion for international assessment".[86] In practice, it has

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[82] *See* General Comment No.1 where the Committee stated:
"While monitoring is designed to give a detailed overview of the existing situation the principal value of such an overview is to provide the basis for the elaboration of clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant".
Supra, note 10, at 88, para.4.

[83] The Committee has commented that in many areas "global bench-marks are of limited use, whereas national or other more specific bench-marks can provide and extremely valuable indication of progress". General Comment No.1, *supra,* note 10, at 89, para.6.

[84] Bossuyt argues that economic, social and cultural rights differ from their civil and political rights counterparts by the fact that they are variable, and dependent upon the resources of the country concerned. Bossuyt, *supra,* note 16, at 790.

[85] *See*, Alston, E/C.12/1989/SR.3, at 3, para.7. He comments that such a conclusion "would deprive the obligations set forth in the Covenant of any real significance, and there would be no point in having a monitoring procedure or an international supervisory body". Tomuschat has similarly concluded that "each State Party is entitled to suggest an interpretation which it believes to reflect the meaning of the provision concerned. There is no power for a state to determine unilaterally the legal substance of an ambiguous text". Tomuschat C., "National Implementation of International Standards on Human Rights", Can.H.R.Yrbk., 31, at 36 (1982).

[86] E/C.12/CRP.1/Add.10, at 5. Oddly enough this sentence was altered (by mistake it appears) in the final copy of the Committee's report, which reads: "...although Governments were duty bound to submit reports, the Committee could accept their national indicators as a general criterion for international assessment". UN Doc.E/1990/23, *supra*, note , at 68, para.271.

questioned national qualitative and quantitative data on the basis of that received from international and non-governmental sources. It would appear then that national bench-marks are useful not so much as a definitive means of assessment, but rather as an indication of whether the State Party is taking its international obligations seriously. It should be noted, however, that the success of the Committee's approach here is crucially dependent upon access to reliable alternative sources of information against which the State reports may be balanced. In absence of such information, the State benchmarks may be the only basis on which assessment might be made.[87]

The next stage in implementation is for the States Parties to establish a coherent policy to overcome the problems encountered and to make sufficient progress in the realization of the rights. This is envisaged specifically in article 14 which establishes that for those States Parties that do not have free and compulsory primary education for all, they should adopt a plan for the progressive implementation of this obligation. It could be said that the provision of article 14 merely spells out the obligations implicit in the other articles.[88] Thus a member of the Committee commented in respect to article 11:

> "Governments were not entitled to content themselves with making a vague general commitment to take steps to ensure that their people did not suffer from hunger, but should be obliged to adopt a precise programme for the implementation of all the rights".[89]

The establishment of such a programme or policy should also include benchmarks to provide a "conceptual framework" in which the progress made towards the full realization of the rights can be evaluated.[90] It has also been suggested that a timetable should be established for the implementation of such a policy.[91] This would be in accordance with the requirements of article 14 which

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[87] For the role of alternative information in the supervision process, *see below*, Chapter 9, text accompanying notes 333-388.

[88] This was the conclusion of the Committee in its General Comment No.1. *Supra*, note 10, at 88, para.4.

[89] Alston, E/C.12/1987/SR.4, at 3, para.6.

[90] *See*, Sparsis, E/C.12/1989/SR.8, at 10, para.58. It might be noted that the full realisation of some rights might of itself be progressive in nature in which case the requirement of progress is continuous.

[91] *ibid.*

stipulates that the number of years, in which the obligation to provide for free primary education will be implemented, should be fixed in the plan.

2) Substantive Concerns

The perspective of the Committee in developing the substantive obligations incumbent upon States Parties has been dominated by three major issues: participation, impoverishment and State control.[92]

First, the question of participation has been foreseen to some extent by the explicit recognition of democratic principles in the Covenant itself. Article 1(1) for example, proclaims the right of all peoples to self-determination and "by virtue of that right they *freely determine their political status* and freely pursue their social and cultural development" [emphasis added]. This "internal" aspect of self-determination[93] is also foreseen in article 21(3) of the Universal Declaration which more explicitly states that "the will of the people shall be the basis of the authority of government".[94] That the Covenant conceives of democracy as a concept inherent in the rights is further emphasised by references to "democratic society" in articles 8(1)(a) and (c), and by the agreement that education "shall enable all persons to participate effectively in a free society".[95]

Such a reading of the Covenant coincides with the central role of participation in the development process. Not only is the individual posited as the primary subject of development, but common emphasis is placed upon self-reliance as an objective.[96] Thus the development process is conceived of as being an

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92 These issues are by no means the only concerns of the Committee, they merely represent areas in which the Committee seems to have expressed a continuing interest. Participation and impoverishment are issues that have derived from current development approaches, the question of State control on the other hand, reflects a world-wide trend towards privatization of essential social services.

93 *See,* Cassese A., "The Self-Determination of Peoples", in Henkin L.(Ed), The International Bill of Rights, 92 (1981).

94 This is reflected in article 25(b) ICCPR which provides for the right to vote. The interdependence of the rights within the two Covenants is foreseen in the preamble to the Covenants.

95 Article 13(1).

96 Shepherd G., "The Power System and Basic Human Rights: From Tribute to Self-Reliance", in Shepherd G. and Nanda V.(eds), Human Rights and Third World Development, 13 (1985).

"enabling" process whereby structural impediments (both social and economic, on a micro and macro scale) are lifted to allow the individual to fulfil his or her material and non-material needs.[97]

Thus one member of the Committee commented with regard to article 11:

> "Even if the responsibility to ensure observance of the right to an adequate standard of living lay ultimately with the state, efforts should be made to see to it that individuals could exercise their right to participate in the achievement of the country's development objectives".[98]

Similar requirements for representation can be found in comments of Committee members with regard to employment rights. Here preference has been expressed for a tripartite bargaining process including representatives of the State, employers and employees.[99]

To a certain degree, the issue of participation has also been manifest in the requirement that the government undertake promotional and publicity strategies regarding the provisions of the Covenant. Thus it has been felt that the State report should be disseminated as widely as possible,[100] that NGO's should participate in its drafting,[101] and that the Covenant itself should be publicised.[102] The role of the government in this respect to educate and encourage participation is central to "increasing the will of the people to implement social change".[103]

Democratic participation also has a subsidiary aim of ensuring that all sectors of the population are catered for in any human rights strategy. This relates to the second matter in which it has generally been established that the "principal concern" of the

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97 For the relationship between human rights and basic needs, *see,* Alston P., "Human Rights and Basic Needs: A Critical Assessment", 12 H.R.L.J., 19 (1979); Muchlinski, *supra*, note 77.

98 Konate, E/C.12/1987/SR.10, at 2, para.2.

99 *See e.g.*, Sparsis, E/C.12/1987/SR.6, at 10, para.42. Such a tripartite system has also been advocated with respect to establishing a strategy to combat unemployment, *see*, Badawi El Sheikh, E/C.12/1989/SR.15, at 16, para.93.

100 General Comment No.1. The primary purpose of dissemination at the reporting stage is to facilitate public scrutiny of government policies and engender a constructive dialogue on the national level. *Supra*, note 10, at 88, para.5.

101 *See e.g.*, Alston, E/C.12/1988/SR.12, at 13, para.72.

102 *See e.g.*, Taya, E/C.12/1988/SR.12, at 9, para.43.

103 Ruiz Canañas (Mexico), E/1986/WG.1/SR.8, at 8, para.43.

ICESCR is the position of the vulnerable and disadvantaged sectors of society.[104] The Committee has consistently required that governments look towards the position of such social groups within States. Accordingly, just as much as the use of aggregate national statistics is criticised, so also State policies that are centred solely upon general economic growth have been felt to be inadequate for securing the rights of marginalised sectors of the population.[105] The emphasis placed upon such groups by the Committee suggests that its approach has been marked by considerations of equality and non-discrimination.[106] To some extent this has allowed the Committee to side-step the issue of developing substantive norms for the rights within the Covenant.

Finally, the State's obligation to fulfil raises the question of how far the private provision of essential services is compatible with the Covenant.[107] Primarily the Committee has been very wary of the possible inequality and discrimination involved in the provision of public services by the private sector.[108] Its concern has been that access to public services becomes a correlate of income distribution in which the poorer sectors of the population may not be able to afford the services,[109] or merely that the State cannot exercise such control as might be necessary. As one member has commented upon the privatisation process:

> "The threat to one or other of those [economic, social and cultural] rights was certain, bearing in mind the substantial element of laisser faire involved in privatization and the very long delay which could

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[104] *See e.g.*, Alston, E/C.12/1987/SR.3, at 3, para.10; *ibid*, 1990/SR.31, at 3, para.10; Simma, E/C.12/1990/SR.15, at 3, para.7. Van Boven comments:

> "If a human rights programme has any relevance to people, it should first and foremost be concerned with the vulnerable, the weak, the oppressed, the exploited".

Van Boven T., People Matter: Views on International Human Rights Policy, 74 (1982).

[105] *See*, Sparsis, E/C.12/1989/SR.16, at 17, para.92; Rattray, *ibid*, SR.17, at 17, para.90.

[106] *See below*, article 2(2).

[107] A distinction has been drawn between public services whose aim is "to ensure the best possible functioning of the community", and social services whose aim is "based upon the solidarity of all the members of the Community". Wold T., "The Right to Social Services", 9 Jour.I.C.J., 41 (1968). The distinction however can be criticised for failing to recognise the contribution of humanitarian services to the development process.

[108] *See e.g.*, Neneman, E/C.12/1988/SR.12, at 11, para.56.

[109] *See e.g.*, Wimer Zambrano, E/C.12/1988/SR.13, at 3, para.6.

> occur between the time when a problem was identified and the possible intervention of the State, which was no longer considered a principal protagonist".[110]

A secondary issue is that "the replacement of a *public* service by the *market* principle undermines the very notion of government obligations in the area"[111] in that the State purportedly delegates its responsibility for a particular service to the private sector. It is arguable that whatever the reason given for privatization, the question of whether the government complies with its obligations under the Covenant depends entirely upon the results achieved. However, given the concern of the Committee with the process of realization of the rights, it would seem doubtful that they would accept a philosophy that had at its heart the reduction of governmental responsibility in those areas.

This conclusion is most apparent with regard to the obligation to take steps to the maximum of available resources. According to the policy adopted by the Committee, it is questionable whether a State could legitimately cut its spending on public services outside a claim under article 4. Even if it is conceded that this is possible, if that reduction were not accompanied by similar reductions in other sectors, such as defence, it would constitute a violation of the provisions of the Covenant.

C) <u>STATE ORGANISATION</u>

It is commonly assumed, partly as a result of the politicisation of human rights, that economic, social and cultural rights require a "socialist" or "centrally planned" form of government. Although a proposal to make realization of the rights dependent upon the "organization" of the State was narrowly rejected in the drafting of the Covenant,[112] it was made clear that the Covenant itself did not prefer any particular system of organization despite arguments to that effect.[113]

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[110] Alston, E/C.12/1989/SR.15, at 7, para.40.

[111] Tomasevski, *supra,* note 22, at 170.

[112] E/CN.4/SR.233, (1951), at 22. The vote was evenly split by six votes to six, with six abstentions.

[113] *See* Alston and Quinn, *supra,* note 6, at 181-183. Indeed it was stated:

> "The Commission... was not concerned with the organization or the Constitution of a State but merely with the guarantee of human rights by the State. The Covenant would lay down the obligation: how that obligation would be fulfilled may vary from State to State".

The Committee has made its position clear on this matter. In its General Comment it noted that:

> "...the undertaking 'to take steps... by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a, socialist or a capitalist system, or a mixed, centrally planned, or *laisser-faire* economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognised in the Covenant are susceptible of realisation within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognised and reflected in the system in question."[114]

The Committee has followed this policy in admitting no preference for any particular form of State structure. It appears to concur with the assertion that "successes and failures have been registered in both market and non-market economies, in both centralized and de-centralized political structures."[115] Accordingly it could be concluded that there is "no single road" to the full realization of the rights.[116]

However, whereas the Covenant does not prescribe the precise form of organisation required, it does nevertheless require that the State possess certain general attributes. Thus, article 8

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Chile, E/CN.4/SR.271, at 7 (1952).

[114] General Comment No.3, *supra*, note 5, at 85, para.8.

[115] Limburg Principle 6. *Supra,* note 54, at 124, para.6. Falk comments generally that "the human rights records of both socialism and capitalism are so poor in the Third World at this point that it is quite unconvincing to insist that one approach is generically preferable to the other". Falk R., "Comparative Protection of Human Rights in Capitalist and Socialist Third World Countries", 1 Uni.H.R., 3, at 5 (1979).

[116] This is implicit in the approach of the Committee. *See e.g.* Badawi El Sheikh, E/C.12/1987/SR.12, at 2, para.1.