

THE
INTERNATIONAL COVENANT
ON
ECONOMIC, SOCIAL AND
CULTURAL RIGHTS:
A PERSPECTIVE ON ITS
DEVELOPMENT

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ABSTRACT

The International Covenant on Economic, Social and Cultural Rights entered currently has 118 States Parties and has been in force for 17 years. Over the past five years, the implementation of the Covenant has come under the supervision of the Committee on Economic, Social and Cultural Rights. Unlike its predecessor, the Sessional Working Group, the Committee has taken its supervisory role seriously such that it has begun to develop both the substance of the Covenant and the implementation procedures.

This study, based principally upon the work of the Committee on Economic, Social and Cultural Rights, discusses a number of aspects in which the substance of the Covenant and its supervision procedures may be seen to have been developed.

Chapter 1 traces the roots of economic, social and cultural rights and outlines their codification in the Universal Declaration of Human Rights, and later the Covenant, following the end of the Second World War. Significant aspects of the drafting process are analysed in detail.

Chapter 2 discusses the nature and scope of the State obligations under the Covenant as regards the implementation of the rights. Particular emphasis is given to the terms of article 2(1) and how they have been interpreted in the work of the Committee.

Chapter 3 analyses, primarily from a theoretical standpoint, the manner and degree to which the terms of the Covenant may be given "direct effect", or in other words, relied upon directly in domestic courts.

Chapters 4 to 8 address particular articles within the Covenant and considers the interpretation given to them by the Committee. Chapter 4 deals with article 2(2) (and to a lesser extent article 3) concerning non-discrimination; Chapter 5 deals with article 6 concerning the right to work; Chapter 6 deals with article 7 regarding the right to just and favourable conditions of work; Chapter 7 deals with article 8 concerning rights related to trade unions; and Chapter 8 deals with article 11 concerning the right to an adequate standard of living and, in particular, the rights to food and housing. In each case, an attempt is made to evaluate the Committee's approach to each article and assess the possibilities for future development.

Chapter 9 addresses the emergence, role and working methods, of the Committee as a human rights supervisory body. Particular consideration is also given to the problems encountered and the Committee's future prospects.

Chapter 10, as the concluding chapter, draws together the observations made in earlier chapters and attempts to make an evaluation of the present and future utility of the Covenant as a mechanism for the promotion and protection of economic, social and cultural rights.

PREFACE

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* It was not considered expeditious to cite all the references to the International Covenant on Economic, Social and Cultural Rights.

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TABLE OF ABBREVIATIONS

A.J.I.L.	American Journal of International Law
B.Y.I.L.	British Yearbook of International Law
Bull.H.R.	Bulletin of Human Rights
Bull.Czech.L.	Bulletin of Czechoslovakian Law
Cal.West.I.L.J.	California Western International Law Journal
Can.H.R.Y.	Canadian Human Rights Yearbook
Can.Y.I.L.	Canadian Yearbook of International Law
CEDAW	Committee on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
C.L.J.	Cambridge Law Journal
Cmd.	United Kingdom Command Papers
C.M.L.R.	Common Market Law Review
Col.H.R.L.R.	Columbia Human Rights Law Review
Colum.J.Trans.L.	Columbia Journal of Transnational Law
Cornell I.L.J.	Cornell International Law Journal
D.R.E.Comm.H.R.	Decisions and Reports of the European Commission of Human Rights
E.C.H.R.	European Convention of Human Rights
ECOSOC	Economic and Social Council
Ed.	Editor
EHRR	European Human Rights Report
ESCOR	Economic and Social Council Official Records
FAO	Food and Agriculture Organisation
GA	General Assembly
GAOR	General Assembly Official Records
G.D.P.	Gross Domestic Product
Ger.Y.I.L.	German Yearbook of International Law
G.N.P.	Gross National Product
Hague Recueil	Recueil des Cours de l'Academie de Droit International
Howard L.J.	Howard Law Journal
HRC	Human Rights Committee
H.R.J.	Human Rights Journal
H.R.L.J.	Human Rights Law Journal
Hum.Rts.Q.	Human Rights Quarterly
IBRD	International Bank of Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
I.C.J.Rev	International Commission of Jurists Review
I.C.L.Q.	International and Comparative Law Quarterly
I.L.C.	International Law Commission
I.L.M.	International Legal Materials
ILO	International Labour Organisation
I.L.R.	Industrial Law Review
IMF	International Monetary Fund
Ind.J.I.L.	Indian Journal of International law
Ind.L.J.	Industrial Law Journal
Ind.R.L.J.	Industrial Relations Law Journal
Iowa L.R.	Iowa law Review

Isr. Y.H.R.	Israel Yearbook on Human Rights
J.I.C.J.	Journal of the International Commission of Jurists
Liv.L.R.	Liverpool Law Review
L.N.O.J.	League of Nations Official Journal
M.L.R.	Modern Law Review
NGO	Non-Governmental Organisation
N.Q.H.R.	Netherlands Quarterly of Human Rights
Neth.I.L.R.	Netherlands International Law Review
Oklahoma L.R.	Osgood Hall Law Journal
P.Q.L.I.	Physical Quality of Life Index
Proc.Am.Soc.I.L.	Proceedings of the American Society of International law
R.B.D.I.	Revue Belge de Droit International
Santa Clara L.R.	Santa Clara Law Review
Scand.Stu.L.	Scandinavian Studies in Law
S.A.Y.I.L.	South African Yearbook of International Law
Stan.J.I.L.	Stanmore Journal of International Law
Tex.I.L.J.	Texas International Law Journal
The Economic Rev.	The Economic Review
U.K.T.S.	United Kingdom Treaty Series
UN	United Nations
UNESCO	United Nations Education, Science and Culture Organisation
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
Uni.H.R.	Universal Human Rights
Uni.Toronto L.J.	University of Toronto Law Journal
U.N.T.S.	United Nations Treaty Series
U.N.	United Nations
U.N.C.I.O.	United Nations Conference on International Organisation
US	United States of America
USSR	United Soviet Socialist Republics
Vand.L.R.	Vanderbilt Law Review
V.J.I.L.	Virginia Journal of International Law
Wisc.L.R.	Wisconsin Law Review
WHO	World Health Organisation
Yale J.I.L.	Yale Journal of International Law
Yrbk.Eur.L.	Yearbook of European Law

INTRODUCTION

The International Covenant on Economic, Social and Cultural Rights (ICESCR)¹ entered into force on 3rd January 1976 following the deposit of the 35th instrument of ratification, and currently has 104 States Parties.² The Covenant was originally intended, together with the International Covenant on Civil and Political Rights (ICCPR)³ and the Universal Declaration of Human Rights (UDHR),⁴ to form the backbone of the international protection of human rights in the post-war era. However, political controversy greatly protracted the drafting of the Covenant such that it was only completed for signature in 1966.⁵ Thereafter, a slow ratification process and an initial "false-start" in the implementation system, meant that the Covenant only began to show signs of life in 1987 when it came under the supervision of the Committee on Economic, Social and Cultural Rights. As with other human rights treaties, the Covenant is a "living instrument" which, in order to fulfil its purpose effectively, requires the nurture of a supervisory body capable and willing to develop both the substance and the procedure of the guarantee. The purpose of this study is to analyze certain of the most pertinent aspects of the Covenant's development with particular emphasis upon the work of the Committee since 1987.

Chapter One outlines the background to the institutionalisation of economic, social and cultural rights in the United Nations (UN) system and aspects of the complex and tortuous drafting process that finally produced the Covenant. An understanding of that process and the issues involved is particularly important in so far as it provides an essential introduction to ideas and controversies that still colour people's perception of the Covenant. A clear understanding of the drafting process is also relevant in that the travaux préparatoires represent a supplementary means of treaty interpretation.

In Chapter Two an analysis is made of the nature and scope of the State obligations laid down within the Covenant with particular emphasis upon the terms of the general obligations clause in article

¹ 993 U.N.T.S. 3. The text is to be found in Appendix I.

² As of 31 Dec.1991, *see*, UN Doc.ST/LEG/SER.E/10, at 122 (1992). A list of States Parties to the Covenant may be found in Appendix II.

³ 999 U.N.T.S. 171.

⁴ GA Resn.217 A (III), (Dec.10 1948), 3 UN GAOR, Resns, Pt.1, at 71 (1948).

⁵ GA Resn.2200 (XXI), (Dec.21 1965), 21 GAOR, Resns, Supp.(No.16) at 49 (1966).

2(1). Although the Covenant, like all human rights treaties, outlines a number of individual rights, the principal characteristic of the Covenant is the progressive nature of the State obligations. Whilst that might appear to leave States with considerable discretion as to the method and time-scale of their implementation initiatives, consideration is given to the degree to which the terms of the Covenant are considered to give rise to more precise, immediate obligations.

In Chapter Three, one specific aspect of State implementation is considered, namely the concept of "direct effect". It is generally considered that the most effective means by which the rights in the Covenant can be guaranteed is by the provision of domestic remedies through which the individual may assert his or her rights. This may be achieved by giving the relevant treaty provisions "direct effect" in domestic law. The Chapter attempts to assess the extent to which provisions of the Covenant may be given "direct effect" in light of the commonly used national criteria for determining that possibility.

Chapter Four addresses the questions of non-discrimination and equality as found in the Covenant. These issues are of particular relevance to the economic, social and cultural rights in the Covenant not merely because they appear to give rise to obligations of an immediate nature, but also because a notion of equality lies close to the heart of what might be seen as the welfarist or redistributionalist attributes of the Covenant. An attempt is made to define the precise form of equality to which the Covenant directs itself and the form and nature of State obligations that arise therefrom.

Chapters Five to Eight consider a number of the substantive rights within the Covenant. Chapter Five concerns rights within article 6, Chapter Six the rights in article 7, Chapter Seven the rights in article 8, and Chapter Eight those in article 11. These articles have been selected primarily upon the basis that they are the ones that have been developed most thoroughly by the Committee. Article 11 stands out as having been the subject of the most extensive consideration by the Committee. Articles 6 to 8, on the other hand, whilst they have not been given particular attention, have been amenable to interpretation given the wealth of existing standards developed by the ILO and other bodies in the area.

In each chapter, the first section will deal with the travaux préparatoires of the article concerned. As indicated above, the travaux préparatoires provide an idea of the intended scope and meaning of the provisions and raise a number of issues that are still pertinent today. The second section of each chapter outlines the manner in which the Committee has developed the relevant provisions through its consideration of State reports. In each case an attempt has been made to outline the direction in which the Committee appears to be moving,

assess the appropriateness or sufficiency of its approach and, on occasions, make suggestions as to alternative strategies.

Chapter Nine considers the institutional mechanisms for supervision of the implementation of the Covenant with particular emphasis on the creation, mandate and operation of the Committee on Economic, Social and Cultural Rights. An analysis is made of the theoretical framework of the reporting system and the degree to which its development has altered some of the basic premises upon which it was based. Further, attention is given to the future prospects of the supervision system in particular as regards the possible creation of an Optional Protocol to institute the receipt of individual complaints. Chapter Ten attempts to make a broad evaluation of the existing and potential utility of the Covenant as a human rights guarantee. Consideration is given to the current level of development of the Covenant, the problems facing the Committee and the future prospects.

A number of points should be made about the methodology of this work. First, and most importantly, it is assumed that although the Committee is not empowered to make binding interpretations of the Covenant, its position as the primary supervisory body gives its interpretations considerable legal weight.⁶ The Committee is in the position of being a "clearing centre" for the divergent interpretations of the Covenant offered by States parties and is best placed for establishing the common agreement of States as to the interpretation of the Covenant. In addition, the Committee might serve to direct and shape the practice of States in applying the Covenant such that the agreement of States is developed over time.

Secondly, although the most coherent source of information as to the Committee's approach to the interpretation of the articles in the Covenant is its general comments, the limited number of such comments means that other sources of information have to be relied upon. The largest individual source is the comments and questions of the Committee members in the consideration of State reports. Although often contradictory and generalised, such comments sometimes give a clear indication as to the position of a number of the members of the Committee. Indeed even the questions, which by their nature do not presuppose any particular position, do provide an indication as to the concerns of the members of the Committee.

A more useful source is the concluding comments of the Committee. Whilst not prescribing precise standards, the concluding comments occasionally indicate areas in which the Committee as a whole (or sometimes individual members) consider the State to fall

⁶ See *e.g.*, Meron T., Human Rights Law-Making in the United Nations, at 10 (1986).

short of compliance with its obligations under the Covenant. In such cases, the concluding comments do provide a means by which the Committee's position can be determined. Occasionally reference will be made to the Committee's general discussion which provides an opportunity for members of the Committee and other experts to air their views on a particular subject. Whilst not being a direct indication of the position of the Committee as a whole, they may occasionally demonstrate a consensus of opinion on a particular issue.

The final source of information as to the position of the Committee is its reporting guidelines. It is clear that the primary intention of the Committee in drafting the reporting guidelines was to assist States parties to produce adequate reports. However, in detailing what information is to be provided, the Committee has gone some way to define in more detail the scope at least, if not the meaning, of the provisions concerned. It might be argued that the guidelines are not prescriptive in any way; all they stipulate is the type of information that is to be provided. Nevertheless, if the Committee feels that the information requested is relevant to its evaluation of a States performance, then the nature of that information will be a tentative indication of what the Committee considers to be the content of the Covenant's provisions.

CHAPTER ONE: THE BACKGROUND TO THE COVENANT

The International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force on 3rd January 1976, following the deposit of the 35th instrument of ratification. Alongside its "sister Covenant", the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR) it constitutes an integral part of the "International Bill of Rights" which was intended to form the basis of freedom, justice and world peace following the Second World War. The reality, however, as will be shown below, is that the text of the Covenant was only completed in 1966 following a complex, over-lengthy and politically fraught drafting process.

I) THE ROOTS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Much has been written about the roots of human rights generally, and in particular about their derivation from natural law in Western philosophy.¹ Comparatively less has been written about the philosophical background to economic, social and cultural rights.² More often than not, the emergence of economic, social and cultural rights is attributed to the growth of socialist ideals in the late nineteenth and early twentieth centuries.³ This has led certain commentators to describe them as "second generation" rights.⁴ It has also prompted some to argue that in so far as they derive from a separate tradition, economic, social and cultural rights are of a qualitatively different nature from civil and political rights.⁵

¹ See e.g., Lauterpacht H., International Law and Human Rights, 73-126 (1950).

² *But see*, Peces-Barba G., "Reflections on Economic, Social and Cultural Rights", 2 H.R.L.J., 281 (1981).

³ See, Siegel R., "Socioeconomic Human Rights: Past and Future", 7 Hum.Rts.Q., 255 (1985).

⁴ See e.g., Weston B., "Human Rights", 6 Hum.Rts.Q., 257 (1984).

⁵ See, Cranston M., "Human Rights Real and Supposed" in Raphael D.(ed), Political Theory and the Rights of Man, 43 (1967). *Also cf.* Bossuyt M., "La Distinction Juridique entre les Droits Civil et Politique et les droits Economiques, Sociaux et Culturels", 8 H.R.L.J., 783 (1975); Vierdag E., "The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights", 9 Neth.I.L.R., 69 (1978).

While it is outside the scope of the present study to deal with such issues in detail, a number of points may be made. First, it is by no means agreed that the natural law tradition did in fact provide a coherent philosophical basis for the modern notion of human rights.⁶ Indeed, it is purely speculative to assert that the rights expressed in the Universal Declaration were inspired solely by the philosophy of Hobbes or Locke. Although the idea of "natural rights", like many other concepts, may be posited as a justification for human rights as they exist today⁷, any such justification is not necessarily dependent upon establishing a philosophical pedigree for the rights.

Secondly, to present human rights as a concept that emerged solely from a Western philosophical tradition is to undermine their universal value and subject them to claims of cultural relativity.⁸ It has to be accepted that there was probably no common conception of human rights among those States that drafted the UDHR.⁹ Finally, even if some

⁶ Some commentators have denied the link between human rights and the ancient and medieval law traditions, *see*, d'Entrèves A., Natural Law: An Introduction to Legal Philosophy, (1970); Berlin I., "Two Concepts of Liberty", in Four Essays on Liberty, 129 (1969). Others have even seen the philosophy of Hobbes and Locke as deficient in this regard, *see*, MacPherson C., "Natural Rights in Hobbes and Locke", in Raphael D.(ed), Political Theory and the Rights of Man, 4 (1967).

⁷ *See*, Donnelly J., "Human Rights as Natural Rights", 4 Hum.Rts.Q., 399 (1982). A number of other justifications have been presented, *see generally*, Shestack J., "The Jurisprudence of Human Rights", in Meron T.(ed), Human Rights in International Law, 69 (1984). The following justifications may commonly be found: "Equal Respect", Dworkin R., Taking Rights Seriously, (1977), Benn S., "Human Rights- for Whom and for What?", in Kameneka E. and Tay A.(eds), Human Rights, 59 (1978); "Needs", Lewis J., "On Human Rights", in UNESCO, Human Rights Comments and Interpretations, 54, (1949), Bay C., "Self-Respect as a Human Right: Thoughts on the Dialectics of Wants and Needs in the Struggle for Human Community", 4 Hum.Rts.Q., 53 (1982); "Equality", Vlastos G., "Justice and Equality", in Waldron J.(ed), Theories of Rights, 41 (1984); "Social Justice", Beitz C., "Human Rights and Social Justice", in Brown P. and MacLean D.(eds), Human Rights and US Foreign Policy, 45 (1979).

⁸ For issues concerning "cultural relativism" *see*, Howard R., "The Full-Belly Thesis: Should Economic Rights take Priority over Civil and Political Rights? Evidence from Sub-Saharan Africa", 4 Hum.Rts.Q., 467 (1983); Donnelly J., "Cultural Relativism and Universal Human Rights", 6 Hum.Rts.Q., 400 (1984); Teson F., "International Human Rights and Cultural Relativism", 25 Virg.J.I.L., 868 (1985); Renteln A., "The Unanswered Challenge of Relativism and the Consequences for Human Rights", 7 Hum.Rts.Q., 514 (1985); Donoho D., "Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards", 27 Stan.J.I.L., 345 (1991).

⁹ *See*, Maritain J., "Introduction", in UNESCO Symposium, Human Rights Comments and Interpretations, 9 (1949); Dworkin, *supra*, note 7, at 10. For a detailed analysis of the different approaches to the UDHR *see*, Morsink J., "The Philosophy of the Universal Declaration", 6 Hum.Rts.Q., 309 (1984). This may also apply to the

valid link between the concept of human rights and the natural law tradition may be established, there is no evidence to suggest that there was any strict division in that context between economic and social rights on the one hand, and civil and political rights on the other.¹⁰

A truly universal conception of human rights has to admit the diversity of philosophical and cultural influences that were involved in the institutionalisation of human rights on the international plane. It is not sufficient then, to explain the recognition of economic, social and cultural rights merely by reference to socialist ideals and the rise of the labour movement in Europe.¹¹ Equally important influences may have been the traditional communitarian philosophy of the African States or the "fully-fledged" natural rights approach of the Latin American States.

It is apparent that even the earliest formulations of human rights at the international level included certain economic, social and cultural rights. Thus, the minority treaties under the League of Nations provided for the protection of the cultural rights of the inhabitants.¹² Similarly the mandate system covered a whole range of civil, political,

earlier formulations of the "Rights of Man". As McKeon stated:

"The conception of natural rights... was written into the constitutions of the eighteenth, nineteenth and twentieth centuries, not because men had agreed on a philosophy, but because they had agreed, despite philosophical differences, on the formulation of a solution to a series of moral and political problems".

McKeon R., "The Philosophical Bases and Material Circumstances of the Rights of Man", in UNESCO Symposium, Human Rights Comments and Interpretations, 37 (1949). *See also*, Fields B. and Wolf-Deiter N., "Human Rights as a Wholistic Concept", 14 Hum.Rts.Q., 1 (1992).

¹⁰ *See*, Siegel, *supra*, note 3, at 260-266; Raphael D., "Human Rights Old and New", in Raphael D.(ed), Political Theory and the Rights of Man, 57 (1967).

¹¹ For the effect of the emerging labour movement *see*, Ghebali V-Y, The International Labour Organisation: A Case Study on the Evolution of UN Specialised Agencies, 1-16 (1989); Follows J, The Antecedents of the International Labour Organisation (1951).

¹² The provisions of the treaties generally provided that: "nationals belonging to minorities shall have an equal right to establish, manage and control, at their own expense, charitable, religious or social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein". Report of the Committee of Three, (6 June 1929), LNOJ, Special Supp.(No.73), at 46-54, (1929).

Azcarate comments that the provision on equality before the law was extensively claimed by minorities to safeguard their economic position. de Azcarate P., League of Nations and National Minorities, An Experiment, 61-66 (1945).

social, economic, and cultural aspects of life in the mandated territories.¹³ Indeed even under the Covenant of the League, members undertook to "endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend".¹⁴

The institutionalisation of economic, social and cultural rights was spurred on by the depression of the 1930s and the war.¹⁵ This was most clearly expressed by Roosevelt in his message to Congress on 6th January 1941 in which he asserted that the aim of peace was to secure four freedoms: freedom of speech and expression, freedom of worship, freedom from want and freedom from fear.¹⁶ Freedom from want he described as "understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world".¹⁷ He later reinforced the importance of social and economic issues within the field of human rights in another message to Congress in 1944, where he commented:

"We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence".¹⁸

This concern with the social and economic aspects of human rights was continually reiterated up to the adoption of the Universal Declaration.¹⁹

¹³ Cf. Anker P., The Mandates System: Origin- Principles- Application, (1945).

¹⁴ Article 23 Covenant of the League of Nations, 225 CTS 195.

¹⁵ Johnson M., "The Contributions of Eleanor and Franklin Roosevelt to the Development of International Protection for Human Rights", 9 Hum.Rts.Q., 19, at 21 (1987).

¹⁶ The Public Papers and Addresses of Franklin D. Roosevelt: War and Aid to Democracies, 1940, 284-5 (1941).

¹⁷ The US Secretary of State, Stettinius, later commented that the four freedoms "encompass all other rights and freedoms". Freedom from want, in particular, he saw as encompassing the right to work, the right to social security, and the right to opportunity for advancement. US Dept. of State Bulletin, Vol XII, 928-929 (1945).

¹⁸ Congressional Record, Vol.90, Pt.1, 78 Cong.2nd Sess., at 57 (1944). Roosevelt in this speech enumerated certain rights; among them he mentioned: the right to a useful and remunerative job, the right to earn enough to provide adequate food and clothing, the right to a decent home, and the right to education .

¹⁹ For example the Atlantic Charter principle six. "Great Britain-United States Joint Declaration of the President and the Prime Minister". US Dept. of State Bulletin, Vol.V, No.112, at 125 (1941), in 35 A.J.I.L., Supp. at 191, (1941). Also the American Declaration of the Rights and Duties of Man 1948 contains many references

It was only at this point that the opposition to economic, social and cultural rights, which had previously existed within the US,²⁰ emerged onto the international plane. It is not difficult to associate this occurrence with the onset of the Cold War.

II) DRAFTING OF THE INTERNATIONAL BILL OF RIGHTS²¹

As suggested, the Second World War proved to be an essential stimulus to the codification of human rights norms on the international plane. It was established early in the war, that the foundations of lasting peace had to be built on respect for human rights. Roosevelt's "four freedoms" were incorporated in the Atlantic Charter of 1941,²² which in turn was endorsed in principle by the preamble to the Declaration by United Nations.²³ Thus human rights, whilst symbolising the allied powers' struggle against tyranny, became an integral part of their war aims.

By 1945 there was a widespread demand for the institutionalisation of human rights provisions as a mechanism for preventing a reoccurrence of the atrocities and excesses associated with

48 (PAU 1948).

²⁰ Opposition in the US was evident in the difficulties encountered in formulating economic and social provisions for the proposed bill of rights in 1942. See, Russell R. A History of the United Nations Charter, 323-328 (1958).

²¹ For general outlines of the drafting of the international bill of rights see, Tolley H., The UN Commission on Human Rights, (1987); Lauterpacht, *supra*, note 1, at 273-434; Humphrey J., Human Rights and the United Nations- A Great Adventure, (1984); Green J., United Nations and Human Rights, 664-707, (1956); Sohn L., "A Short History of United Nations Documents on Human Rights", in the 18th Report of the Commission to Study the Organisation of Peace, The United Nations and Human Rights, 59-107 (1968).

²² *Supra*, note 19. The Atlantic Charter was a declaration of principles "on which they base their hopes for a better future for the world". In fact the sixth principle only refers to freedom from fear and want, however this is considered to be a mere oversight, see Johnson, *supra*, note 15, at 22. Nevertheless Roosevelt's concern with economic issues was reflected in the fifth principle which proposed the "fullest collaboration between all nations in the economic field with the object of securing, for all, improved labour standards, economic advancement, and social security".

Equally importantly, reference was made to the "right of all peoples to choose the form of government under which they will live". This reflected a continuation of the concern for self-determination championed formerly by President Wilson in 1919. It has since become an issue of great controversy- not least in the formulation of the Covenants on human rights. See *below*, text accompanying notes 154-188.

²³ 36 A.J.I.L., Supp., 191 (1942). It was declared that "complete victory over the enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice". The declaration was initially signed by 21 states, and later by a further 26.

By 1945 there was a widespread demand for the institutionalisation of human rights provisions as a mechanism for preventing a reoccurrence of the atrocities and excesses associated with the war and totalitarian regimes.²⁴ The United States in particular,²⁵ had prepared drafts for an international bill of rights earlier in the war.²⁶ However owing to internal disputes,²⁷ US plans for international organisation after 1944 left the question of human rights open. Thus the Dumbarton Oaks proposal for the United Nations Charter, only contained a single reference to human rights.²⁸

It was primarily a result of the efforts of the Latin American states²⁹ and non-governmental organisations (NGOs)³⁰ that human rights provisions are to be found in the UN Charter. Although many proposals were not taken up (such as those for a declaration of human

²⁴ To some extent the collapse of the minority regimes under the League of Nations spelt out the need for a more general, and less discriminatory system for preserving human rights.

²⁵ See, Sohn, *supra*, note 21, at 46-47.

²⁶ The 1942 Draft included a Bill of Rights, US Dept. of State Postwar Foreign Policy Preparation 1939-45, 115-6 and 483-85 (1949); a draft of 14 Aug. 1943 envisaged a separate "Declaration of Human Rights", *ibid.* at 530. "At its inception" writes Farer, "the United Nations seemed destined to be the engine of human rights". Farer T., "The United Nations and Human Rights: More Than A Whimper Less Than A Roar", 9 Hum.Rts.Q., 553 (1987).

²⁷ The main dispute centred around the formulation of rights associated with freedom from want, and the right to public education. Sohn, *supra*, note 21, at 46.

²⁸ Chapter IX, Sect. A(1) stated that among its purposes: "the Organisation should facilitate solutions of international, economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms". 3 UNICIO, at 90 (1945).

²⁹ The Latin American states had recently adopted its resolution in the Final Act of the American Conference at Chapultepec (the Inter-American Conference on Problems of War and Peace, Mexico City, Feb-March 1945). It requested the Inter-American Juridical Committee to prepare a Declaration of the International Rights and Duties of Man. This was finally completed, a few weeks before the Universal Declaration, at the Bogota Conference in 1948. *Supra*, note 19.

³⁰ The 42 non-governmental organisations acting as consultants to the American delegation at San Francisco are said to have had considerable impact. See, Humphrey, *supra*, note 21, at 13. Green comments that this was an unprecedented occurrence, *supra*, note 21, at 656, n.16. These efforts were to some extent successful. The inclusion of a reference to human rights in article 1 of the Charter is considered to be "directly attributable" to the efforts of the non-governmental "consultants". See, Humphrey J., "The UN Charter and the Universal Declaration of Human Rights", in Luard E.(ed), The International Protection of Human Rights, 39, at 41 (1957).

rights³¹), the Charter of the United Nations makes explicit references to human rights in its preamble and six articles;³² there are also a number of indirect references.³³ The exact nature of obligations undertaken by states with regard to the human rights provisions of the Charter is a matter of some controversy,³⁴ particularly as the rights themselves are nowhere defined. However there is no doubting the importance of the

³¹ Proposals were for a Declaration in the Preamble (South Africa, 1 UNCIO, at 425; and 3 UNCIO, at 474-6), for a Bill of Rights in the body of the Charter (Panama, 1 UNCIO, at 560; and 3 UNCIO, at 265-69), and a "Charter of Mankind" containing a declaration of rights with a system of supervision (Uruguay, 3 UNCIO, at 34-5). Similar proposals were made by Mexico (3 UNCIO, at 60-64), Cuba (3 UNCIO, at 500-502) and Ecuador (3 UNCIO, at 400). *See*, Sohn, *supra*, note 21, at 48-56. However, such proposals were not taken up because it was thought they required more detailed consideration than was possible in the situation.

³² UN Charter, articles 1, 13, 55(c), 56, 62(2), 68.

³³ For example the implicit obligations undertaken with regard to trust territories (article 87), and non-self-governing territories (article 73). Moreover all references to the purposes of the organisation can be read to allude to human rights in the light of article 1.

³⁴ On the one hand it is asserted that the Charter "does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects", Kelsen H., The Law of the United Nations, 29 (1951). *See also*, Hudson M., "Integrity of International Instruments" 42 A.J.I.L., 105 (1948), and Kunz J. "The United Nations Declaration of Human Rights" 43 A.J.I.L., 316 (1949).

On the other hand Lauterpacht has commented that "members of the United Nations are under a legal obligation to act in accordance with these purposes. It is their legal duty to respect and observe fundamental human rights and freedoms", *supra*, note 1, at 147. *See also* Sohn L., "The Human Rights Law of the Charter", Tex.I.L.J., 129 (1977); Schwelb argues that Lauterpacht's interpretation has been validated by subsequent practice: Schwelb E., "The International Court of Justice and the Human Rights Clauses of the Charter" 66 A.J.I.L., 372 (1972). Moreover Henkin maintains that the injunction in article 2(7) of the UN Charter against interference in the domestic concerns of a state is no longer valid as regards human rights: Henkin L., "Introduction", in Henkin L.(ed), International Bill of Rights, 1, at 6 (1982).

However it would seem that the actual protection of human rights is beyond the powers of the United Nations under the Charter. A Panamanian suggestion to insert a reference to the protection of human rights in the purposes of the organisation was widely opposed, 6 UNCIO, 324-325. Subcommittee 1/1/A held in its report that "assuring or protecting such fundamental rights is primarily the concern of each state", 6 UNCIO, at 705. Schwarzenberger concludes therefore that:

"a clear distinction is drawn between the promotion and encouragement of respect for human rights, and the actual protection of these rights. The one is entrusted to the United Nations. The other remains in the prerogative of each member state".

Schwarzenberger G., Power Politics- A Study of World Society, at 462 (3rd ed.1964).

provisions in establishing human rights as a matter of prime importance in the post-war era.³⁵

Article 68 of the Charter, included at the insistence of the US under NGO pressure, provides expressly for the establishment of a Commission "for the promotion of human rights". It was "generally understood"³⁶ that the new Commission would draft an international bill of rights as was mentioned by Truman in his closing speech at the San Francisco Conference.³⁷ This presaged the drafting of the UDHR and the two Covenants on human rights.

In 1946 the Preparatory Commission of the UN recommended that the Economic and Social Council (ECOSOC) should establish a Commission on Human Rights and should direct it *inter alia* to formulate an "International Bill of Rights".³⁸ This decision was approved by the General Assembly in January 1946.³⁹ ECOSOC established the mandate for the future Commission on Human Rights which was directed towards submitting proposals, recommendations and reports to ECOSOC regarding an international bill of rights.⁴⁰ By way of referring to a proposal to the Commission on Human Rights, the Assembly confirmed ECOSOC's decision.⁴¹

The Commission on Human Rights met for its first session in January 1947.⁴² Its composition included the five permanent members of the Security Council and was also attended by the ILO, UNESCO and various NGOs. The initial discussion, centred upon the need to define the form of the bill of rights. Suggestions were made as to a General

³⁵ There is some support for the view that the UN Charter is a form of constitution of the new world order. See, McDonald R., "The United Nations Charter: Constitution or Contract", in McDonald R. and Johnstone D.(eds), *The Structure and Process of International Law*, 889 (1983).

³⁶ Humphrey, *supra*, note 30, at 41.

³⁷ US Dept. of State Bulletin, Vol.XIII, No.314, at 5 (1945).

³⁸ Report of the Preparatory Commission, 28, (1946).

³⁹ GA Resn.7(1), (Feb.12 1946), 1 UN GAOR, Pt.1, Resns, at 12 (1946).

⁴⁰ ECOSOC Resn.5(1), (Feb.16 1946), 1 UN ESCOR, Annex 8, at 163 (1946). Other matters with which it had to deal were the protection of minorities, the prevention of discrimination, and international declarations or conventions on civil liberties, the status of women and freedom of information.

⁴¹ GA Resn.43(1), (Dec.11 1946), 1 UN GAOR, Resns, Pt.2, at 68 (1946). Humphrey comments that it was from this decision that the Commission essentially derived its mandate to draft the international bill of rights. Humphrey, *supra*, note 21, at 17.

⁴² UN Doc.E/259, 4 UN ESCOR, Supp.(No.3), (1947).

Assembly Resolution, a multilateral Convention, and a Charter amendment.⁴³ A drafting committee was appointed to formulate a preliminary draft of the international bill of human rights for examination at its second session.⁴⁴

In June 1947 the drafting committee met to review a secretariat outline of 48 articles.⁴⁵ Total agreement was not possible at this stage however, largely due to dispute as to whether the Bill should take the form of a binding convention or a mere declaration of principles.⁴⁶ The drafting Committee therefore prepared a draft declaration and a draft convention.⁴⁷ These it submitted, together with a Secretariat memorandum on the question of implementation,⁴⁸ to the Commission.

It was decided at the Commission's second session in December 1947,⁴⁹ that three documents should be prepared: a non-binding declaration of a general nature, a convention of more limited scope, and finally a document of methods of implementation (or what might be called "supervision"). The term "International Bill of Rights" was to

⁴³ Humphrey, *supra*, note 21, at 26.

⁴⁴ Initially the drafting committee was to have only three members of the Commission: Mrs Roosevelt (Chairperson), Charles Malik (Lebanon) and Chang (China). This was challenged in ECOSOC by the USSR, and the Committee was expanded to eight members. Additional representatives from UK, USSR, France, Australia, and Chile thereafter attended the drafting committee.

⁴⁵ UN Doc.E/CN.4/AC.1/3, (1947). This was compiled by Humphrey from a number of proposals submitted by individuals (such as Lauterpacht H. and Wells H.G.) and by NGOs (particularly the American Law Institute). The draft included economic, social and cultural rights as well as the basic civil and political rights. Humphrey describes his approach as a combination of "humanitarian liberalism with social democracy".

The drafting committee also had before it a draft convention on civil and political rights submitted by the United Kingdom, UN Doc.E/CN.4/21, Annex B/R.25 (1947). The committee concentrated however on the Secretariat outline.

⁴⁶ The UK on the one hand preferred the idea of a binding instrument. On the other hand the US (perhaps because of the need for Senate approval) preferred a declaration that would contain goals and aspirations rather than legally binding commitments.

The divergence of opinion was not as great as it seems, as those who preferred a Declaration agreed that it should be followed by a Convention. Equally it was thought that if a Convention was adopted, a more general declaration might be formulated to accompany it.

⁴⁷ UN Doc.E/CN.4/21, *supra*, note 45, annexes F and G. The draft was rearranged to an extent by Rene Cassin before referral to the Commission.

⁴⁸ *Ibid*, Annex H.

⁴⁹ UN Doc.E/600, 6 UN ESCOR, Supp.(No.1), (1948).

apply to all three documents.⁵⁰ The Commission established three working groups to work on the drafts.⁵¹ On the basis of the working group reports the Commission drafted a declaration and a convention. These drafts, together with the report on methods of implementation, were circulated to governments for their comments. ECOSOC created a special Human Rights Committee to review the drafts but unfortunately had no time to do so.

A) THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

The Commission met for its third session in May 1948.⁵² It gave priority to the preparation of the Declaration, and after considering the replies of governments,⁵³ adopted it by 12 votes to none with four abstentions.⁵⁴ The Declaration was then referred to ECOSOC⁵⁵ and from there to the General Assembly Third Committee. After 81 meetings in which it dealt with 168 proposed amendments, the Third Committee adopted the Universal Declaration on Human Rights,⁵⁶ followed by the General Assembly on 10th December 1948.⁵⁷

The Universal Declaration consists of 30 articles covering civil, political and economic, social and cultural rights. The inclusion of the latter in the Declaration has not prevented criticism of its philosophy as primarily "western" and "liberal", with a preference for civil and political rights.⁵⁸ Yet given that the Declaration was agreed upon

⁵⁰ *Ibid*, para.18.

⁵¹ The reports of the working groups are contained in UN Docs. E/CN.4/57 (Declaration), E/CN.4/56 (Convention), E/CN.4/53 (Methods of Implementation), in UN Doc.E/600, Annexes A-C, *ibid*.

⁵² UN Doc.E/800, 7 UN ESCOR, Supp.(No.2), (1948).

⁵³ This was in fact done by the Drafting Committee at its second session (3 to 21 May 1948) which produced revised drafts of the declaration and convention. UN Doc.E/CN.4/95, Annexes A and B, (1948).

⁵⁴ UN Doc.E/800, *supra*, note 52, Annex A. The abstentions consisted of the eastern bloc states (Byelorussia, Ukraine, USSR and Yugoslavia).

⁵⁵ ECOSOC made no substantive changes to the Declaration.

⁵⁶ By 29 votes to 0 with 7 abstentions. 3 UN GAOR, C.3, Pt.1, 879-881, (1948).

⁵⁷ GA Resn.217 A (III), (Dec.10 1948), 3 UN GAOR, Resns, Pt.1, at 71 (1948). It was adopted by 48 votes to 0 with 8 abstentions (Byelorussia, Czechoslovakia, Poland, USSR, Saudi Arabia, Ukraine, S.Africa, and Yugoslavia).

⁵⁸ There was seemingly an intention to maintain a distinction between the civil and political rights which form the first twenty articles, and economic, social and cultural rights which lie at the end. This was apparent in the rejection of a joint amendment to article 3, to include a reference to social and economic security. Similarly

during the time of the Cold War it is to be seen as something of an achievement.⁵⁹

The main group of abstentions came from the then socialist states of central and eastern Europe. The USSR recorded its opposition in the records of the Commission's third session.⁶⁰ It complained that the declaration did not contain sufficient references to democracy and anti-fascism; that it did not guarantee the implementation of the rights; and that it did not enumerate the duties of the individual to the state.⁶¹

South Africa abstained because it felt that even though the declaration was not *prima facie* binding, it might be interpreted as "an authoritative definition of fundamental rights and freedoms which had been left undefined by the Charter". There was indeed some indication that States wished to endow the Universal Declaration with a status higher than that of a mere declaration of principles. For example, the French delegate declared that the UDHR represented "general principles of law" implying therefore that it would be enforceable by the International Court of Justice (ICJ). The US however made clear that it considered the declaration to be purely of a hortatory character.⁶² Such

the discussion on the form of article 1 suggests that much emphasis was placed on an eighteenth century concept of human rights. See, Morsink, *supra*, note 9; Dowrick F., "Introduction", in Human Rights- Problems, Perspectives and Texts, 1 (1979).

⁵⁹ Tolley notes that there were three ideological forces in competition. First the Western States preferring a minimum list of strictly enforceable civil and political rights. Secondly the Eastern Bloc states championed economic, social and cultural rights with state implementation and concomitant duties. Lastly, the Latin American states, having recently completed their Bogota Declaration, wished to incorporate a maximum catalogue of rights including the economic, social and cultural components. Tolley, *supra*, note 21, at 21-22. However Humphrey comments in this respect:

"The legislative history of the Declaration shows that, while there was deep disagreement on how they [the provisions] should be implemented, there was substantial agreement on the stated objectives".

Humphrey, *supra*, note 21, at 74.

⁶⁰ UN Doc.E/800, *supra*, note 54.

⁶¹ This position was with the socialist concept of human rights. According to that philosophy, the emphasis is placed upon the individual as a citizen within a community. Thus individuals are deemed to have duties to the state as much as they have rights. As the individual is considered to have no status in international law, the implementation process is primarily a national one. It seems therefore, that in complaining about the absence of an implementation process, the soviet representative did not envisage an international system but merely that specific state action should be outlined. See, Przetacznik F., "The Socialist Concept of Human Rights: Its Philosophical Background and Political Justification", 13 R.B.D.I., 238 (1977).

⁶² The representative of the US in her statement to the General Assembly commented:

"It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a

disagreements about the status of the Universal Declaration have persisted.⁶³

Two provisions in the UDHR were explicitly excluded from the final draft. The first was the right to petition the state or the United Nations.⁶⁴ It was thought that this preempted the discussion on implementation, and the Commission was thus asked to consider the matter further.⁶⁵ The second was an article referring to the rights of ethnic, linguistic and religious minorities. Again the Assembly requested the Commission and the Subcommittee to make a thorough study on the question.⁶⁶

declaration of basic principles of human rights and freedoms. to be stamped with the approval of the General Assembly by a formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations".

US Dept. of State Bulletin, Vol.XIX, at 751 (1948).

⁶³ Although General Assembly Resolutions are traditionally considered to have no direct legal force, there has been a tendency to confer some weight upon their status. *See e.g.*, Falk R., "The Quasi-Legislative Competence of the General Assembly", 60 A.J.I.L., 782 (1966). This is most apparent in the intersection between General Assembly resolutions and customary international law. *See*, Sloan B., "General Assembly Resolutions Revisited", 58 B.Y.I.L., 39 (1987); Akehurst M., "Custom as a source of international law", 46 B.Y.I.L., 4 (1972-3); Higgins R., "The United Nations and Lawmaking: The Political Organs", 64 Proc.Am.Soc.I.L., 38 (1970); Bin Cheng, "Instant International Customary Law", 5 Ind.J.I.L., 23 (1965). This has to some extent been generated by decisions of the ICJ: Western Sahara Case (1975) ICJ Rep., para.53, and Nicaragua Case (1986) ICJ Rep., paras.183-209.

With regard to the Universal Declaration specifically, it has often been cited as an authoritative interpretation of the UN Charter. *See* for example the Declaration on the Elimination of All Forms of Racial Discrimination Article 11, GA Resn.1904 (XVIII), (Nov.20 1963). It has also been affirmed on its own to establish obligations as in Article 2 of the Proclamation of Teheran (Final Act of the International Conference on Human Rights, Teheran, 22 April-13 May, 1968. A/Conf.32/41 at 4). *See generally* Humphrey J., "The Universal Declaration of Human Rights: Its History, Impact and Juridical Character", in Ramcharan B.(ed), Human Rights Thirty Years After the Universal Declaration, (1979); Green, *supra*, note 21, 666-677; Sohn, *supra*, note 21, at 59-73; Tolley, *supra*, note 21, at 19-24; Alston P., "The Universal Declaration at 35", 31 I.C.J.Rev., 60 (1983); Lauterpacht, *supra*, note 1, 394-434.

⁶⁴ UN Doc.A/C.3/ 3 UN GAOR, Pt.1, Annex 1 (1948). The French proposal stated that:

"Everyone has the right, either individually, or in association with others, to petition or to communicate with the public authorities of the State of which he is a national or in which he resides. He also has the right to petition or to communicate with the competent organs of the United Nations in matters relating to human rights."

⁶⁵ The preamble of the resolution stated that: "the right of petition is an essential human right, as is recognized in the Constitutions of a great number of countries." GA Resn. 217B (III), *supra*, note 57.

⁶⁶ GA Resn.217 C (III), *ibid.*

B) THE COVENANTS ON HUMAN RIGHTS⁶⁷

In 1948, the Commission on Human Rights was requested by the General Assembly to give priority to the preparation of a draft Covenant on human rights and measures of implementation.⁶⁸ At its fifth session⁶⁹ (9th May to 20th June) the Commission began to examine a draft Covenant which at this stage, contained only civil and political rights. It decided to transmit the draft Covenant, together with a number of proposed additional articles (including certain economic, social and cultural rights) and a questionnaire on implementation, to states for their comments.⁷⁰

At its sixth session⁷¹ in 1950 the Commission continued with its consideration of the draft Covenant, but decided to begin drafting a separate Covenant on economic, social and cultural rights at its next session in 1951. However, having been requested to make a number of policy decisions, the General Assembly declared *inter alia* that only a single Covenant should be drafted which would include both civil and political, and economic, social and cultural rights.⁷² The decisions of the Assembly were accordingly discussed by ECOSOC which then transferred them to the Commission and invited the specialised agencies to participate in the Commission's work regarding economic, social and cultural rights.⁷³

At its seventh session in 1951,⁷⁴ the Commission held a lengthy discussion spanning six meetings on the question of including articles on economic, social and cultural rights.⁷⁵ Various draft proposals were considered leading to the adoption of 14 articles on economic, social and cultural rights. In addition, it adopted a number of articles

⁶⁷ See generally, UN Doc.A/2929, 10 UN GAOR, Annexes, (Ag.Item 28), Pt.II, (1955).

⁶⁸ GA Resn.217 E (III), *supra*, note 57; ECOSOC Resn.191 (VIII), (Feb.9 1949), 8 UN ESCOR, Resns, Supp.(No.1), at 7 (1949).

⁶⁹ UN Doc.E/1371, 9 UN ESCOR, Supp.(No.10), (1949).

⁷⁰ *Ibid.* Annex 1.

⁷¹ UN Doc.E/1681, 11 UN ESCOR, Supp.(No.5), (1950).

⁷² GA Resn.421 (V), Sect.E, (Dec.4 1950), 5 UN GAOR, Resns, Supp.(No.20), at 42 (1950).

⁷³ ECOSOC Resn.349 (XII), (Feb.25 1951), 12 ESCOR, Resns, Supp.(No.1), at 8 (1951).

⁷⁴ UN Doc.E/1992, 13 UN ESCOR, Supp.(No.9), (1952).

⁷⁵ The discussion was conducted during the Commission's 203 to 208 meetings.

providing for a system of State reporting to be included in part V of the draft Covenant.

In the following year however, the General Assembly's Third Committee conducted an extended debate on the draft Covenant.⁷⁶ After deciding not to take on the drafting of the Covenant itself,⁷⁷ the Third Committee adopted a joint amendment⁷⁸ directing the Commission to draft two separate Covenants. The General Assembly, in a complete reversal of its original position, reaffirmed the Third Committee's amendment in Resolution 543 (VI).⁷⁹ On the basis of that decision the Commission was therefore asked to revise the draft articles on economic, social and cultural rights, taking into consideration the views of governments, NGO's and the specialised agencies.⁸⁰

In accordance with the decision of the General Assembly, the Commission spent most of its eighth session⁸¹ drafting two separate Covenants. It produced a draft article on self-determination but was however unable to consider the questions of implementation, reservations or a federal state clause. Similarly, at its ninth session,⁸² the Commission only had time to consider certain articles on civil and political rights. It was unable to discuss new additional articles, such as that concerning the right to property, for inclusion in the draft Covenant on Economic, Social and Cultural Rights. However, the Commission did conclude its consideration of the Covenant at its tenth session in 1954⁸³ following the redrafting of the articles on periodic reporting and the adoption of a federal-state clause. It was noted that the

⁷⁶ UN Docs.A/C.3/SR.358-372, 387-411, 6 UN GAOR, C.3, (358-372 and 387-411 mtgs.), (1952).

⁷⁷ See the report of the Committee. UN Doc.A/C.3/559, 6 UN GAOR, C.3, Annexes, (Ag.Item 29), at 4 (1951).

⁷⁸ Joint amendment proposed by Belgium, India, Lebanon and the USA: UN Doc.A/C.3/L.184/Rev.1, (1951).

⁷⁹ The majority in this decision was relatively small: 29 votes to 25 with 4 abstentions. GA Resn.543 (VI), (Feb.5, 1952), 6 UN GAOR, Resns, Supp.(No.20), at 36 (1952).

⁸⁰ GA Resn.544 (VI), (Feb.5 1952), 6 UN GAOR, Resns, Supp.(No.20), at 36 (1952).

⁸¹ UN Doc.E/2250, 13 UN ESCOR, Supp.(No.4), (1952).

⁸² The ninth session of the Commission was held from 7 April to 30 May 1953. UN Doc.E/2447, 16 UN ESCOR, Supp.(No.8), (1953).

⁸³ UN Doc.E/2573, 18 UN ESCOR, Supp.(No.7), (1954).

draft Covenants as completed by the Commission,⁸⁴ "represented a broad compromise between differing political, economic, and cultural opinions and, while not ideal, should be regarded as fairly satisfactory".⁸⁵

The draft Covenants were duly referred to the General Assembly for consideration at its ninth session.⁸⁶ After a general discussion, the Assembly requested further observations from States, Specialised Agencies and non-governmental organisations, and resolved that the Third Committee should discuss the drafts article by article "with a view to their adoption at the earliest possible date".⁸⁷

The Third Committee began its discussion of the draft Covenants by considering the Preambles and article 1 of each Covenant at the Assembly's tenth session.⁸⁸ The Committee continued by discussing article 2 of the draft Covenant on Economic, Social and Cultural rights, but resolved to postpone the adoption of that article until the other rights in Part III of the Covenant had been discussed. At the General Assembly's eleventh session⁸⁹ the Third Committee accordingly addressed itself to the substantive articles in Part III of the Covenant. It completed its consideration of those articles at the twelfth session.⁹⁰ The Committee then spent the next four sessions discussing the correlative provisions (articles 6-26) of the draft Covenant on Civil and Political Rights.⁹¹

It was not until the General Assembly's seventeenth session that the Third Committee resumed its consideration of the draft Covenant on

⁸⁴ The final version of the Commission's draft Covenants is to be found in UN Doc.E/2447, *supra*, note 82, Annex 1.

⁸⁵ UN Doc.A/2808 and Corr.1, 9 UN GAOR, C.3, Annexes, (Ag.Item 28), at 10, para.30 (1954).

⁸⁶ UN Docs.A/C.3/SR.557-586, 9 UN GAOR, C.3, (557-586 mtgs.), (1954).

⁸⁷ GA Resn.833 (IX) Sect.4, (Dec.4 1954), 9 UN GAOR, Resns, Supp.(No.21), at 20 (1954).

⁸⁸ UN Doc.A/3077, 10 UN GAOR, C.3, Annexes, (Ag.Item 28), 30-40 (1955).

⁸⁹ UN Doc.A/3525, 11 UN GAOR, C.3., Annexes, (Ag.Item 31), 2-22 (1956).

⁹⁰ UN Doc.A/3764, 12 UN GAOR, C.3, Annexes, (Ag.Item 33), 1-15 (1957).

⁹¹ UN Doc.A/4045, 13 UN GAOR, C.3, Annexes, (Ag.Item 32), (1958); UN Doc.A/4299, 14 UN GAOR, C.3, Annexes, (Ag.Item 34), (1959); UN Doc.A/4625, 15 UN GAOR, C.3, Annexes, (Ag.Item 34), (1960-61); UN Doc.A/5000, 16 UN GAOR, C.3, Annexes, (Ag.Item 35), (1961-62).

Economic, Social and Cultural Rights.⁹² After considerable discussion on the nature of the obligations incumbent upon the States Parties with regard to economic, social and cultural rights, article two was finally adopted.⁹³ Articles three to five followed; all being adopted unanimously, without amendment, and with minimal discussion.⁹⁴ The main body of the Covenant on Economic, Social and Cultural Rights was thus completed in 1962.⁹⁵ However, the Third Committee continued to discuss the measures of implementation at its next session⁹⁶ and again in 1966. During that time, it also reviewed the final clauses, found in Part V of the draft Covenant⁹⁷ and considered a late amendment to article 11. The International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Optional Protocol were all adopted and opened for signature by the General Assembly on 16th December 1966.⁹⁸ The adoption of the Covenants witnessed the completion of the International Bill of Human Rights.

III) ISSUES IN THE DRAFTING PROCESS

A) THE INCLUSION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS⁹⁹

The initial draft Covenant, as discussed by the Commission at its fifth session, contained no mention of economic, social or cultural

⁹² UN Doc.A/5365, 17 UN GAOR, C.3, Annexes, (Ag.Item 43), 6-17 (1962).

⁹³ *Ibid* at 13. Article two was adopted by 51 votes to four with 33 abstentions. An indication of the controversy is demonstrated by the fact that article two paragraph three was adopted by the narrow margin of 41 votes to 38 with 12 abstentions.

⁹⁴ *Ibid*.

⁹⁵ For the draft Covenant on Economic, Social and Cultural Rights as adopted at this stage *see*, UN Doc.A/5929 Annex, 20 UN GAOR, C.3, Annexes, (Ag.Item 65), 4-7 (1966).

⁹⁶ UN Doc.A/5655, 18 UN GAOR, C.3, Annexes, (Ag.Item 48), 14-25 (1963).

⁹⁷ *Ibid*.

⁹⁸ GA Resn.2200 (XL), (Dec.16 1966), 21 UN GAOR, Resns, Supp.(No.16), at 49 (1966). On the drafting of the ICCPR *see*, McGoldrick D., The Human Rights Committee, 3-43 (1991).

⁹⁹ *See generally*, Green, *supra*, note 21, at 679-682; Jhabvala F., "On Human Rights and the Socio-Economic Context", 31 Neth.I.L.R., 149 (1984); UN Doc.A/2929, *supra*, note 67, at 7-8, paras.4-12; Van Boven T., "Distinguishing Criteria of Human Rights", in Vasak K.and Alston P.(eds), International Dimensions of Human Rights, Vol.1, 43 (1982); UN Doc.A/C.3/559, *supra*, note 77, at 40-41, paras.16-22.

rights. However, a number of proposals were made by Australia and the USSR, for the inclusion of certain economic and social rights in the draft Covenant. Without discussing the proposals, the Commission resolved that the Covenant should contain such articles.¹⁰⁰ However, by its next session, the Commission had changed its position. It was felt that additional time was needed to discuss economic and social rights at length, in consultation with the specialised agencies and particularly UNESCO and the ILO.¹⁰¹ As far as the Commission was concerned, the best course of action was to adopt an initial draft Covenant limited to civil and political rights, with a view to adopting further Covenants on other rights at a later stage.¹⁰² Thus it resolved to begin drafting a separate Covenant on economic, social and cultural rights at its next session in 1951.

In considering the draft Covenant, ECOSOC approved¹⁰³ the Commission's decision to consider additional Covenants¹⁰⁴ and requested the Secretary-General to consult the specialised agencies on the matter of economic, social and cultural rights.¹⁰⁵ Furthermore, it asked the General Assembly to make a policy decision regarding the desirability of including articles on economic, social and cultural rights in the existing draft Covenant.¹⁰⁶

Following the request, the General Assembly made a policy decision.¹⁰⁷ It decided that the Covenant lacked "certain of the most elementary rights" and accordingly instructed the Commission to revise the Covenant with a view to the inclusion of other rights.¹⁰⁸ However in considering specifically the inclusion of economic and social rights, the

¹⁰⁰ By 12 votes to 0 with 3 abstentions.

¹⁰¹ The Commission was in possession at this time of the survey of activities of UN organs and specialised agencies in matters within the scope of articles 22 to 27 of the Universal Declaration. UN Doc.E/CN.4/364 (1950).

¹⁰² This was decided by 13 votes to 2.

¹⁰³ ECOSOC Resn.303 C (XI), (Aug.9 1950), 11 UN ESCOR, Resns, Supp.(No.1), at 25 (1950).

¹⁰⁴ E/CN.4/SR.377-379, 11 ESCOR, (377-379 mtgs.) (1950). It actually referred to "economic, social, cultural" and "political" rights. The suggestion being that the draft convention only dealt with civil rights.

¹⁰⁵ ECOSOC Resn.303 D (XI), *supra*, note 103, at 25-6.

¹⁰⁶ ECOSOC Resn.303 I (XI), *ibid*, at 29.

¹⁰⁷ *Cf.* UN Docs.A/C.3/SR.278-316 and 318, 5 UN GAOR, C.3, (278-316 and 318 mtgs.), (1951).

¹⁰⁸ GA Resn.421 (V) Sect.B, *supra*, note 72.

debate was long and acrimonious. The US,¹⁰⁹ Brazil and Turkey introduced a draft in the Third Committee instructing the Commission to consider additional instruments dealing with such rights.¹¹⁰ The majority however preferred a Yugoslav amendment including economic, social and cultural rights within the existing Covenant. When the matter came to plenary the Assembly adopted the amended text by 35 votes to nine with seven abstentions.¹¹¹

In its resolution the General Assembly decided that "the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent". As such the Commission was to include in the draft Covenant "a clear expression of economic, social and cultural rights in a manner which relates them to the civil and political freedoms proclaimed by the draft Covenant".¹¹²

At its seventh session in 1951¹¹³ the Commission held a lengthy discussion on the question of including articles on economic, social and cultural rights, for which it had before it a number of documents on the subject.¹¹⁴ Despite clear opposition to the General Assembly directive,¹¹⁵ it discussed the various proposals for draft articles¹¹⁶ first

¹⁰⁹ Opposition of the US to economic, social and cultural rights dates back to the early debates over the drafting of an international instrument for the United Nations. Internal opposition was such in the US that the Senate was unlikely to accept a human rights treaty that included economic, social and cultural rights. It was therefore of prime importance to the delegation to ensure the exclusion of such rights from the draft covenant.

¹¹⁰ UN Doc.A/C.3/L.76, (1950).

¹¹¹ Those who voted against the amendment included Australia, Canada, the UK, and the US.

¹¹² GA Resn.421 (V) Sect.E., *supra*, note 72.

¹¹³ UN Doc.E/1992, *supra*, note 74.

¹¹⁴ The discussion was conducted during the Commission's 203 to 208 meetings. The documents that it had before it included: "Memorandum of the Secretary-General on Economic, Social and Cultural Rights", UN Doc.E/CN.4/529, (1951); "Memorandum on Co-operation Between the Commission and the Specialised Agencies and Other Organs of the United Nations", UN Doc.E/CN.4/534 and Add.1-3, (1951); Survey of Action by UN Organs and Specialised Agencies of Matters Within the Scope of Articles 22-27 UDHR", UN Doc.E/CN.4/364, Corr.1-3, and Add.1-3, (1951); various reports containing draft articles and suggestions by Specialised Agencies (UNESCO, WHO, ILO, High Commissioner for Refugees).

¹¹⁵ The question was mooted as to whether the Commission was bound by the Assembly's decisions. It was considered that even if it was not, it was still bound to carry out the recommendations of ECOSOC which had directed the Commission in accordance with the Assembly's wishes.

¹¹⁶ The proposals of governments and the specialised agencies are to be found in UN Doc.E/CN.4/AC.14/2 and Add.1-5, (1951).

in a working group then in plenary. The result was the adoption of 14 draft articles on economic, social and cultural rights including two separate "umbrella clauses" concerning obligations and limitations.¹¹⁷

Despite the seeming ambiguity in the Commission's position regarding its opposition to the General Assembly's decision, an Indian proposal to ask ECOSOC to recommend that the General Assembly reconsider its decision to include economic, social and cultural rights in the Covenant was defeated by 12 votes to 5 with 1 abstention.¹¹⁸ The opposition of the western states to economic, social and cultural rights however continued.

ECOSOC, following a discussion of implementation measures, invited the General Assembly to reconsider its decision regarding a single Covenant.¹¹⁹ The General Assembly Third Committee conducted an extended debate on the matter at its sixth session,¹²⁰ and adopted a joint amendment¹²¹ directing the Commission to draft two separate Covenants. This decision was reaffirmed by the General Assembly in Resolution 543 (VI) which requested the Commission:

"To draft two Covenants on human rights..., one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible...".¹²²

The Assembly thus reversed its earlier decision, a step which Humphrey has commented as having been "taken largely on ideological

¹¹⁷ The inclusion of the umbrella clauses (*ibid.* Annex 1, pt.III, draft articles 19 and 32) showed that the Commission was determined to maintain a distinction between the categories of rights even if forced to deal with them in the same convention.

¹¹⁸ Draft Resn.E/CN.4/619/Rev.1, (1951). The proposal recognised that economic, social and cultural rights were "equally fundamental", but maintained that they formed a separate category of rights "in that they were not justiciable".

¹¹⁹ ECOSOC Resn.384 (XIII), (Aug.29 1951), 13 UN ESCOR, Resns, Supp.(No.1), at 35 (1951).

¹²⁰ *Supra*, note 76.

¹²¹ Joint amendment proposed by Belgium, India, Lebanon and the USA. UN Doc.A/C.3/L.184/Rev.1, *supra*, note 78.

¹²² GA Resn.543 (VI), (Feb.5 1952), 6 UN GAOR, Resns, Supp.(No.20), at 36 (1952). The majority in this decision was relatively small: 29 votes to 25 with 4 abstentions.

grounds".¹²³ On the basis of this decision, the Commission was asked to revise the draft articles on economic, social and cultural rights taking into consideration the views of governments, NGO's and the specialised agencies.¹²⁴ From that point on, the Commission continued to draft and discuss economic, social and cultural rights with a view to their adoption in a separate Covenant. Later proposals requesting the General Assembly to revise its decision to draft two separate Covenants were rejected.¹²⁵

The decision to draft two separate Covenants was certainly a momentous one, and has coloured the manner in which human rights, and particularly economic, social and cultural rights, have been treated since. The arguments on behalf of those who desired two separate Covenants may be summarised as follows:

i) Whereas civil and political rights were absolute and fundamental,¹²⁶ economic, social and cultural rights were dependent for their realisation on economic resources¹²⁷ and were therefore relative, contingent,¹²⁸ long term objectives. It followed that civil and political rights were positive and justiciable¹²⁹ whereas economic, social and cultural rights were not.

ii) Civil and political rights could be undertaken immediately through legislative or administrative action calling for state restraint. Economic, social and cultural rights on the other hand, could only be achieved progressively through positive state action.¹³⁰ The implementation of civil and political rights as "legal" rights was thus of an entirely different nature to that of economic, social and cultural rights which were "programme" rights.

iii) Given that the Covenant was to be acceptable to the majority of

¹²³ Humphrey, *supra*, note 21, at 107.

¹²⁴ GA Resn.544 (VI), *supra*, note 80.

¹²⁵ UN Doc.E/CN.4/L.195, (1952), and UN Doc.E/CN.4/L.272, (1953).

¹²⁶ *See e.g.*, D'Souza (India), UN Doc.A/C.3/SR.361, at 86, paras.30-32 (1951).

¹²⁷ *See e.g.*, Marshall (Canada), UN Doc.A/C.3/SR.362, at 91, paras 30-31 (1951).

¹²⁸ *See e.g.*, Alfonzo-Ravard (Venezuela), UN Doc.A/C.3/SR.367, at 122, para.13 (1951).

¹²⁹ *See* India's proposed draft resolution at the Commission's seventh session, UN Doc.E/1992, *supra*, note 74, at 15, para.67.

¹³⁰ *See e.g.*, Heald (United Kingdom), UN Doc.A/C.3/SR.361, at 87, paras 48-49 (1951).

states, it was unwise to include obligations in the Covenant that would prevent certain states from ratifying it.¹³¹

iv) As suggested by the general disagreement over the issue, the inclusion of economic, social and cultural rights would delay unduly the completion of the Covenant.¹³²

On the other hand those who desired a single covenant containing all the rights advanced the following arguments:

i) That the UN Charter (article 55) and the Universal Declaration of Human Rights both contemplated the unity of all human rights¹³³ and that the division of the Covenant created a hierarchy of rights contrary to such provisions.¹³⁴

ii) That attempts to secure civil and political rights without regard to their social, economic and cultural context were purely abstract and theoretical.¹³⁵

iii) That the asserted differences were to some extent artificial. Not only were some economic, social and cultural rights immediately enforceable,¹³⁶ but it was clear that in some countries civil and political rights were not "legal" in any effective way.¹³⁷

iv) That as economic, social and cultural rights were a more recent phenomenon they expressed the progress achieved in the field of human rights. Their exclusion would merely reaffirm those civil and political

¹³¹ See e.g., Harry (Australia), UN Doc.A/C.3/SR.363, at 101, para.43 (1951).

¹³² See e.g., Dehousse (Belgium), UN Doc.A/C.3/SR.361, at 83, para.5 (1951).

¹³³ See e.g., Dedijer (Yugoslavia), UN Doc.A/C.3/SR.365, at 107, para.5 (1951).

¹³⁴ See e.g., Mufti (Iraq), A/C.3/SR.364, at 103, para.5 (1951). The point is an interesting one as, despite indications to the contrary, some states did in fact suggest that civil and political liberty had to be assured before the full enjoyment of economic, social and cultural rights became possible, see Heald (United Kingdom), A/C.3/SR.361, at 87, para.48 (1951).

¹³⁵ See, Alborno (Ecuador), A/C.3/SR.366, at 117, para.47 (1951). There were indications that some states considered economic, social and cultural rights as being the condition for the realisation of civil and political rights, and thus of more immediate importance. The tendency to create a new hierarchy of this nature was to become an issue of great controversy later in the General Assembly, see e.g., Howard, *supra*, note 8.

¹³⁶ E.g. Trade Union Rights, Article 8(1)(a) ICESCR.

¹³⁷ See e.g., summary by Najjar (Israel), A/C.3/SR.368, at 129, paras 20-21 (1951).

rights that already exist in constitutions, undermining any real development in the protection of human rights in general.¹³⁸

v) That to separate the rights into two Covenants would amount to postponing indefinitely the realization of economic, social and cultural rights.¹³⁹

The main proponents of the separation of the rights were the Western States, whereas the Soviet Bloc together with certain Latin American states preferred the single Covenant. There was therefore an implicit ideological commitment on either side, given that it was a time of Cold War, to maintain the respective positions. This was made particularly apparent by the scant notice paid to the Israeli Memorandum advocating a new categorisation of the rights along the lines of their differing implementation requirements.¹⁴⁰ It was essentially the shifting Third World vote, however, that allowed the initial General Assembly decision to be reversed.¹⁴¹

It is clear that it was not intended that the division of the Covenant should imply any notion of relative value. Indeed it was stated that "the enjoyment of civil and political freedoms and economic, social and cultural rights are interconnected and interdependent" and that "when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man".¹⁴² However it would seem that the division of the Covenants was a solution to an ideological conflict in which the Western States' preference for civil and political rights was to some extent vindicated. That this was an unsatisfactory result is apparent

¹³⁸ See e.g., Cortina (Cuba), A/C.3/SR.366, at 117, para.41 (1951).

¹³⁹ *Ibid*, at 116, para.40.

¹⁴⁰ The proposal was to divide the rights into those that were immediately realizable and those that were to be implemented progressively according to the conditions of each state. Each state would therefore have different rights in each category. This would cut across the existing ideological differentiation between civil and political, and economic, social and cultural rights. Israeli Memorandum, UN Doc.A/C.3/565, 6 UN GAOR, C.3, Annexes, (Ag.Item 29), at 17, (1952).

¹⁴¹ See, Jhabvala, *supra*, note 99, at 50.

¹⁴² Preamble to GA Resn.543 (VI), *supra*, note 122. The unity of the two categories of rights has been continually recognised since, see Proclamation of Teheran, article 13, GA Resn.32/130, (Dec.16 1977), 33 UN GAOR, Resns, Supp.(No.45), at 150 (1977); GA Resn. 41/128, article 6(2), (Dec.4 1986), 41 UN GAOR, Resns, Supp.(No.53), at 186 (1986).

from the continuing debate as to the relationship between the rights and their relative importance.¹⁴³

B) PROGRESSIVE OR IMMEDIATE OBLIGATIONS.

The Covenants, as finally accepted, have significant differences not only in respect to the relative implementation procedures, but also with regard to the obligations accepted by the States parties to ensure the rights in each Covenant. Whereas under the ICCPR states undertake to "respect and ensure" the rights recognised,¹⁴⁴ under the ICESCR the obligation is one where the States undertake "to take steps...with a view to achieving progressively the full realization of the rights recognised" in the covenant.¹⁴⁵ Thus the obligations under the ICCPR could be said to be immediate in contrast to the progressive nature of the undertakings in the ICESCR.

It was initially suggested that since the two categories of rights were to be of equal importance, the ICESCR should have the same obligations clause as the ICCPR. It was recognised however that the process of realisation of economic, social and cultural rights was generally of a different nature to that of civil and political rights.¹⁴⁶ The obligation upon states with regard to economic, social and cultural rights was considered to be necessarily progressive in character, as full and immediate realisation of all the rights was beyond the resources of many states.

The obligations clause as adopted (article 2(1)) was criticised by many as providing too many loopholes for states to avoid or delay

¹⁴³ Some commentators have maintained the validity of the distinction between the two categories of rights, *see e.g.* Bossuyt, *supra*, note 5. *Contra*, 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); Berenstein A., "Economic and Social Rights: Their Inclusion in the ECHR-Problems of Formulation and Interpretation", 2 H.R.L.J., 257 (1981). Others have gone further in arguing that civil and political rights are therefore more important, *e.g.* Cranston, *supra*, note 5, or that economic, social and cultural rights are "legally negligible" *e.g.* Vierdag, *supra*, note 5. *Contra* Van Hoof, *ibid.*

The majority in the United Nations has alternatively expressed the interests of developing states with a preference for economic, social and cultural rights, *see generally*, Türk D. Realisation of Economic, Social and Cultural Rights, UN Doc.E/CN.4/Sub.2/1989/19, (1989).

¹⁴⁴ Article 2(1) ICCPR.

¹⁴⁵ Article 2(1) ICESCR.

¹⁴⁶ See above. It has been argued that the implementation of the ICCPR is similarly progressive. Jhabvala *supra*, note 99. This is evidenced by the need for financial input to secure civil and political rights ie. for an efficient court system, and that the reporting procedure under article 40(1) provides for the States to report on the "measures they have adopted... and on the progress made".

undertaking their obligations. However, it was argued that the progressive nature of the obligation was essential given its dependency upon state resources and that it would leave sufficient leeway to the specialised agencies to develop the rights in more elaborate international instruments.¹⁴⁷

Perhaps the greatest criticism of article 2(1), as will be seen, is its relative lack of sophistication. Despite the fact that it was agreed during the drafting of the Covenant, that certain rights should be seen as capable of immediate implementation, this was not reflected in the terms of article 2(1). Moreover, given that governments are naturally reluctant to give effect to human rights provisions that seem to offer them no obvious benefit in the short run, the general progressive nature of the obligation does appear to provide them with excessive leeway.

C) THE LOCATION OF OBLIGATION PROVISIONS

A recurring issue in the drafting of the Covenant was the location of provisions outlining State obligations. Although the matter was generally resolved in 1951 with the decision to create an umbrella clause outlining State obligations, individual proposals to specific articles thereafter often contained elaborations of the requirements laid down in the general clause.¹⁴⁸ Thus for example, during the drafting of article 6, there was considerable support for the inclusion of an extra paragraph outlining in more detail the steps to be taken by States in realising the rights within the Covenant.¹⁴⁹

A number of States continually opposed the inclusion of such phrases, on the basis that they might detract from, or serve to weaken, the general obligation clause,¹⁵⁰ and that it was inconsistent to have those phrases in some clauses and not others.¹⁵¹ On the whole, it was felt that the general clause in no way prevented the inclusion of more specific implementation provisions within the substantive articles themselves.¹⁵² However, the matter was complicated by the fact that article 2(1) (the general implementation provision) was drafted and adopted after the substantive articles themselves. Thus, at most stages, it

¹⁴⁷ UN Doc.A/2929, *supra*, note 67.

¹⁴⁸ See e.g. discussion on the inclusion of article 6(2), *below* Chapter 5, text accompanying notes 52-64.

¹⁴⁹ *Ibid.*

¹⁵⁰ See e.g., Rossel (Sweden), E/CN.4/SR.277, at 3 (1952); Roosevelt (USA), E/CN.4/SR.277, at 7 (1952).

¹⁵¹ See e.g. Elliot (UK), A/C.3/SR.710, at 143, para.26 (1956).

¹⁵² See e.g., Diaz Casanueva (Chile), A/C.3/SR.710, at 144, para.38 (1956).

was not possible to predict exactly what would be provided for in the umbrella clause.

It would appear that the inclusion of obligation clauses in the substantive portion of the Covenant does upset its general conceptual form. Many articles possess a confusing mixture of norms and sub-norms, with both immediate and progressive obligations. Article 11(2), in particular, lacks the conceptual clarity that might have been achieved with a stricter division between norms and measures of implementation. Article 11(2) not only deals with specific implementation provisions that relate to the right to food (such as the reform of agrarian systems), but it provides for an additional sub-norm (the right to be free from hunger) and objectives to which the measures of implementation should be directed (such as the equitable distribution of food supplies).¹⁵³

D) SELF DETERMINATION

Article 1 of both International Covenants on human rights proclaims that:

"All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The inclusion of this provision was the first occasion on which self-determination was spelled out in a treaty as a human right. Indeed its formulation was to be a source of great controversy during the drafting of the covenants, to the extent that it was feared that the Covenant was becoming a pawn in the fight against colonialism.

The concept evolved initially¹⁵⁴ as a political principle most notably in the form of Wilson's "Fourteen Points" of 1917.¹⁵⁵ Then on the prompting of the USSR,¹⁵⁶ it was set out as one of the purposes of

¹⁵³ See below, Chapter 8.

¹⁵⁴ It is sometimes argued that the self-determination of individuals and peoples was the fundamental concept behind the development of human rights following the enlightenment, see e.g. Kameneka E., "Human Rights: Peoples Rights", in Crawford J.(ed), The Rights Of Peoples, 130 (1988).

¹⁵⁵ Wilson stated inter alia:

"No peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their powers from the consent of the governed".

Address to the US Senate, Jan 1917, Washington 1917.

The principle of self-government was also enshrined in the Atlantic Charter of 1941 and thence in the Declaration of the United Nations of 1942.

¹⁵⁶ The final formulation is thought to be a compromise between the Colonialist and Socialist States. See, Cassese A., "Political Self-Determination- Old Concepts and New Developments", in Buergenthal T.(ed), Human Rights, International Law and the