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CHAPTER 3: RATIFICATION AND IMPLEMENTATION OF TREATIES: THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

A. INTRODUCTION

Chapter 1 established that treaties constitute a primary source of international human rights law. Chapter 2 describes the process for drafting treaties. The decision to become a party to a treaty is the next critical step. This chapter examines ratification of a treaty with regard to a crucial group of rights characterized as economic, social and cultural. Here we focus on the Covenant on Economic, Social and Cultural Rights, which complements the Covenant on Civil and Political Rights, which is discussed in chapter 4. Together with the Universal Declaration of Human Rights, the two Covenants and a procedural protocol to the Civil and Political Covenant (entered into force in 1976) constitute the International Bill of Human Rights.

We first examine the nature and content of economic, social and cultural rights and the issue of their justiciability. We next describe the implementation of these rights at the international level, and the role of the Committee on Economic, Social and Cultural Rights. As a prelude to the issue of U.S. ratification of the Covenant, we summarize the process by which states accept treaty obligations and analyze the highly contested question of permissible reservations to human rights treaties.

B. QUESTIONS

The class is to conduct itself as a Senate committee that has scheduled hearings to determine whether the Senate should consent to U.S. ratification of the Covenant on Economic, Social and Cultural Rights. One student (or more) should testify in favor of ratification, another (or more) against. Others, as committee members, will question the two witnesses and debate the issues. In deciding whether to recommend that the Senate consent, consider these questions:

1. Are there categorical legal differences between civil and political rights, as compared to economic, social, and cultural rights?

a. Do you think that one set of rights is positive in nature, the other negative?

b. How would you characterize the non-discrimination norm (for example, in matters of employment and education)? Or the right to form independent trade unions? Or the prohibition on slavery?

c. In what ways might implementation and enforcement of the two sets of rights differ? Does the manner of implementation necessarily affect outcome?

d. Are there differences in the cost of complying with the two sets of rights? Can one characterize civil and political rights as negative rights and economic, social and cultural rights as positive rights? Do both kinds of rights require state systems and structures to be in place? Is the question of cost really one of degree?

e. Are there conflicts between the achievement of civil and political rights and achievement of economic, social, and cultural rights?

2. Can the objectives of the Covenant on Economic, Social and Cultural Rights be realized in the context of globalization and/or the dominance of the market system?

3. Should the U.S. ratify the Covenant on Economic, Social and Cultural Rights?

a. What advantages might be gained by ratifying?

b. Are there disadvantages?

c. Are there disadvantages of non-ratification?

4. What is the significance of the ratification of the Covenant by the People's Republic of China for the prospects of U.S. ratification?

5. Exactly what obligations would the U.S. undertake by ratifying?

a. Do you think it likely that the U.S. would be found in violation of the Covenant? If so, which clauses?

b. How is compliance monitored?

6. How might advocates of ratification most effectively proceed?

a. What are advantages and disadvantages of a "stealth" approach?

b. What are advantages and disadvantages of advocating ratification via open discussion of the Covenant's perceived impact on U.S. laws and practices?

c. In designing a strategy for U.S. ratification of human rights treaties, which treaties should receive priority? What priority should the Covenant on Economic, Social and Cultural Rights have?

7. Are reservations and other qualifications desirable?

a. Should the Senate accept all of President Carter's proposals? Should it propose some of its own?

b. What effect would the qualifications have on other parties to the Covenant? Might they argue that some of the proposed qualifications are invalid?

c. Is it worth ratifying a treaty with so many reservations? What is the significance of China's qualification to Article 8?

d. What impact might the U.S. practice of extensively qualifying or seeking to limit the legal effect of the treaties it ratifies have on other countries?

C. THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. What Are Economic, Social, and Cultural Rights?

After the Second World War a series of documents, including the U.N. Charter and the Universal Declaration of Human Rights broadly defined the scope of economic, social, and cultural rights. The principal source of international obligations now is the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976. Originally the drafters intended to create one document covering all rights enunciated in the Universal Declaration. In the course of drafting, however, they decided to employ separate documents: the Economic, Social and Cultural Rights Covenant; and the Civil and Political Covenant.

It is sometimes perceived that economic, social and cultural rights are less securely defined and recognized than civil and political rights, especially in developed democracies such as the United States. The following readings are intended to assist you in considering those questions, which are of significant concern in the debate over potential U.S. ratification of the Covenant on Economic, Social and Cultural Rights.

On January 6, 1941, while German bombers continued their nightly blitz of British cities and Hitler planned an invasion of the Soviet Union that ultimately would leave 20 million people dead, President Roosevelt, in his annual State of the Union address to Congress, outlined his vision of the future based upon "four essential human freedoms." He declared:

In the future days, which we seek to make secure, we look forward to a world founded upon four essential human freedoms.

The first is the freedom of speech and expression everywhere in the world.

The second is the freedom of every person to worship God in his own way everywhere in the world.

The third is the freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peace-time life for its inhabitants everywhere in the world.

The fourth is freedom from fear -- which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor -- anywhere in the world.

Franklin D. Roosevelt, "Four Freedoms" Speech, 87-I Cong. Rec. 44, 46-47 (1941).

Later during World War II, President Roosevelt's State of the Union message on January 11, 1944, more specifically addressed the freedoms he had previously enumerated:

It is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known. We cannot be content, no matter how high that general standard of living may be, if some fraction of our people -- whether it be one-third or one-fifth or one-tenth -- is ill-fed, ill-clothed, ill-housed, and insecure. . . .

This Republic had its beginning and grew to its present strength, under the protection of certain inalienable political rights -- among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty. . . .

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not free men." People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all -- regardless of station, race or creed.

Among these are:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won, we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.

America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world.

Franklin D. Roosevelt, State of the Union Message, 90-I Cong. Rec. 55, 57 (1944) (emphasis added). President Roosevelt, of course, presided over the New Deal, a series of programs by which the federal government combated the effects of the Depression of the 1930s. How resonant are Roosevelt's conceptions of rights with the present-day leadership of the United States, which often stresses the need to limit government?

After World War II the international community began to focus on the rights discussed by President Roosevelt in the excerpts above. Several international instruments issued during the post-War period protect economic, social, and cultural rights to some extent. Notably, Article 55 of the U.N. Charter prescribes:

[T]he United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and universal respect for, and observance of

human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

In Article 56, all members pledge "to take joint and separate action . . . for the achievement of the purposes set forth in Article 55."

The 1948 Universal Declaration of Human Rights added specificity to those goals. In its Article 22, the General Assembly proclaimed that:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The Declaration also proclaims that everyone has the right to: work and join trade unions (Article 23); rest and leisure (Article 24); an adequate standard of living (Article 25); education (Article 26); and participate freely in cultural life (Article 27).

Professor David Trubek suggests one reason for that decision might have been a belief that it was impossible to develop one system to implement both sets of rights. He notes that civil and political rights can be implemented more immediately through passing laws and revising constitutions, while economic, social, and cultural rights generally require action over time, including establishment of social programs. The difference in temporal implementation suggests a similar difference in implementation methodology. He also noted that some states might be unwilling to accept an obligation to ensure economic, social, and cultural rights. While there were historically significant debates relating to the distinction between the two categories of rights, the 1993 Vienna Declaration and Programme of Action reflected significant movement on this subject in pronouncing that "All human rights are universal, indivisible and interdependent and interrelated." Vienna Declaration, World Conference on Human Rights, Vienna, 14 - 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20, para. 5 (1993). The challenge remains, however, the willingness of states to commit to action. Indeed, some states (e.g., India, Ireland, Romania, South Africa) have incorporated constitutional commitments to economic and social rights within their national constitutions.

The following section further illuminates the nature of economic, social, and cultural rights in the context of the Covenant on Economic, Social and Cultural Rights. Before reading further, consider the substantive provisions of the Economic, Social and Cultural Rights Covenant that are reprinted in Selected International Human Rights Instruments at 28.

2. Interpreting States' Obligations under the Covenant on Economic, Social and Cultural Rights

Since the adoption of the Covenant, the Committee on Economic, Social and Cultural Rights, as well as scholars and experts in the international community have worked to ensure the legitimacy of economic, social and cultural rights and to make clear an understanding of the obligations enumerated in the Covenant.

Major misperceptions of the Covenant on Economic, Social and Cultural Rights have been created by the controversy surrounding whether economic, social, and cultural rights are justiciable. The debate has centered on the idea that civil and political rights are justiciable while economic, social, and cultural rights are not. The Committee on Economic, Social and Cultural Rights addressed this issue in its General Comment No. 9:

> It is important . . . to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by the courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, . . . be considered to possess at least some significant justiciable dimensions. . . . The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond reach of the courts would . . . be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect rights of the most vulnerable and disadvantaged groups in society.

This section attempts to explain and define the perimeters of states obligations in order provide a setting where economic, social and cultural entitlements can be claimed. One of the first attempts to define the nature and the scope of states' obligations under the Covenant on Economic, Social and Cultural Rights occurred in 1986 when a group of international law experts met in Maastricht, the Netherlands. The experts agreed to guidelines to the Covenant which they believed reflected principles of international law, known as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter the Limburg Principles). In January 1997, on the tenth anniversary of the Limburg Principles, experts convened once again to discuss and elaborate on guiding principles to the Covenant. Reflecting the evolution of international law since the last meeting, new guidelines (the Maastricht Guidelines) were created in consideration of the adoption of new instruments such as the revised European Social Charter of 1996 and the Additional Protocol to the European Charter Providing for a System of Collective Complaints, the San Salvador Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988, the seven UN World Summit

Conferences occurring between 1992 and 1996, and the proposed Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

An understanding of the obligations expressed in Article 2(1) is crucial to the understanding of the Covenant, because this section provides the basis for interpretation all other provisions. Article 2(1) states:

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

The nature of the obligations found in Article 2(1) includes both obligations of conduct and obligations of result. An obligation of conduct refers to a specific action (or omission) that is required of a state. In contrast, an obligation of result obliges a state to take action (or omission), however the state chooses, in order to achieve a specific result. Although scholars have argued that the Covenant contains solely obligations of result, these two types of obligations should be viewed as overlapping and including one another. As explained by Scott Leckie, "[o]bligations to respect, protect, and fulfill consist simultaneously of dimensions of obligations of conduct and obligations of result, all of which are subject to violation under human rights law."

"to take steps . . . by all appropriate means, including particularly the adoption of legislation."

The phrase, "to take steps" may merely be seen as a general rule of international law, requiring States Parties to the Covenant to comply in implementing the provisions. It has been argued that the phrase "take steps" in conjunction with a later provision, "to achieve progressively," delays states' obligations. While this may be true for some obligations, it is not so for all of them. As General Comment No. 3 explains:

While the full realization 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. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. This principle places the burden on States parties to show that they are "taking steps" at implementing the Covenant and making progress. Hence, to "take steps" seems to entail at least a preliminary commitment.

The phrase "by all appropriate means . . ." conveys the flexible approach of the Covenant. It allows States parties discretion in the action that they will take,

however, the final determination as to whether a measure is "appropriate" is left to the Committee. While some states have limited resources, this provision mandates that a government must use whatever means are available. This idea is also expressed in the Vienna Convention on the Law of Treaties in Article 27: "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." Further, the means used to give effect to the Covenant must be "adequate." This approach includes, as explained in General Comment No. 9, an analysis of implementation of other treaties. In other words, if the means for implementing the provisions of this Covenant are very different from others, that choice should be supported by a compelling reason.

Finally, "including particularly the adoption of legislation" seems to identify legislative measures as a suggested preference, but the Covenant has not made such measures mandatory. In contrast, the Covenant on Civil and Political Rights regulates how its obligations should be realized. It clearly requires that legal measures be used in fulfilling states' obligations. Under the Economic, Social and Cultural Rights Covenant particular measures seem to be open to various options to deliver implementation. The Covenant clearly expresses legislation as a means, however, administrative, financial, social, judicial, and educational methods are all legitimate options that a state may choose, depending on the state's particular set of circumstances. In addition, as General Comment No. 3 emphasizes, even if a state chooses to use legislative measures, they may not be sufficient. Accordingly, this provision details when legislative measures might be necessary; for example, states should modify domestic law before ratifying a treaty to ensure that it will be in compliance with the obligations of the treaty. In addition, legislative measures may be necessary when a state's current measures are ineffective or where it is necessary for an obligation of result. In these instances where legislative measures are not "exhaustive of the obligations of States parties," but only an element to the implementation rights. For example, enforcement procedures and judicial remedies may also be needed.

"to achieve progressively the full realization of the rights"

"Progressive realization" of rights generally means that the full enforcement of rights need not be achieved at once. This provision is different than the Covenant on Civil and Political Rights which demands immediate realization of obligations; a demand to "respect and ensure" the rights of the Covenant. Note that ensuring certain civil and political rights, such as the availability of interpreters to assist criminal defendants, may require planning and expenditure. The difference in the texts of the two Covenants does not diminish the objective of the Covenant on Economic, Social and Cultural Rights, but rather reflects the reality that the realization of economic, social and cultural rights depends on the availability of resources and societal structures rather than state abstention. States parties must begin immediately to work towards the goals, even if they cannot be achieved

instantaneously. Concern over emphasizing that the realization of the rights is not to be put off indefinitely is illustrated in the General Comment No. 3:

The fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in light of the overall objective . . . of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.

An aspect of "progressive achievement" relates to minimum core entitlements or obligations. Minimum core obligations refer to the necessity to provide for the basic needs of the people. The Limburg Principles 25-28, which are reaffirmed in the Maastricht Guidelines, and the General Comments issued by the Committee on Economic, Social and Cultural Rights, explain that the failure to meet minimum core obligations cannot be justified by lack of resources. Rather, meeting these obligations is an immediate necessity, regardless. As expressed in General Comment No.3, it is a prima facie violation of the Covenant when a state fails to provide for the basic subsistence needs of its people. In addition, the U.N. Special Rappoteur on economic, social and cultural rights, Danilo Türk, explained, "[s]tates are obliged, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all." Minimum core obligations are assessed as outlined by the Committee in General Comment No. 3:

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its dispositionin an effort to satisfy, as a matter of priority, those obligations.

"to the maximum of its available resources"

This provision, recognizing various country circumstances, provides for flexibility and discretion. However, state discretion must have limits. To ensure that obligations are not nullified by states, the Committee must examine the real resources of a country.

The High Commissioner on Human Rights in 1993 suggested "benchmarks" to evaluate state compliance with the Covenant. When public expenditures for certain social services are reduced, compliance with the obligation of progressive realization may be in doubt. The Committee stated that "deliberately retrogressive measures" by states amounts to a violation if there is no compelling justification for the reduction, especially when other areas have been increased, for instance

military spending. Retrogressive measures "can only be justified by reference to the totality of the rights provided for in the Covenant and the context of the full use of the maximum available resources." In its General Comment No. 3 the Committee stressed:

Even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.

"individually and through international assistance and co-operation, especially economic and technical"

"Available resources" refers to resources within a state and also to resources available from the assistance of the international community. This idea is contained in Articles 11, 15, 22, and 23 of the Covenant, and explored in General Comment No. 3:

The Committee wishes to emphasise that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of inter-national law, and with the provisions of the Covenant itself, international co- operation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. It is particularly incumbent upon those States which are in a position to assist others in this regard. . . . [The Committee] emphasises that, in the absence of an active programme of international assistance and co-operation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.

How much must the international community do for other states? How does this provision of the Covenant fit with the commitments in the U.N. Millennium Declaration, for example to reduce by half the proportion of people living on less than a dollar a day or to reduce by half the proportion of people who suffer from hunger? See United Nations Millennium Declaration, G.A. Res. 55/2, U.N. GAOR, 55th Sess., Supp. No. 49, at 4, U.N. Doc. A/55/49 (2000). Must other states fulfill the obligations of poor or otherwise incapable states, or must a state merely contribute to another? Would this provision forbid economic sanctions that may undermine another country's fulfillment of its obligations under the Covenant? In addition, must states accept all aid, no matter where it is coming from or the ideals behind it? Would States parties ratify the Covenant if it obligated the fulfillment of other states' obligations as well as their own?

Consider the following excerpt from a case decided by the Constitutional Court of South Africa, in considering the issue of the justiciability of economic, social and cultural rights. Note the impact of the Covenant and its interpretation by the Committee on Economic, Social and Cultural Rights on the reasoning of the

Constitutional Court. Is this approach surprising, given that South Africa had signed but not yet ratified the Covenant?

The Government of the Republic of South Africa et al. V. Grootboom (Constitutional Court of South Africa, Case CCT 11/00, Judgment of 4 October 2000):

Yacoob, J.

A. Introduction

The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment. The Constitution declares the founding values of our society to be "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms." This case grapples with the realisation of these aspirations for it concerns the state's constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa's new constitutional order.

The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.

The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing. They are the people whose constitutional rights have to be determined in this case.

Mrs Irene Grootboom and the other respondents were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court (the High Court) for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief. The appellants were ordered to provide the respondents who were children and their parents with shelter. The judgment provisionally concluded that "tents, portable latrines and a regular supply

of water (albeit transported) would constitute the bare minimum." The appellants who represent all spheres of government responsible for housing challenge the correctness of that order.

The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas. Influx control was rigorously enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the "coloured labour preference policy." In consequence, the provision of family housing for African people in the Cape Peninsula was frozen in 1962. This freeze was extended to other urban areas in the Western Cape in 1968. Despite the harsh application of influx control in the Western Cape, African people continued to move to the area in search of jobs. Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape peninsula. The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals. The legacy of influx control in the Western Cape is the acute housing shortage that exists there now. Although the precise extent is uncertain, the shortage stood at more than 100 000 units in the Cape Metro at the time of the inception of the interim Constitution in 1994. Hundreds of thousands of people in need of housing occupied rudimentary informal settlements providing for minimal shelter, but little else.

Mrs Grootboom and most of the other respondents previously lived in an informal squatter settlement called Wallacedene. . . . The conditions under which most of the residents of Wallacedene lived were lamentable. . . . About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare.

Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from the municipality no definite answer was given. Clearly it was going to be a long wait. Faced with the prospect of remaining in intolerable conditions indefinitely, the respondents began to move out of Wallacedene at the end of September 1998. They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing. They called the land "New Rust."

They did not have the consent of the owner and on 8 December 1998 he obtained an ejectment order against them in the magistrates' court. The order was served on the occupants but they remained in occupation beyond the date by which they had been ordered to vacate. Mrs Grootboom says they had nowhere else to go: their former sites in Wallacedene had been filled by others. . . . The validity of the eviction order has never been challenged and must be accepted as correct. However, no mediation took place and on 18 May 1999, at the beginning of the cold, windy and rainy Cape winter, the respondents were forcibly evicted at the municipality's expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings. . . . The respondents went and sheltered on the Wallacedene sports field under such temporary structures as they could muster.

[S]ection 26 of the Constitution . . . provides that everyone has the right of access to adequate housing. Section 26(2) imposes an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources.

The [trial court] rejected an argument that the right of access to adequate housing under section 26 included a minimum core entitlement to shelter in terms of which the state was obliged to provide some form of shelter pending implementation of the programme to provide adequate housing. This submission was based on the provisions of certain international instruments. . . .

D. The relevant constitutional provisions and their justiciability
The key constitutional provision[] at issue in this case [is] section 26:
(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.
These rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. They entrench the right of access to land, to adequate housing and to health care, food, water and social security . . . and the right to education.

While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution. . . :

[T]hese rights are, at least to some extent, justiciable. [M]any of the civil and political rights entrenched in the [constitutional text before this Court for

certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. . . .

E. Obligations imposed upon the state by section 26

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

The right of access to adequate housing cannot be seen in isolation. . . . The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. . . .

Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality. . . .

ii) The relevant international law and its impact

Section 39 of the Constitution obliges a court to consider international law as a tool to interpretation of the Bill of Rights. In Makwanyane Chaskalson P . . . said: . . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour

Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

The amici submitted that the International Covenant on Economic, Social and Cultural Rights (the Covenant) is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution. [The Court cited Articles 2(1) and 11(1) of the Covenant].

The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26. These differences, in so far as they relate to housing, are:

(a) The Covenant provides for a right to adequate housing while section 26 provides for the right of access to adequate housing.
(b) The Covenant obliges states parties to take appropriate steps which must include legislation while the Constitution obliges the South African state to take reasonable legislative and other measures.

The obligations undertaken by states parties to the Covenant are monitored by the United Nations Committee on Economic, Social and Cultural Rights (the committee). The amici relied on the relevant general comments issued by the committee concerning the interpretation and application of the Covenant, and argued that these general comments constitute a significant guide to the interpretation of section 26. In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of general comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core:

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'etre. By the same token, it must be noted that any assessment as to whether a State has

discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

It is clear from this extract that the committee considers that every State party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing. Accordingly, a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as prima facie in breach of its obligations under the Covenant. A State party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right. However, it is to be noted that the general comment does not specify precisely what that minimum core is.

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. . . .

[T]he real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. . . .

iii) Analysis of section 26

Subsection (1) aims at delineating the scope of the right. . . . Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from

preventing or impairing the right of access to adequate housing. The negative right is further spelt out in subsection (3) which prohibits arbitrary evictions. Access to housing could also be promoted if steps are taken to make the rural areas of our country more viable so as to limit the inexorable migration of people from rural to urban areas in search of jobs.

The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system. . . . Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups.

Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. . . .

The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. . . . The formulation of a programme is only the first stage in meeting the state's obligations. . . .

Progressive realisation of the right
The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But . . . accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. . . . The committee has helpfully analysed this requirement in the context of housing as follows:

Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

Within available resources

The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources.

There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

F. Description and evaluation of the state housing programme

In support of their contention that they had complied with the obligation imposed upon them by section 26, the appellants placed evidence before this Court of the legislative and other measures they had adopted. There is in place both national and provincial legislation concerned with housing. . . . The national Housing Act provides a framework which establishes the responsibilities and functions of each sphere of government with regard to housing. The responsibility for implementation is generally given to the provinces. Provinces in turn have assigned certain implementation functions to local government structures in many cases. All spheres of government are intimately involved in housing delivery and the budget allocated by national government appears to be substantial. . . . In addition, various schemes are in place involving public/private partnerships aimed at ensuring that housing provision is effectively financed.

What has been done in execution of this programme is a major achievement. Large sums of money have been spent and a significant number of houses has been built. Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery. It is a programme that is

aimed at achieving the progressive realisation of the right of access to adequate housing.

A question that nevertheless must be answered is whether the measures adopted are reasonable within the meaning of section 26 of the Constitution. . . .

This Court must decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. . . .

. . . The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme. . . .

In conclusion it has been established in this case that as of the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need. . . .

H. Evaluation of the conduct of the appellants towards the respondents

The final section of this judgment is concerned with whether the respondents are entitled to some relief in the form of temporary housing because of their special circumstances and because of the appellants' conduct towards them. . . . [W]e must also remember that the respondents are not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout our country.

The respondents began to move onto the New Rust Land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.

There is, however, no dispute that the municipality funded the eviction of the respondents. The magistrate who ordered the ejectment of the respondents directed a process of mediation in which the municipality was to be involved to identify some alternative land for the occupation for the New Rust residents. Although the reason for this is unclear from the papers, it is evident that no effective mediation took place. The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.

At the hearing in this Court, counsel for the national and Western Cape government, tendered a statement indicating that the respondents had, on that very day, been offered some alternative accommodation, not in fulfilment of any accepted constitutional obligation, but in the interests of humanity and pragmatism. Counsel for the respondents accepted the offer on their behalf.

This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind.

I. Summary and conclusion

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.

[S]ection 26 does oblige the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application

was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.

In the light of the conclusions I have reached, it is necessary and appropriate to make a declaratory order. The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.

NOTES AND QUESTIONS

1. Several other international instruments that affect economic, social, and cultural rights are excerpted in Selected International Human Rights Instruments. See:

a. Articles 1, 7, 17, and 23-30 of the Universal Declaration of Human Rights;

b. Preamble and Articles 22 and 27 of the Covenant on Civil and Political Rights;

c. Articles 16, 29-31, 40, 42-45, 47-48, and 52(d) of the O.A.S. Charter;

d. Preamble and Articles XI-XVI, XXIII, XXVIII, and XXXV-XXXVII of the American Declaration of the Rights and Duties of Man;

e. Articles 21 and 26 of the American Convention on Human Rights;

f. European Social Charter;

g. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints;

h. Charter of Fundamental Rights of the European Union.

2. Might the differences between economic, social, and cultural rights, on the one hand, and civil and political rights, on the other, explain why the U.S. has not ratified the Covenant on Economic, Social and Cultural Rights while it has ratified the Civil and Political Covenant? Are there other explanations?

3. For further reading on economic, social, and cultural rights, see:

Advisory Committee On Hum. Rts. And Foreign Pol y, Economic, Social And Cultural Human Rights, Advisory Report No. 18 (1994);

Amnesty International, Human Rights for Human Dignity: A Primer on Economic, Social and Cultural Rights (2005);

Audrey R. Chapman & Sage Russell, Core Obligations: Building a Framework for Economic, Social and Cultural Rights (2002);

Matthew C.R. Craven, The International Covenant On Economic, Social And Cultural Rights: A Perspective On Its Development (1998);

Connie de la Vega, Protecting Economic, Social and Cultural Rights, 15 Whittier L. Rev.471 (1994) (discussing the ways in which international human rights standards may be used to promote welfare and education rights);

Economic, social, and cultural rights: a legal resource guide (Scott Leckie & Anne Gallagher eds., 2006);

Economic, Social And Cultural Rights: A Textbook (Asbjørn Eide, Catarina Krause, & Allan Rosas eds., 2d rev. ed. 2001);

Economic, Social And Cultural Rights: Fifty Years After The Universal Declaration, Proceedings of an international workshop in Vancouver, Canada (1998);

Fons Coomans, Netherlands Inst. Hum. Rts., Economic, Social And Cultural Rights, Netherlands Inst. Hum. Rts. SIM Special No. 16 (1995) (report commissioned by the Advisory Committee on Hum. Rts. and Foreign Pol y of the Netherlands);

Berma Klein Goldewijk & Adalid Contereras Baspineiro, Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights (2002);

Sofia Gruskin, Perspectives on Health and Human Rights (2005);

Rhoda E. Howard-Hassmann & Claude Emerson Welch, Economic Rights in Canada and the United States (2006);

Vladimir A. Kartashkin, Economic, Social and Cultural Rights, in International Dimensions of Human Rights 111 (Karel Vasak & Philip Alston eds., 1982);

Beth Lyon, Discourse in Development: A Post-Colonial "Agenda" for the United Nations Committee on Economic, Social and Cultural Rights through the Post-Colonial Lens, 10 Am. U. J. Gender, Soc. Pol'y & L. 535 (2002);

Mahmood Mamdani, The Truth According to the TRC, in Politics of Memory, Truth, Healing and Social Justice 176 (I Amadiume & A An-Na im eds., 2000);

Martin Scheinin, The Proposed Optional Protocol to the Covenant on Economic, Social and Cultural Rights: A Blueprint for UN Human Rights Treaty Body Reform-Without Amending the Existing Treaties, 6 Hum. Rts. L. Rev. 131 (2006);

Henry J. Steiner & Philip Alston, International Human Rights In Context: Law, Politics, Morals (2d ed. 2000);

Katarina Tomaševski, Justiciability of Economic, Social and Cultural Rights, 55 IJC Rev. 203 (1995);

Katarina Tomaševski,Report submitted by U.N. Special Rapporteur on the right to education, Mission to the United States of America, 24 September - 10 October 2001, U.N. Doc. E/CN.4/2002/60/Add. 1 (2002);

Realization of Economic, Social and Cultural Rights, Report Submitted by Mr. Danilo Turk, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1992/16 (1989) (report of a study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities);

M. Magdalena Sepúlveda Carmona, The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights (2003);

United Nations Action in the Field of Human Rights, U.N. Doc. ST/HR/2/Rev.3 at 163-83 (1988);

United Nations, Economic, Social, and Cultural Rights: Handbook for National Human Rights Institutions (2005).

D. IMPLEMENTATION AND ENFORCEMENT

U.N. Committee on Economic, Social and Cultural Rights

The United Nations created the Committee on Economic, Social and Cultural Rights in May 1986 with the general purpose of effectively implementing the Covenant and replacing the previous weak supervision system. In its efforts at realization of the Covenant, the Committee assists the Economic and Social Council (ECOSOC) in monitoring States parties' compliance and recommending improvements to State policies and procedures.

The Committee is the latest and most effective approach of the Economic and Social Council to implementing the Covenant. First, ECOSOC created a Sessional Working Group to review the reports submitted by States parties, which is a requirement under the Covenant. Next, this group's membership was altered to bring in experts with specialized knowledge in this area, accordingly it was renamed the Sessional Working Group of Governmental Experts. Unsatisfied with the Group's performance, finally the Committee on Economic, Social and Cultural Rights was formed. The members of this committee are still experts in human rights, yet they serve "in their personal capacity" rather than acting as government representatives.

There are eighteen members of the Committee. Only States parties may make nominations for election. Committee members are elected to four year terms and they are eligible for reelection. The Committee meets twice annually in Geneva, generally for three weeks in April-May and November, to review States reports and discuss the reports with States representatives.

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Committee on Economic, Social and Cultural Rights, Report on the Eighteenth and Nineteenth Sessions, Supp. No. 2, U.N. Doc. E/1999/22 (1999) (paragraph numbers omitted):

. . . Since its first session, in 1987, the Committee has made a concerted effort to devise appropriate working methods which adequately reflect the nature of the tasks with which it has been entrusted. In the course of its nineteen sessions it has sought to modify and develop these methods in the light of its experience. These methods will continue to evolve. . . .

A. Examination of State parties' reports . . .

A pre-sessional working group meets, for five days, prior to each of the Committee's sessions. It is composed of five members of the Committee nominated by the Chairperson, taking account of the desirability of a balanced geographical distribution and other relevant factors.
The principal purpose of the working group is to identify in advance the questions which will constitute the principal focus of the dialogue with the representatives of the reporting States. . . .

With regard to its own working methods, the working group . . . allocates to each of its members initial responsibility for undertaking a detailed review of a specific number of reports and for putting before the group a preliminary list of issues. . . . Each draft by a country rapporteur is then revised and supplemented on the basis of observations by the other members of the group and the final version of the list is adopted by the group as a whole. This procedure applies equally to both initial and periodic reports. . . .

In order to ensure that the Committee is as well informed as possible, it provides opportunities for non-governmental organizations to submit relevant information to it. They may do this in writing at any time. The Committee's pre-sessional working group is also open to the submission of information in person or in writing from any non-governmental organizations. . . . In addition, the Committee sets aside part of the first afternoon at each of its sessions to enable representatives of non-governmental organizations to provide oral information. . . .

The lists of issues drawn up by the working group are given directly to a

representative of the States concerned, along with a copy of the Committee's most recent report. . . .

In accordance with the established practice of each of the United Nations human rights treaty monitoring bodies, representatives of the reporting States are entitled . . . to be present at the meetings of the Committee when their reports are examined. The following procedure is generally followed. The representative of the State party is invited to introduce the report by making brief introductory comments and introducing any written replies to the list of issues drawn up by the pre-sessional working group. The Committee then considers the report on an article-by-article basis, taking particular account of the replies furnished in response to the list of issues. The Chairperson will normally invite questions or comments from Committee members in relation to each issue and then invite the representatives of the State party to reply immediately to questions that do not require further reflection or research. Other questions remaining to be answered are taken up at a subsequent meeting or, if necessary, may be the subject of additional information provided to the Committee in writing. Members of the Committee are free to pursue specific issues in the light of the replies thus provided. . . . Representatives of the relevant specialized agencies and other international bodies may also be invited to contribute at any stage of the dialogue.

The final phase of the Committee's examination of the report consists of the drafting and adoption of its concluding observations. . . . The agreed structure of the concluding observations is as follows: introduction; positive aspects; factors and difficulties impeding the implementation of the Covenant; principal subjects of concern; and suggestions and recommendations. At a later stage, the Committee then discusses the draft, again in a private session, with a view to adopting it by consensus. . . .

F. Other consultations

The Committee has sought to coordinate its activities with those of other bodies to the greatest extent possible and to draw as widely as it can upon available expertise in the fields of its competence. For this purpose, it has consistently invited individuals such as special rapporteurs of the Sub-Commission on [the Promotion and Protection of Human Rights], chairpersons of Commission on Human Rights working groups and others to address it and engage in discussions. The Committee has also sought to draw on the expertise of the relevant specialized agencies and United Nations organs, both in its work as a whole and, more particularly, in the context of its general discussions.

In addition, the Committee has invited a variety of experts who have a particular interest in, and knowledge of, some of the issues under review to contribute to its discussions. These contributions have added considerably to its understanding of

some aspects of the questions arising under the Covenant.

G. General Comments

In response to an invitation addressed to it by the Economic and Social Council, the Committee decided to begin, as from its third session, the preparation of general comments based on the various articles and provisions of the International Covenant on Economic, Social and Cultural Rights with a view to assisting the States parties in fulfilling their reporting obligations. . . .

The Committee endeavours, through its general comments, to make the experience gained so far through the examination of States' reports available for the benefit of all States parties in order to assist and promote their further implementation of the Covenant; to draw the attention of the States parties to insufficiencies disclosed by a large number of reports; to suggest improvements in the reporting procedures; and to stimulate the activities of the States parties, the international organizations and the specialized agencies concerned in achieving progressively and effectively the full realization of the rights recognized in the Covenant. . . . The Committee has so far adopted the following general comments: General Comment No. 1 (1989) on reporting by States parties; General Comment No. 2 (1990) on international technical assistance measures; General Comment No. 3 (1990) on the nature of States parties' obligations (art. 2, Para. 1, of the Covenant); General Comment No. 4 (1991) on the right to adequate housing (art.11, para. 1, of the Covenant); General Comment No.5 (1994) on the rights of persons with disabilities; General Comment No.6 (1995) on the economic, social and cultural rights of older persons; General Comment No.7 (1997) on the right to adequate housing (art. 11, para. 1, of the Covenant): forced evictions; General Comment No.8 (1997) on the relationship between economic sanctions and respect for economic, social and cultural rights; General Comment No. 9 (1998) on domestic application of the Covenant; and General Comment No.10 (1998) on the role of nationalhuman rights institutions in the protection of economic, social and cultural rights. [Since that time the Committee has adopted additional general comments: General Comment No. 11 (1999) on plans of action for primary education; General Comment No. 12 (1999) on the right to adequate food; General Comment No. 13 (1999) on the right to education; General Comment No. 14 (2000) on the right to the highest attainable standard of health; General Comment No. 15 (2003) on the right to water; General Comment No. 16 (2005) on the equal rights of men and women; General Comment No. 17 (2005) on the right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author; and General Comment No. 18 (2005) on the right to work.]

NOTES AND QUESTIONS

1. As noted above, the Committee on Economic, Social and Cultural Rights at its Sixth Session issued a General Comment regarding the right to adequate housing:

Pursuant to article 11(1) of the Covenant, States parties "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights. . . .

Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11(1) of the Covenant and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resource and other constraints, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed. There is no indication that this number is decreasing. It seems clear that no State party is free of significant problems of one kind or another in relation to the right to housing. . . .

The right to adequate housing applies to everyone. While the reference to "himself and his family" reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. . . .

In the Committee's view, the right to housing . . . should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. . . . Secondly, the reference in article 11(1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: "Adequate shelter means . . . adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities -- all at a reasonable cost."

Committee on Economic, Social and Cultural Rights, Report on the Sixth Session, General Comment No. 4 (1991), Supp. No. 3, Annex III, at 114-15, U.N. Doc. E/1992/23 (1992) (footnotes omitted). General Comment No. 4 identifies seven aspects of the right to adequate housing: legal security of tenure; availability of

services, materials, facilities, and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. Id. at 115-17. The Comment concludes:

[T]he Committee considers that instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law. Id. at 119.

2. The Committee's work on adequate housing is founded in part on codifications of the right to housing included in U.N. instruments such as the Universal Declaration, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. A right to housing is also espoused in the American Declaration on the Rights and Duties of Man and the Charter of the Organization of American States. Because of its ability to monitor compliance, however, the Committee on Economic, Social and Cultural Rights may have more influence on the definition and protection of housing rights than monitors of the other instruments. For further reading see Scott Leckie, The UN Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach, 11 Hum. Rts. Q. 522 (1989); Centre for Human Rights, The Human Right to Adequate Housing: Fact Sheet No. 21 (1996).

3. The U.N. Commission on Human Rights reaffirmed at its 49th Session that "the practice of forced evictions constitutes a gross violation of human rights, in particular the right to adequate housing." C.H.R. res. 1993/77, adopted Mar. 10, 1993 and General Comment No. 7 on Forced Evictions. Despite the international prohibition, however, forced evictions are not uncommon. The Centre on Housing Rights and Evictions reported such evictions between 1992 and 1994 in 27 countries, including France and the United Kingdom. Centre On Housing Rights And Evictions, Forced Evictions: Violations Of Human Rights 6-17 (6th compilation, 1994). The Centre reported planned or possible evictions in 22 countries. Id. at 18-25. In describing positive developments, the report noted "[o]f all United Nations human rights bodies, the [Economic, Social and Cultural Rights] Committee has become the premier international legal mechanism in the struggle against forced evictions." Id. at 28. That opinion was based in part on Committee reports from the 7th, 8th, 9th, and 10th Sessions regarding housing rights in Belgium, Canada, Italy, Kenya, Mauritius, Mexico, and Nicaragua Id. at 28-32. The report concluded that:

[W]hile such pronouncements may on the surface of things seem inconsequential, once the Committee begins explicitly addressing housing rights issues within countries, a broad series of domestic political and legal processes are brought into motion, leading in some instances to favourable changes in national laws and

policies, reconsideration of the practice of forced evictions and awareness throughout countries that the international community is concerned about and closely monitoring the human rights situation. The intense scrutiny given by this Committee to housing rights in both developing as well as developed countries reveals, as well, that such matters are anything but purely internal affairs, as is argued by a select few governments. Housing rights everywhere are, without doubt, matters of universal concern and relevance.

Id. at 28.

4. The work of the Committee on Economic, Social and Cultural Rights on the issues of adequate housing and forced evictions has assisted in making changes in a number of countries. For instance, in 1991, military presence in the areas of La Ciénaga and Los Guandules (Dominican Republic), and a relocation agreement between the government and over 680 families living in a shanty town in Los Alcarrizos left many families evicted and without homes. 209 families found shelter in a church for a year. The relocation agreement resulted from a government plan to build a Colombus memorial for the 500th anniversary, which included plans for clearing an occupied slum area. The Committee intervened before the plan was fully implemented, receiving a response from the Dominican Republic that they would not clear as much of the land as they had planned. In 1997 at its seventeenth session, the Committee noted that the Dominican Republic had "taken steps" by setting up a policy, which was applied by the new government, giving housing project preference to low-income groups and by establishing housing projects in low income communities. In addition, in 1996, the Dominican Republic hosted a national conference entitled "A New Policy for the Housing Sector."

5. Might the Committee's work on adequate housing and forced evictions be used as an argument against U.S. ratification of the Covenant? How might proponents and opponents of U.S. ratification use the Grootboom case in their arguments to the Senate? How might the standards discussed in the preceding notes be used to challenge U.S. practices if it ratified the Covenant, or now when the U.S. is a signatory?

6. The Committee on Economic, Social and Cultural Rights has been engaged in discussions with the Office of the High Commissioner for Human Rights, other treaty bodies, governments, and non-governmental organizations about how to make their overlapping work more effective. For example, the treaty bodies have begun to establish more uniform and joint reporting requirements. United Nations, Harmonized guidelines for reporting under the international human rights treaties, including guidelines on a common core document and treaty specific documents, U.N. Doc. HRI/MC/2006/3 (2006). There have also been discussions about the unification of the treaty bodies or at least some aspects of their work, such as, the

adjudication of individual complaints. See Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, U.N. Doc. HRI/MC/2006/2 (2006).

7. In addition to the activities of the Committee on Economic, Social and Cultural Rights in regard to the right to adequate housing, the U.N. Commission on Human Rights established the Special Rapporteur on adequate housing. The Special Rapporteur has reported on his visits to Afghanistan (2003), Australia (2006), Brazil (2004), Cambodia (2005), Iran (2005), Kenya (2004), Mexico (2002), Occupied Palestinian Territories (2002), Peru (2003) and Romania (2002). Through his visits and public appeals the Special Rapporteur has drawn worldwide attention to serious violations of human rights. For example, in 2005 the Special Rapporteur raised concerns about mass forced evictions in Zimbabwe. See Special Rapporteur on adequate housing, Women and U.N. Doc. E/CN.4/2006/118 at 18 (2006). In 2006 the functioning of the Special Rapporteur was transferred from the U.N. Commission on Human Rights to the Human Rights Council.

8. For further reading on forced evictions, see:

Centre On Housing Rights And Evictions, Forced Evictions & Human Rights: A Manual For Action (1993);

Centre On Housing Rights And Evictions, Habitat & International Coalition, Forced Evictions: Violations Of Human Rights (1993);

Scott Leckie, Habitat International Coalition, When Push Comes To Shove: Forced Evictions And Human Rights (1995).

9. In 1993, Professor Alston, who served as Chairman of the Committee on Economic, Social and Cultural Rights at that time, argued in favor of an Optional Protocol to the Covenant on Economic, Social and Cultural Rights which would allow the Committee to receive complaints submitted by individuals or groups alleging violations of the Covenant. In this way, he stated, the Committee could "fill the existing vacuum, as a result of which international procedures effectively exclude these rights from their purview. . . ." In addition, an Optional Protocol would allow the Committee to develop "meaningful jurisprudence on economic, social and cultural rights." See Philip Alston, Human Rights in 1993: How Far Has the United Nations Come and Where Should it Go from Here? (memorandum distributed at the Vienna Conference on Human Rights, June 1993). See also Draft Report of the Committee on Economic, Social and Cultural Rights to the Economic and Social Council, Annex V, U.N. Doc. E/C.12/1992/CRP.2/Add.3 (1992) (discussing the draft of an Optional Protocol). In November 1993, the Committee requested that Alston write a draft Optional Protocol and in November of 1995 he was asked to submit a revised report. In February 1996, the Committee on

Economic, Social and Cultural Rights concluded the consideration of a draft optional protocol to the Economic, Social and Cultural Rights Covenant and at the fifty-third session in 1997, a draft was submitted to the Committee for consideration. See U.N. Doc. E/CN.4/1996/96 (1996) and E/CN.4/1997/165 (1997). The Commission on Human Rights and its successor Human Rights Council have been considering the proposal; however, progress has been slow until 2006. See U.N. Doc. E/CN.4/2006/47 (2006). How does the complex question of the justiciability of economic, social and cultural rights relate to the question of the suitability of an Optional Protocol permitting complaints? Should the complaints mechanism be open to individuals as well as groups? To complaints concerning all rights in the Covenant or to a more limited list?

10 For further reading on the work of the Committee on Economic, Social and Cultural Rights, see references at 24 supra and:

Philip Alston, The Committee on Economic, Social and Cultural Rights, in The United Nations And Human Rights: A Critical Appraisal (Philip Alston ed., 1992); Centre for Human Rights, The Committee on Economic, Social and Cultural Rights: Fact Sheet No. 16 (1994);

Philip Alston & Bruno Simma, First Session of the UN Committee on Economic, Social and Cultural Rights, 81 Am. J. Int'l L. 747 (1987);

Philip Alston & Bruno Simma, Second Session of the UN Committee on Economic, Social and Cultural Rights, 82 Am. J. Int'l L. 603 (1988).

E. RATIFICATION OF TREATIES

1. How Do Governments Become Bound?

The Vienna Convention on the Law of Treaties codifies the basic canons of treaty interpretation.

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, U.S. No. 58 (1980), reprinted in 8 I.L.M. 679 (1969), entered into force Jan. 27, 1980:

Article 9

Adoption of the text

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.

2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting . . . .

Article 11

Means of expressing consent to be bound by a treaty

The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. . . .

Article 16

Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:
a. their exchange between the Contracting States;
b. their deposit with the depositary; or
c. their notification to the Contracting States or to the depositary, if so agreed. . . .

Article 18

Obligation not to defeat the object and purpose of a treaty prior to its entry into force

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

* * * * *

Note on processes for becoming bound by treaty obligations

The Vienna Convention on the Law of Treaties in the above-excerpted articles illustrates the variety of means by which states may assume treaty obligations (i.e., by signature, exchange of instruments, ratification, accession, etc.). By agreement, the parties may specify the act(s) by which they will regard each other as being bound. For example, some treaties do not enter into force until they have been

ratified by a minimum number of states. Or, a simple exchange of notes by diplomats may suffice.

National processes for assumption of treaty obligations vary, and are related to the state's perception of the proper separation of powers among the branches of its government and especially the allocation of the power to conduct foreign relations. In some states ratification of treaties may be purely an executive prerogative, while in others the power may be shared by the executive and legislative branches.

As discussed in chapter 1, supra, some nations directly incorporate international law in their national legal structures. This direct incorporation approach, known as the monist approach, accepts international law, including treaty obligations, as an integral part of domestic law. Other countries have adopted the dualist approach, under which treaties, and sometimes customary law, must be implemented by national legislation. The United States has accepted certain aspects of both the monist and dualist approaches to international law and, therefore, to international human rights law.

Article 18 of the Vienna Convention establishes an important if uncertain principle, that signatories (states that have signed but not yet ratified) must not take steps that would defeat the object and purpose of the treaty, at least until they have made their intention clear not to become parties. Please note that once a state has ratified a treaty it should be referred to as a "party," and not as a "signatory." Only a party has assumed full treaty obligations, and only by completing whatever procedures its national law and the treaty itself specify. A state may become a party without ever being a signatory, for example where it did not attend the international drafting conference or did not sign at that time, but has later completed a process called "accession" if permitted by the treaty. Both the United States and South Africa are signatories to the Covenant on Economic, Social and Cultural Rights, but neither is a party as of April 2001. See generally, Anthony Aust, Modern Treaty Law And Practice 75-99 (2000). In the next excerpt the processes for treaty ratification by the United States are described.

* * * * *

Anne M. Williams, United States Treaty Law, in U.S. Ratification of the International Covenants on Human Rights 35, 39-43 (Hurst Hannum & Dana D. Fischer ed., 1993)(footnotes omitted):

[I]n an impressive number of instances, the Senate or its committees dealing with foreign affairs have participated in the negotiating process in advance of the conclusion of a treaty, lending at least advisory assistance but leaving the ultimate power of consent or non-consent to the formal Senate vote. The House of Representatives has likewise participated in such an advisory role. . . .

Once negotiations are complete, the President signs the treaty as an indication that

the text represents the agreement reached by the parties. At that stage, the President decides whether to submit the treaty to the Senate for its advice and consent to ratification. If it is submitted to the Senate, the President usually sends an accompanying report explaining the treaty's provisions and the circumstances which make its ratification desirable.
Once the Senate receives the treaty, it is referred to the Committee on Foreign Relations. . . .

The Committee may or may not decide to report the treaty to the full Senate for its advice and consent. Sometimes the Executive Branch may request that the Committee withhold or suspend action on the treaty. When the treaty is submitted to the full Senate, the advice and consent of the Senate must be given by a vote of two-thirds of the Senators present. Few treaties have been defeated in recent years by a direct vote, and non-action is the usual method of withholding consent to controversial treaties. . . .

After the Senate gives its advice and consent, a treaty is returned to the President for ratification. The President may either ratify the treaty as presented by the Senate, or if he believes any Senate action taken is undesirable, the treaty may be returned to the Senate for further consideration. The President may also decide not to ratify the treaty.

After a treaty is ratified, which is a domestic action, some form of international action must be taken to bring the treaty into force. Usually the treaty specifies this action as the exchange or deposit of a certain number of instruments of ratification.

NOTES AND QUESTIONS

1. There are several steps in the ordinary treaty ratification process, most of which are identified in the preceding excerpts. For multilateral treaties, the U.N. or a similar international body begins the ratification process by creating and announcing the proposed text of the treaty as described in chapter 2. In the U.S., the President endorses the text by signing it. The President then submits it to the Senate, sometimes with recommendations for reservations, declarations, and understandings. The Senate refers the treaty to its Foreign Relations Committee, which conducts hearings to monitor public reaction. The full Senate ordinarily withholds advice and consent until the Committee recommends the treaty by at least a majority vote. The Committee may also recommend various qualifications, which the full Senate may accept, reject, or revise. Once the Senate gives advice and consent by a two-thirds vote, any limitations must be fulfilled before the President submits the formal ratification documents to the U.N. For example, the Senate may ask that legislation to implement the treaty be enacted before ratification. Three months after the ratification documents are deposited with the U.N., the U.S. normally becomes a party to the treaty.

2. Does the House of Representatives have a role (e.g., if compliance will be costly)?

3. Before ratifying a treaty, should the U.S. make certain that all its provisions are consistent with domestic law?

4. While no exact comparison is possible, the U.S. appears to have one of the most demanding requirements for ratification. As discussed above, the U.S. vests treaty making power in the executive and requires the advice and consent of two thirds of the Senate for ratification. Countries such as Australia, Canada, Israel, and United Kingdom follow the Westminster tradition which allows the executive to ratify treaties. The legislature may have right to information and an opportunity to review the treaty, but their consent is not needed for ratification. Countries that operate under the Westminster tradition tend to follow a dualist approach to international law and therefore require the legislative branch to enact implementing legislation. Civil law countries, such as Austria and France generally require only the majority of the parliament to ratify a treaty. When consent of the legislative branch is required, most countries require only a majority of those voting subject to a quorum requirement. Though majority voting may be the standard, certain types of treaties (such as those that transfer sovereign rights) may be subject to higher voting requirements in such nations as Andorra, Croatia, the Netherlands, Luxembourg, and Poland. The U.S. grants more power to the executive to negotiate the terms of treaties than most other nations. Many other countries require at least one signature in addition to the executive for adopting a treaty. For example, Belgium requires the signature of the King and the Foreign Minister; Greece requires the signature of the competent minister (generally the Foreign Minister); Liechtenstein requires a signature of the Prince and the Head of Government; and Luxembourg requires the signature of the Grand Duke and the minister technically responsible (generally the Minister of Foreign Affairs). See Treaty Making - Expression of Consent by States to be Bound by a Treaty (Council of Europe ed. 2001) (examining the ratification process for Australia, Canada, EU nations, Japan, Turkey, and the United States).

5. There are 107 States parties to the Vienna Treaties Convention. The U.S. has yet to ratify it, but the State Department has said that "the Convention is already generally recognized as the authoritative guide to current treaty law and practice." S. Exec. Doc., 92d Cong., 1st Sess. 1 (1971).

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2. Reservations

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, U.S. No. 58 (1980), reprinted in 8 I.L.M. 679 (1969), entered into force Jan. 27, 1980:

Article 2

Use of Terms . . .

1. For purposes of the present Convention: . . .

(d) “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State . . ..

Article 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) or (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorised by a treaty does not require any subsequent acceptance by the other Contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organisation.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

a. acceptance by another Contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

b. an objection by another Contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

c. an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other Contracting State has accepted the reservation. . . .

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation . . .

a. modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

b. modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

* * * * *

Dinah Shelton, International Law, in U.S. Ratification of the International Covenants on Human Rights 27, 29-33 (Hurst Hannum & Dana D. Fischer ed., 1993) (footnotes omitted):

In the process of becoming party to a treaty, States may file reservations to their consent to be bound unless the treaty provides otherwise. . . .

. . . Prior to 1945, reservations were generally held to be valid only if the treaty concerned permitted reservations and if all other parties accepted the reservations. In essence the reservation constituted a counter-offer which required a new acceptance. This rule rested on the notion of the absolute integrity of the treaty as adopted.

While scattered support for this principle remains, practice in regard to multilateral treaties demonstrates considerable variation on the acceptability and effect of reservations. When questions arose on the admissibility of reservations to the Genocide Convention, a request was made for an advisory opinion from the International Court of Justice. The Court in its opinion stressed the divergence of practice as well as the unique character of the Genocide Convention, including the intent of the drafters and parties that the Convention be universal in scope. Although its findings were expressly limited to the Genocide Convention, the Court's often-cited holding was that "a State which has made . . . a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention. . . ." The Compatibility test is incorporated in the Vienna Convention in Articles 19-21 . . ..

The effect of a reservation is to modify relations between the reserving State and other States Parties to the treaty to the extent of the reservations. This applies on a reciprocal basis, meaning that no State may invoke a provision to which it has reserved until the reservation is withdrawn. Reservations may be withdrawn at any time, as may objections to reservations. . . .

. . . Neither Covenant [(i.e. the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights)] expressly addresses the issue of reservations, so the question is one of compatibility with the object and purpose of the treaties.
In regard to the ESC Covenant, [42] States expressed reservations [or declarations] out of the [153] that had ratified as of [August 2006]. The reservations of [28] of the [42] States concern substantive rights, but in many cases the reservations are postponements of application rather than permanent exemptions. [Eleven] of the permanent reservations limit in some way the right to strike guaranteed in Article 8(1)(d); [three] States do not accept the requirement to pay for public holidays,

[eight] temporarily or permanently limit the right to education; and one provides regional preferences for workers. . . .
Past United States practice is consistent with the generally limited use of reservations to human rights treaties. The United States submitted one reservation to the 1926 Slavery Convention, none to the Supplementary Convention on Slavery, and none to the two Conventions on the Political Rights of Women. All four treaties were unanimously approved by the Senate.

NOTES AND QUESTIONS

1. As previously discussed, the President often has proposed qualifications to a treaty when submitting it for advice and consent. President Carter proposed many limitations on the Civil and Political Covenant when he submitted it to the Senate in 1978. President Carter also proposed qualifications to the other three treaties submitted at the same time: the Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the American Convention on Human Rights.

2. Regarding Shelton's statement concerning the United States' "limited use of reservations", see infra at 45 for discussion of qualifications attached to treaties to which the Senate has given advice and consent since 1989. Do you agree that Shelton's characterization of U.S. reservations is still accurate?

3. The question of reservations to human rights treaties is extremely complex and contested, and became a prominent subject for international debate as a result of adverse comments by the Human Rights Committee on the reservations attached by the United States to its instrument of ratification of the Covenant on Civil and Political Rights and the Committee's issuance of General Comment No. 24 (52) of 1994. The Human Rights Committee attempted to identify the types of reservations that would defeat the object and purpose of the treaty, and included reservations to non-derogable rights, to self-determination, to the obligation to provide remedies for human rights violations, and to the Committee's monitoring role. The Human Rights Committee asserted its own authority to characterize reservations as incompatible with the Covenant's object and purpose. Moreover, the Committee found the Vienna Convention scheme of State party objection and interstate reciprocity to be unsuited to human rights treaties. Incompatible reservations may be severable, and the reserving state thus bound to the treaty without regard to the reservation. See infra at 51-52.

The United States questioned General Comment No. 24 in a letter submitted by Conrad K. Harper, the Department of State Legal Adviser dated March 28, 1995. See infra at 52-54. The International Law Commission undertook a study of reservations to treaties in 1994, which continues but which has generally supported the Vienna Convention approach to reservations. This study has been the subject of

debate in the Sixth Committee of the General Assembly. See International Law Commission, Third report on reservations to treaties, U.N. Doc. A/CN.4/491 (1998).

For further reading on reservations to human rights treaties, the definition of reservations that defeat the object and purpose of the treaty, the severability of such reservations, the authority of human rights treaty bodies to determine the compatibility of reservations, the relation of that authority to the other States parties' capacity to object to reservations, and the effects of such objections, see Roberto Baratta, Should Invalid Reservations to Human Rights Treaties Be Disregarded?, 11 Eur. J. Int'L L. 413 (2000); Elena A. Baylis, General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties, 17 Berkeley J. Int'l L. 277 (1999); Catherine Redgwell, Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties, 64 Brit. Y.B. Int'l L. 245 (1993); William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?, 21 Brook. J. Int'l L. 277 (1995). The question of reservations to human rights treaties is also addressed in Chapter 13.

4. The Standing Committee of the National People's Congress of the People's Republic of China adopted a Decision Concerning the Approval of the Covenant on Economic, Social and Cultural Rights on February 28, 2001. According to the Xinhua News Agency, China's ratification of the Covenant was conditioned upon the following statement:

Regarding article 8, paragraph 1(a) of the Covenant on Economic, Social and Cultural Rights, the government of the People's Republic of China will in future handle this matter in accordance with stipulations of the Constitution, the Trade Union Law , the Labor Law, and with other laws of the People's Republic of China.

[unofficial translation by William B. McCloy]. Article 8(1)(a) concerns the right to form independent trade unions. Does this Chinese reservation resemble any of the actual or proposed reservations by the United States to human rights treaties?

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3. U.S. Ratification of Human Rights Treaties

Despite its active participation in the drafting of many U.N. human rights instruments, the U.S. found itself unable to ratify them because of congressional opposition during the 1950s. Several members of Congress, including notably Senator Bricker, feared that the Genocide Convention and various instruments then in draft (which later became the two Covenants, as well as the Racial Discrimination treaty) might lead to international scrutiny of U.S. practices,

particularly racial discrimination, and might infringe on prerogatives of state governments. As a result, a series of proposals known as the Bricker Amendment were introduced to amend the U.S. Constitution by restricting the government from entering into treaties that might infringe on the powers of the states or be applicable in domestic courts without implementing legislation.

One version of the Bricker Amendment failed in 1954, by only one vote, to pass the Senate. To secure defeat, Secretary of State Dulles was moved to promise that the United States did not plan to become a party to any human rights treaties or present any such treaties for consideration by the Senate. He also indicated that the U.S. would neither sign the Convention on the Political Rights of Women nor seek ratification of the Genocide Convention.

The Kennedy Administration sought to relax the Dulles doctrine by submitting three minor human rights treaties to the Senate. Only one, the Supplementary Slavery Convention, was approved. The two U.N. Covenants were first submitted to the Senate in 1977 by the Carter Administration.

With the enactment of major civil rights statutes, the efforts of courts to eradicate the worst injustices of racial discrimination, a decrease of interest in states rights, and an increasing interest in international human rights, the climate for ratification of multilateral treaties gradually improved. In 1976 the U.S. ratified the Inter-American Convention on Granting of Political Rights to Women and the U.N. Convention on the Political Rights of Women. In 1986, at the urging of the Reagan Administration at a hearing of the Senate finally, with certain qualifications, consented to U.S. ratification of the Genocide Convention, which President Truman had signed almost 40 years earlier.

Keep that historical overview in mind as you read the following excerpt:

Nigel S. Rodley, On the Necessity of United States Ratification of the International Human Rights-Conventions, in U.S. Ratification of the Human Rights Treaties: With or Without Reservations? 3, 4-13 (Richard B. Lillich ed., 1981) (footnotes omitted):

One of the most important activities of the UN has been the elaboration of the International Bill of [Human] Rights consisting of the Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the latter covenant. The withdrawal in 1953 of the U.S. from the process of drafting these instruments and its continuing aloofness from participating in their operation demonstrate a degree of inconsistency that it is fair to say the U.S. must rectify if it is to maximize its declared commitment in favor of human rights, a commitment that we are assured is being sustained and is "the soul" of American foreign policy. . . .

I. Disadvantages of Nonparticipation

One of the disadvantages of nonparticipation in the promotion of human rights through the development of international standards became apparent when the U.S. opted out of the process of negotiating the texts of the international covenants on human rights. But even where the U.S. has participated in the development of such standards, as for example in the conclusion of the Convention on the Elimination of All Forms of Racial Discrimination or, more recently, in the development of international standards (including a convention) against torture, the impact of that participation may well have been weakened by the possible perception on the part of representatives of other states that for the U.S. such activity is, in terms of future legal obligations, more academic than real.

Similarly, U.S. credibility is at stake in efforts to develop mechanisms to monitor compliance at the international level. The U.S. has taken strong and positive positions on the strengthening of the existing UN mechanisms providing for thorough studies or investigations of situations appearing to reveal consistent patterns of gross and reliably attested violations of human rights pursuant to Economic and Social Council Resolution 1503 (XLVIII). It has similarly sought . . . the establishment within the UN of a High Commissioner for Human Rights. Both of these efforts are designed to advance UN involvement in the protection of human rights by developing fact-finding techniques that would function on an objective basis. The development of such mechanisms would inhibit manipulation according to the preferences of fluctuating government majorities. Indeed, no delegation at the UN has been more vocal in the last few years than that of the U.S. in denouncing the apparent double standard with which the UN assesses various allegations of violations of human rights. Yet it is precisely the mechanisms established under the various international human rights instruments that are designed to institutionalize a more objective, consistent, and depoliticized approach to assessing such allegations. By standing aloof from participation in such UN human rights mechanisms, the credibility of the U.S. position is impaired when it eloquently complains about alleged double standards in actual UN investigations.

What is also damaging about the failure of the U.S. government to integrate itself into the standard-setting and compliance-assessment systems provided by the international instruments is that the U.S. opens itself to the charge that, despite concern for the protection of human rights in other countries, it is not willing to enter into an international obligation to protect human rights at home. You may not consider it a particularly . . . cogent [argument], but . . . it is an extremely telling one. . . .

Of course, the damaging effect of noninvolvement in the international treaty protection systems is not just evident at the multilateral level; it also must

inevitably limit the amount of influence the U.S. government can bring to bear bilaterally. This would be particularly true in the case of governments with which the U.S. does not already have a tradition of influence, especially of governments that have themselves ratified the instruments. . . .

Indeed, the double-standard charge against the U.S. takes on particular significance in the context of some of the interesting legislation that has over the past few years been adopted by the Congress whereby U.S. aid policy is made subject to the taking into account of and compliance with "internationally recognized human rights." There are a number of places one might go to look for internationally recognized human rights, but the International Bill of [Human] Rights, and not just the [Universal] Declaration, would certainly be one such place. It can hardly enhance the integrity of the U.S. posture when it is prepared to incorporate into its own legislation standards for application against others that it is not prepared to apply juridically to itself. . . .

II. The Advantages of Participation

. . . I shall now turn to the advantages that I see would flow from its ratification of the same conventions. Perhaps it goes without saying that the principal advantage would be avoidance of the disadvantages that I have already described. The major reproaches of inconsistency, hypocrisy, and the exercise of a double standard would lose their force. . . .

More particularly, the U.S. may feel it has something to contribute to the work of the [Human Rights] Committee. It could not have a governmental delegate on the Committee; that, indeed, is the Committee's strength. However, it would be one of the electors of the Committee, and it could nominate an expert who might be able to bring something of the rich tradition of American jurisprudence and legal creativity to bear upon the work of the Committee. Meanwhile, there would be far greater opportunities for U.S. participation in the appropriate forums of the UN in discussion of the annual reports of the Human Rights Committee. At the moment, any such participation by the U.S., or any other country that has not become a party to the covenant, is hardly likely to carry much weight . . ..

I do not hesitate to deal with what some would perceive to be the disadvantages of the U.S. being subjected to criticism by others in an international forum. This should indeed be listed amongst the manifest advantages of the U.S. being a party to the covenants and subject to the substantive and procedural obligations of those instruments. In my view, it is good for any and every country to be subjected to criticism. It is healthy and constructive, and this is so even if the criticism itself is not. For, in the final analysis, a forum for rational discussion of criticism, well- or ill-founded, is precisely the value that is afforded by the work of the Human Rights

Committee. . . . [T]here are no doubt areas of human rights where the U.S. would think it had reason to be fairly satisfied with its performance. I think there are other areas where that may not so easily be the case, and obviously here I have in mind to some extent the field of economic, social, and cultural rights. . . . I am also mindful that . . . the history of the U.S., as of other countries, does not demonstrate continuous and uniform commitment to certain very fundamental civil and political rights. . . . Not only is there further to go, it is necessary to build safeguards against retrogression. Systematic international scrutiny is one such safeguard. . . .

It may also be cause for some satisfaction that what the U.S. does or does not do is frequently influential on the behavior of other countries. In the final analysis there can surely be no more desirable way to influence the behavior of others than by the example of one's own behavior. This is not mere rhetoric. I can assure you that in at least one Third World country it has been a matter of deep disappointment to those who are seeking to persuade their government of the importance of ratifying the covenants that the U.S. has itself not done so. It has been a partial answer that an administration of the U.S. has at least declared an intention to secure ratification. A complete answer would have been better. . . .

NOTES

1. For illustrative arguments in favor of and against U.S. ratification of human rights treaties, see Natalie Hevener Kaufman & David Whiteman, Opposition to Human Rights Treaties in the United States: The Legacy of the Bricker Amendment, 10 Hum. Rts. Q. 309, 321-37 (1988); Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int'l L. 341 (1995); Frank C. Newman, United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures, 42 Depaul L. Rev. 1241 (1993); Nadine Strossen, United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights, 24 U. Toledo L. Rev. 571 (1992); David Weissbrodt, United States Ratification of the Human Rights Covenants, 63 Minn. L. Rev 35 (1978).

2. Chapter 17 infra also discusses studies as to whether the ratification of human rights treaties improves the human rights record of ratifying countries. E.g., Douglass Cassel, Does international human rights law make a difference?, 2 Chicago J. Int'l L. 121 (2001); Oona Hathaway, Do Human Rights Treaties Make a Difference?, 111 Yale L. J. 1935 (2002); Ryan Goodman & Derek Jinks, Measuring the effects of human rights treaties?, 14 European J. Int'l L. 171 (2003); Eric Neumayer, Do international human rights treaties improve respect for human rights?, 49 J. Conflict Resolution 925 (2005).

The U.S. is now a party to several human rights treaties. The number of States parties listed here represents the number as of August 2006. The parenthetical notes as to reservations, declarations, understandings, etc., pertain to U.S. qualifications only.

(a) U.N. Charter, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945 (191 States parties);

(b) Slavery Convention, 60 L.N.T.S. 253, entered into force Mar. 9, 1927, for the U.S. Mar. 21, 1929 (91 States parties) (1 U.S. reservation);

(c) Four Geneva Conventions for the Protection of Victims of Armed Conflict, 75 U.N.T.S. 31, 85, 135, 287, entered into force Oct. 21, 1950, for the U.S. Feb. 2, 1956 (194 States parties) (Convention I - 1 U.S. reservation; Convention IV -- 1 U.S. reservation);

(d) Protocol Amending the Slavery Convention, 182 U.N.T.S. 51, entered into force July 7, 1955, for the U.S. Mar. 7, 1956 (59 States parties);

(e) Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, entered into force Apr. 30, 1957, for the U.S. Dec. 6, 1967 (119 States parties);

(f) Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, entered into force Oct. 4, 1967, for the U.S. Nov. 1, 1968 (143 States parties) (2 U.S. reservations);

(g) Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force including for the U.S. Dec. 13, 1951, amended 721 U.N.T.S. 324, entered into force Feb. 27, 1990 (35 States parties) (1 U.S. reservation);

(h) Convention on the Political Rights of Women, 193 U.N.T.S. 135, entered into force July 7, 1954, for the U.S. July 7, 1976 (119 States parties);

(i) Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, entered into force Jan. 12, 1951, for the U.S. Feb. 23, 1989 (138 States parties) (2 U.S. reservations, 5 understandings, 1 declaration);

(j) International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, for the U.S. Sept. 8, 1992 (156 States parties) (5 U.S. reservations, 5 understandings, 4 declarations, 1 proviso);

(k) Abolition of Forced Labour Convention (ILO No. 105), 320 U.N.T.S. 291,

entered into force Jan. 17, 1959, for the U.S. Sept. 25, 1992 (165 States parties);

(l) Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, G.A. res. 39/46, Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, for the U.S. ratification deposited Nov. 20, 1995 (141 States parties) (2 U.S. reservations, 5 understandings, 2 declarations);

(m) International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969, for the U.S. Nov. 20, 1994 (170 States parties) (3 U.S. reservations, 1 understanding, 1 declaration, 1 proviso);

(n) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), entered into force Nov. 17, 2000, for the U.S. Nov. 17, 2000) (161 States parties);

(o) Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, G.A. res. 54/263, Annex I, 54 U.N. GAOR Supp. (No. 49) at 7, U.N. Doc. A/54/49 (2000), entered into force February 12, 2002, for the U.S. Dec. 23, 2002 (108 States parties) (1 U.S. reservation, 6 understandings with several sub-parts);

(p) Optional Protocol to the Conventions on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. res. 54/263, Annex II, 54 U.N. GAOR Supp. (No. 49) at 6, U.N. Doc. A/54/49 (2000), entered into force January 18, 2002, for the U.S. Dec. 23, 2002) (107 States parties) (4 U.S. declarations, 5 understandings with several sub-parts).

* * * * *

The U.S. has signed these treaties, but has not become a party:

(a) Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 521 U.N.T.S. 231, entered into force Dec. 9, 1964 (53 States parties);

(b) International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 (153 States parties);

(c) American Convention on Human Rights, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), entered into force July 18, 1978 (25 States parties);

(d) Additional Protocols I and II to the Geneva Conventions of 12 August 1949, 1125 U.N.T.S. 3, 609, entered into force Dec. 7, 1978 (Protocol I -- 166 States

parties, Protocol II – 162 States parties); (Protocol I – 2 U.S. understandings attached at signing; Protocol II – 1 understanding attached at signing);

(e) Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, entered into force Sept. 3, 1981 (184 States parties);

(f) Convention on the Rights of the Child, G.A. res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990 (192 States parties).

(g) Statute of the International Criminal Court, 2187 U.N.T.S. 3, entered into force July 1, 2002 (100 States parties). In a communication received May 6, 2002, the Government of the United States of America informed the Secretary-General of the following: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. . .."

* * * * *

The U.S. has neither signed nor ratified a number of significant treaties, including:

(a) Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force Apr. 22, 1954 (143 States parties) (The U.S., however, did ratify this convention by implication when it ratified the Protocol relating to the Status of Refugees, see above at 43);

(b) Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force Mar. 23, 1976 (105 States parties);

(c) Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, G.A. res. 44/128, Annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), entered into force July 11, 1991 (57 States parties);

(d) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, Annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force July 1, 2003 (34 States parties);

(e) Inter-American Convention to Prevent and Punish Torture, 25 ILM 519, Dec. 9, 1985, entered into force Feb. 28, 1987 (16 States parties);

(f) Inter-American Convention on the Prevention, Punishment and Eradication of

Violence Against Women, 27 U.S.T. 3301, entered into force Apr. 22, 1994 (32 States parties);

(g) Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. A/RES/57/199, entered into force June 22, 2006 (22 States parties).

a. Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)

The Genocide Convention, adopted on December 9 and signed by President Truman on December 11, 1948, was transmitted to the Senate in 1949. The Foreign Relations Committee reported favorably to the Senate in 1970, 1971, 1973, and 1976; but not until 1986 did the Senate give advice and consent to ratification. 132 Cong. Rec. S1377 (daily ed., Feb. 19, 1986). Ratification was qualified by two reservations, five understandings, and one declaration. See Selected International Human Rights Instruments at 281. One reservation required specific consent to submitting a dispute involving the treaty to the International Court of Justice. Another articulated the supremacy of the U.S. Constitution over any treaty obligation. The five understandings limited the meaning of several clauses, and the Senate declared that implementing legislation would be required before the administration could deposit the ratification documents. The statute was finally enacted on November 5, 1988. Genocide Convention Implementation Act of 1987, P.L. 100-606; 102 Stat. 3045.

During the Administration of President Reagan, the U.S. deposited notice of ratification on November 25, 1988. Twelve nations (Denmark, Estonia, Finland, Greece, Ireland, Italy, Mexico, Netherlands, Norway, Spain, Sweden, and the United Kingdom) have objected to or commented unfavorably on the reservation that claimed supremacy of the U.S. Constitution. Three objected to the U.S. reservation regarding jurisdiction of the International Court of Justice. See Lawrence J. LeBlanc, The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding, 78 Am. J. Int'l L. 369, 369-70 (1984); Lawrence J. LeBlanc, The ICJ, the Genocide Convention, and the United States, 6 Wisc. Int'l L.J. 43, 43-45 (1987); International Human Rights Instruments 130.1-.16 (Richard Lillich ed., 1986); Comment, International Convention on the Prevention and Punishment of the Crime of Genocide: United States Senate Grant of Advice and Consent to Ratification, 1 Harv. Hum. Rts. Y.B. 227 (1988).

b. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Treaty Against Torture)

The U.N. General Assembly adopted the Treaty Against Torture on December 10, 1984. On April 18, 1988, the U.S. signed, and on May 20, 1988, President Reagan submitted the treaty to the Senate. He attached a letter from the Secretary of State

suggesting reservations, understandings, and declarations that might be attached to the treaty. Letter from Secretary of State George Shultz to President Reagan (May 10, 1988), Message from the President of the United States transmitting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 100th Cong., 2d Sess. (1988).
In 1989 the first Bush Administration indicated that the Convention Against Torture had higher priority for ratification than any other human rights treaty. In that year the Bush Administration withdrew several of the Reagan/Shultz proposals and forwarded its own package of 3 reservations, 8 understandings, and 2 declarations.

One newly proposed reservation limited the treaty's proscription of "cruel, inhuman or degrading treatment or punishment" to the narrower protections afforded by the 5th, 8th, and/or 14th Amendments to the U.S. Constitution. A Reagan/Shultz reservation limiting the impact of the treaty on state governments, as distinguished from the federal government, was reasserted. Also reasserted was a Reagan/Shultz reservation requiring the State Department to decide on a case-by-case basis whether to refer a dispute under the treaty between two governments to the International Court of Justice.

The Reagan Administration letter had recommended that the U.S. not accept the competence of the Committee Against Torture for complaints initiated by one state against another state, individual complaints, or sua sponte visits. The Bush package withdrew the proposed reservation as to U.S. participation in regard to state v. state complaints, but did not imply that the U.S. would permit individual complaints to the Committee.

The Bush package also kept the proposal of Secretary of State Schultz that the treaty be considered not self-executing. Just prior to hearings in the Senate Foreign Relations Committee on January 30, 1990, the Bush Administration proposed another declaration stating that the treaty would not restrict U.S. use of the death penalty. Senator Helms also proposed a reservation similar to the reservation he had attached to the Genocide Convention, stating:

Nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States, as interpreted by the United States.

The State Department opposed his proposed reservation because it might lead other governments to make similar reservations, thus inappropriately indicating that national law should be invoked as a justification for failure to perform a treaty.

When the Senate gave its advice and consent, it made only minor modifications to the package and adopted 2 reservations, 5 understandings, and 2 declarations.

136 Cong. Rec. S17486-92 (daily ed., Oct. 27, 1990); see Selected International Human Rights Instruments at 282. Senator Helms' proposed reservation was not included, and he agreed to withdraw and resubmit it as a proviso. The "sovereignty proviso," included in the resolution of ratification, requires the President to notify all present and prospective parties to the Convention Against Torture that nothing in the treaty authorizes legislation prohibited by the Constitution. Id. The U.S. deposited its instrument of ratification on October 21, 1994, and the treaty came into force with regard to the U.S. on November 20, 1994. The treaty required a U.S. report to the Committee Against Torture by November 21, 1995, and the U.S. produced its first report on October 15, 1999. In November 1999, a second periodic report was due and a third report was due in November 2004, but the U.S. submitted a combined second and third report in May 2005 and it was considered by the Committee against Torture in May 2006. In November 1999 Felice Gaer, the first U.S. member of the Committee Against Torture was elected and she was re-elected in November 2003 after having been re-nominated by the George W. Bush Administration.

c. Covenant on Civil and Political Rights

During the first Bush Administration, the U.S. ratified the Covenant on Civil and Political Rights on June 8, 1992; the treaty entered into force for the U.S. on September 8, 1992. It was encumbered by five reservations, five understandings, four declarations, and one proviso. 102 Cong. Rec. S4781-4784 (daily ed., April 2, 1992); see Selected International Human Rights Instruments at 283. The first reservation preserved the higher protection of free speech and association guaranteed by the U.S. Constitution. The second ensured that the U.S. could continue to impose the death penalty as punishment for persons under the age of 18 convicted of appropriate crimes. The third reservation, similar to a reservation imposed on the Convention Against Torture, limited the proscription of "cruel, inhuman or degrading treatment or punishment" to the definition under the 5th, 8th, and 14th Amendments. The fourth preserved the imposition of any criminal penalty in force at the time an offense was committed even if a lighter penalty is later prescribed. The final reservation preserved the right to treat juveniles as adults in exceptional circumstances, and reserved certain provisions with respect to individuals who volunteer for military service prior to age 18.

There also were five understandings. The first reflected the U.S. practice of permitting distinctions based on people's varying characteristics when they are rationally related to a legitimate governmental objective or when they have a disproportionate effect on persons of a particular status. The second ensured that victim compensation for unlawful arrest, detention, or miscarriage of justice might be subject to the "reasonable requirements of domestic law." The third preserved certain practices concerning accused and convicted persons, while the fourth limited governmental responsibilities to criminal defendants. The final

understanding limited the obligation of the federal government to enforce the terms of the Covenant in the federal system.

The Senate also added four declarations. As it had done with the Convention Against Torture, the Senate declared the Covenant not to be self-executing. Second, the Senate declared that states should not use the words of the Covenant to reduce higher human rights standards protected by relevant national law. The U.S. also accepted the competence of the Human Rights Committee to receive and consider reports under the Covenant. The Senate then attached a proviso, similar to the reservation to the Genocide Convention and the proviso attached to the Convention Against Torture regarding the sovereignty of U.S. law.

Many commentators have criticized the U.S. package of qualifications as excessive. See, e.g., M. Christian Green, The 'Matrioshka' Strategy: U.S. Evasion of the International Covenant on Civil and Political Rights, 10 So. Afr. J. Hum. Rts. 357 (1994); Lawyers Committee for Human Rights, Statements on U.S. Ratification of the CCPR, 14 HUM. RTS. L.J. 125 (1993). The State Department defended them. See David Stewart, U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations, 14 Hum. Rts. L.J. 77 (1993). See also Stefan Riesenfeld & Frederick Abbott, Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties, 67 Chi-Kent L. Rev. 293 (1992); Cherif M. Bassiouni, Reflections on the Ratification of the International Covenant on Civil and Political Rights by the United States Senate, 42 De Paul L. Rev. 1169 (1993); Hurst Hannum, Concluding Observations, 42 De Paul L. Rev. 1405 (1993); Aryeh Neier, Political Consequences of the United States Ratification of the International Covenant on Civil and Political Rights, 42 Depaul L. Rev. 1233 (1993); Jordan Paust, Avoiding 'Fraudulent' Executive Policy: Analysis of Non-self-execution of the Covenant on Civil and Political Rights, 42 De Paul L. Rev. 1257 (1993); John Quigley, The International Covenant on Civil and Political Rights and the Supremacy Clause, 42 De Paul L. Rev. 1287 (1993); William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?, 21 Brook. J. Int'l L.277 (1995).

Several parties to the Covenant objected to various limitations. Eleven European countries, for instance, objected to the reservation preserving the right to impose the death penalty on juvenile offenders. They contended that it is incompatible with the object and purpose of the treaty. Eight countries objected to the reservation limiting the meaning of "cruel, inhuman or degrading treatment or punishment." Finland and Sweden objected to the understanding allowing distinctions based on certain characteristics if rationally related to a legitimate governmental objective. Sweden also objected to the reservation preserving the right to apply the penalty in effect at the time an offense was committed. See United Nations, Ratification Status of the International Covenant on Civil and

Political Rights (visited February 28, 2000).

The first U.S. report to the Human Rights Committee was to be submitted on September 7, 1993, however, it was submitted on July 29, 1994, and the Committee considered the initial report at its fifty-third session in March 1995. The second U.S. report was due in September 1998. A combined second and third report was issued in October 2005 and reviewed in July 2006. In 1996, Thomas Buergenthal became the first U.S. member of the Human Rights Committee. He was replaced by Louis Henkin in 2000. The current U.S. member is Ruth Wedgewood.

d. Convention on the Elimination of All Forms of Racial Discrimination (Racial Convention)

The Racial Convention was adopted in 1965. Although President Johnson signed on September 28, 1966, it was not transmitted to the Senate until President Carter did so in 1978. Neither President Reagan nor the first President Bush supported ratification. The Clinton Administration, however, recommended ratification and proposed three reservations, one understanding, and one declaration. 140 Cong. Rec. S7634 (daily ed., June 24, 1994). The first reservation preserved the higher protection of free speech, expression, and association guaranteed by the U.S. Constitution. The second ensured that private conduct would remain protected only in accordance with the U.S. Constitution. The final reservation ensured the consent of the United States before a dispute against it could be brought to the ICJ.

There was only one understanding to the Racial Convention. It specified the nature of the obligation of the federal government to enforce the terms of the Covenant in the federal system.

The Senate added one declaration. As it has done with other conventions, the Senate declared the Covenant not to be self-executing. The Senate Foreign Relations Committee then attached a proviso. The proviso, as part of a compromise with Senator Helms, was not included in the instrument of ratification to be deposited by the President. The attached proviso regarding the sovereignty of U.S. law is similar to the reservation to the Genocide Convention and the analogous provisos to the Covenant on Civil and Political Rights and the Convention Against Torture stating that nothing in the Covenant will be interpreted by the United States to require legislation or action that is prohibited by the Constitution.

Many human rights activists criticized the qualifications, particularly the declaration that the treaty was not self-executing. The International Human Rights Law Group, for example, declared that most of the qualifications were unnecessary or undesirable. The American Bar Association supported most of the qualifications, but believed the third reservation was more restrictive than

necessary to achieve its goal of gradual acceptance of ICJ jurisdiction through successive agreements with specific states. See Hearing on the International Convention on the Elimination of All Forms of Racial Discrimination Before the Committee on Foreign Relations of the United States Senate, S. HRG. REP. NO. 659, 103d Cong., 2d Sess. (1994). Nonetheless, on June 24, 1994, the Senate gave its advice and consent to ratification with the quoted qualifications. 140 Cong. Rec. S7634 (daily ed., June 24, 1994). The U.S. deposited its instrument of ratification on October 21, 1994, and the treaty came into force with regard to the U.S. on November 20, 1994. An initial U.S. report to the Committee on the Elimination of Racial Discrimination was due on November 20, 1995. This report, along with two other periodic reports, have not yet been submitted. In January 1998, Gay J. McDougall was elected the first U.S. member of the Committee. The current U.S. member of the Committee is Ralph Boyd.

e. Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention)

The Women's Convention was adopted by the U.N. General Assembly on December 18, 1979, signed by the U.S. on July 17, 1980, and submitted to the Senate by President Carter on November 12, 1980. Neither President Reagan nor the first President Bush advocated ratification. The Senate Foreign Relations Committee held no hearings until August 2, 1990, and then did not send the Convention to the full Senate. In 1993, however, 68 senators asked President Clinton to take steps necessary for ratification. In October 1994, the Committee voted 13-4 in favor of forwarding the Convention to the full Senate, but no action was taken. The Committee recommended four reservations, four understandings, and two declarations. 140 Cong. Rec. S13927-28 (daily ed. Oct. 3, 1994). The first reservation referred to existing U.S. anti-discrimination laws and sought to ensure that private conduct would not be affected by the Women's Convention. The second reservation ensured the U.S. the right not to assign women to military units requiring direct combat. The third reservation stated that the provision demanding "equal pay for equal worth" would not be understood as creating a right to comparable worth. The fourth reservation ensured that the U.S. federal government would not be required to provide paid maternity leave or ensure the continuation of other benefits.

There also were four understandings. The first reflected the concept of federalism as stated in the Racial Convention. The second preserved the higher protection of free speech, expression, and association guaranteed by the U.S. Constitution. The third ensured that the U.S. would be able to determine which health care service was appropriate and which services would be free. The fourth understanding clarified that the Convention did not establish a right to an abortion.

The Senate also added two declarations. As it has done with most other treaties, the

Senate first declared the Covenant not to be self-executing. The second declaration ensured that the U.S. would only be subject to the jurisdiction of the ICJ with its consent on a case-by-case basis. See Kathryn Tongue, Eliminating Discrimination Against Women: The Push for an International Treaty, 25 Hum. Rts. Q. 14 (1998).

f. American Convention on Human Rights (American Convention)

The American Convention was adopted in 1968. President Carter signed on June 1, 1977, and submitted it to the Senate six months later. In a letter accompanying the transmission of the Convention to President Carter, Deputy Secretary of State Warren Christopher acknowledged,

The American Convention on Human Rights is a significant advance in the development of the international law of human rights and in the development of human rights law among the American States. United States ratification of the Convention is likely to spur interest in this important document among other American States. United States adherence is in the national interest and in that of the world community. It is our hope that the Senate, after full consideration, will give prompt approval to the Convention, and that the United States will become a party to it.

The Senate Committee held hearings in 1979 but took no action, and the U.S. still has not ratified. At the June 1993 World Conference on Human Rights in Vienna, Secretary Christopher declared that the U.S. "strongly support[s] the general goals" of the American Convention. He said that the Clinton Administration would support ratification after the Senate had acted on the Racial Convention.

NOTES AND QUESTIONS

1. Think about the reservations, understandings, and declarations attached to each of the treaties described above. What were the purposes of the qualifications?

2. Should the U.S. attach similar qualifications if it ratifies the Covenant on Economic, Social and Cultural Rights? How might the President and Senate be influenced by the Chinese example given in note 4 on 38. What risks are posed to the treaty regime if states condition their obligations on existing national law?

3. Do you think ratification with so many qualifications is worthwhile? Might other countries argue the qualifications are not effective? What is the effect of an objection?

4. At the 1993 World Conference on Human Rights in Vienna, the U.S. joined a consensus declaration that urged all states "to avoid, as far as possible, the resort to reservations." Has U.S. practice since then been consistent with this recommendation?

5. In November 1994, the Human Rights Committee issued a General Comment, in accordance with its power under Article 40 of the Civil and Political Rights Covenant criticizing the increasing number of reservations states add to treaties before ratifying. Human Rights Committee, General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994). After noting that, as of November 1, 1994, 46 of the 127 parties to the Civil and Political Covenant entered a total of 150 reservations, the Committee concluded that "[t]he number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States Parties." Id. ¶ 1. The Committee also noted that it is often difficult to distinguish between reservations and declarations, and indicated that it would acknowledge distinctions based on the intent of the party rather than on the form of the instrument: If a statement, irrespective of its name or title, purports to exclude or modify the legal effect of a treaty in its application to the State, it constitutes a reservation. Conversely, if a so-called reservation merely offers a State's understanding of a provision but does not exclude or modify that provision in its application to that State, it is, in reality, not a reservation.

Id. ¶ 3 (footnote omitted). The European Court of Human Rights had found an interpretive declaration to be a reservation in function and held it to be both invalid and severable from the European Convention. Belilos Case, 132 Eur. Ct. H.R. (ser. A) (1988). The Human Rights Committee acknowledged that reservations "serve a useful function" by enabling States that might otherwise have difficulty guaranteeing all the rights in the Covenant to nonetheless ratify, but stressed its desire that states accept the full range of obligations imposed by the treaty. Id. ¶ 4. Paragraphs 6 and 16 of the Comment state that the Committee will accept only reservations that are compatible with the object and purpose of the treaty, pursuant to Article 19(3) of the Vienna Convention on the Law of Treaties and the ICJ Reservations to the Genocide Convention Case (1951). The Committee went on to assess the compatibility of certain types of reservations, discuss its authority to make determinations concerning compatibility, and propose consequences for "unacceptable" reservations:

8. Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. . . . [P]rovisions in the Covenant that represent customary international law . . . may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their

own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be. . . .

10. The Committee has further examined whether categories of reservations may offend the "object and purpose" test. In particular, it falls for consideration as to whether reservations to the non-derogable provisions of the Covenant are compatible with its object and purpose. While there is no hierarchy of importance of rights under the Covenant, the operation of certain rights may not be suspended, even in times of national emergency. . . . While there is no automatic correlation between reservations to non-derogable provisions, and reservations which offend against the object and purpose of the Covenant, a State has a heavy onus to justify such a reservation.

11. The Covenant consists not just of specified rights, but of important supportive guarantees. These guarantees provide the necessary framework for securing the rights in the Covenant and are thus essential to its object and purpose. Some operate at the national level and some at the international level. Reservations designed to remove these guarantees are thus not acceptable. Thus, a State could not make a reservation to article 2, paragraph 3 of the Covenant, indicating that it intends to provide no remedies for human rights violations. Guarantees such as these are an integral part of the structure of the Covenant and underpin its efficacy. The Covenant also envisages, for the better attainment of its stated objectives, a monitoring role for the Committee. Reservations that purport to evade that essential element in the design of the Covenant, which is also directed to securing the enjoyment of the rights, are also incompatible with its object and purpose. . . . Accordingly, a reservation that rejects the Committee's competence to interpret the requirement of any provisions of the Covenant would also be contrary to the object and purpose of that treaty.

12. The intention of the Covenant is that the rights contained therein should be ensured to all those under a State party's jurisdiction. . . . Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and, further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed. . . .

16. The Committee finds it important to address which body has the legal authority to make determinations as to whether specific reservations are compatible with the object and purpose of the Covenant. As for international treaties in general, . . . a State which objected to a reservation on the grounds of incompatibility . . . could,

through objecting, regard the treaty as not in effect as between itself and the reserving State. . . . Essentially, a reservation precludes the operation, as between the reserving and other States, of the provision reserved; and an objection thereto leads to the reservation being in operation as between the reserving and objecting State only to the extent that it has not been objected to. . . .

18. It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because . . . it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions. . . . The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.

Id. ¶¶ 8-12, 16, 18 (footnotes omitted). Under the Committee's interpretation should any U.S. qualifications really be considered reservations? Do you think some of the U.S. reservations are invalid?

6. Conrad Harper, Legal Adviser of the State Department, transmitted certain U.S. "observations with respect to General Comment 24." Letter from Conrad Harper to Francisco José Aguilar-Urbina, Chairman, U.N. Human Rights Committee (Mar. 28-29, 1995):

There can be no serious question about the propriety of the Committee's concern about the possible effect of excessively broad reservations on the general protection and promotion of the rights reflected in the Covenant . . .. General Comment 24, however, appears to go much too far. The United States would therefore like to set forth in summary fashion a number of observations concerning the General Comment as follows:

1. Role of the Committee

[The last statement of paragraph 11 on page 51] can be read to present the rather surprising assertion that it is contrary to the object and purpose of the Covenant not to accept the Committee's views on the interpretation of the Covenant. This would be a rather significant departure from the Covenant scheme, which does not impose on States Parties an obligation to give effect to the Committee's interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant. The drafters of the Covenant could have given the Committee this role but deliberately chose not to do so. . . .

Moreover, the Committee appears to dispense with the established procedures for determining the permissibility of reservations and to divest States Parties of any

role in determining the meaning of the Covenant . . . and of the extent of their treaty obligations. . . .

The Committee's position, while interesting, runs contrary to the Covenant scheme and international law.

2. Acceptability of Reservations: Governing Legal Principles

The question of the status of the Committee's views is of some significance in light of the apparent lines of analysis concerning the permissibility of reservations in paragraphs 8-9. . . .

It is clear that a State cannot exempt itself from a peremptory norm of international law by making a reservation to the Covenant. It is not at all clear that a State cannot [choose] to exclude one means of enforcement of particular norms by reserving against inclusion of those norms in its Covenant obligations. The proposition that any reservation which contravenes a norm of customary international law is per se incompatible with the object and purpose of this or any other convention, however, is a much more significant and sweeping premise. It is, moreover, wholly unsupported by and is in fact contrary to international law. As recognized in paragraph 10 analysis of non-derogable rights, an "object and purpose" analysis by its nature requires consideration of the particular treaty, right, and reservation in question. . . .

3. Specific Reservations

The precise specification of what is contrary to customary international law, moreover, is a much more substantial question than indicated by the Comment. Even where a rule is generally established in customary international law, the exact contours and meaning of the customary law principle may need to be considered. Paragraph 8, however, asserts in a wholly conclusory fashion that a number of propositions are customary international law which, to speak plainly, are not. . . .

4. Domestic Implementation

The discussion in paragraph 12, as it stands, is very likely to give rise to misunderstandings . . .. The Committee here states, with regard to implementing the Covenant in domestic law, that such laws "may need to be altered properly to reflect the requirements of the Covenant; and mechanisms at the domestic level will be needed to allow the Covenant rights to be enforceable at the local level." (Emphasis added in original.)

. . . [T]his statement may be cited as an assertion that States Parties must allow suits in domestic courts based directly on the provisions of Covenant. Some

countries do in fact have such a scheme of "self-executing" treaties. In other countries, however, existing domestic law already provides the substantive rights reflected in the Covenant as well as multiple possibilities for suit to enforce those rights. . . .

As a general matter, deciding on the most appropriate means of domestic implementation of treaty obligations is, as indicated in Article 40, left to the internal law and processes of each State Party. . . .

5. Effect of Invalidity of Reservations

It seems unlikely that one can misunderstand the concluding point of this General Comment, in paragraph 18, that reservations which the Committee deems invalid "will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation." Since this conclusion is so completely at odds with established legal practice and principles and even the express and clear terms of adherence by many States, it would be welcome if some helpful clarification could be made.

The reservations contained in the United States' instrument of ratification are integral parts of its consent to be bound by the Covenant and are not severable. If it were to be determined that any one or more of them were ineffective, the ratification as a whole would thereby be nullified.

Articles 20 and 21 of the Vienna Convention set forth the consequences of reservations and objections to them. Only two possibilities are provided. Either (i) the remainder of the treaty comes into force between the parties in question or (ii) the treaty does not come into force at all between these parties. In accordance with Article 20, paragraph 4(c), the choice of these results is left to the objecting party. The Convention does not even contemplate the possibility that the full treaty might come into force for the reserving state.

7. If the Committee is correct, what would be the implications for U.S. ratification of future human rights treaties? Do you agree with Conrad Harper or the Human Rights Committee? On what points?

8. Two other countries have submitted to the Human Rights Committee observations regarding General Comment No. 24. See, e.g., Letter from Michel de Bonnecorse, French Ambassador to the United Nations, to the Center for Human Rights (Sept. 11, 1995) (copy on file with authors); Report of the Human Rights Committee, 50 Supp. (No. 40) at 135, U.N. Doc. A/50/40 (1995) (containing the United Kingdom's observations). These states expressed concern over the Human Rights Committee's authority to declare reservations to be invalid. The prerogative of states to object to invalid reservations was also raised during debate in the Sixth

Committee of the General Assembly on the International Law Commission's interim reports on reservations to treaties. How effective do you think the state objection process is in monitoring invalid reservations to human rights treaties and in clearly delineating their effects. Consider the effectiveness of this approach with regard to the scope of the obligations existing between the reserving state and the objecting state. Also, consider the question of the severability of the reservation and thus the basic question whether the reserving state is bound to the treaty at all? When states object to allegedly incompatible reservations to human rights treaties, they also tend to assert that they regard the reserving state as being a party to the treaty. And relatively few objections are filed.

9. On December 9, 1993, the U.N. General Assembly endorsed a decision of the U.N. International Law Commission (ILC) to consider and report on "the law and practice relating to reservations to treaties." U.N. Doc. A/RES/48/31 (1993). At its forty-sixth session in 1994, the ILC appointed Alain Pellet as Special Rapporteur for this topic, and his first report was received and discussed at the forty-seventh session in 1995. A second report was delivered two sessions later in 1997 and a third report with 10 draft guidelines was referred to the Drafting Committee during the fiftieth session. In July 1999, the Commission adopted on first reading 18 draft guidelines and created new versions to two of the draft guidelines on reservations to treaties. U.N. Doc. A/CN.4/L.575 (1999).

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3. Should the U.S. Ratify the Covenant on Economic, Social and Cultural Rights? Philip Alston, U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy, 84 Am. J. Int'l L. 365, 365-92 (1990) (footnotes omitted):

In January 1989, in the follow-up to the Conference on Security and Co-operation in Europe(the so-called Helsinki process), the United States signed the Vienna Declaration, in which it recognized "that the promotion of economic, social, cultural rights . . . is of paramount importance for human dignity and for the attainment of the legitimate aspirations of every individual." To that end, the United States in signing the declaration undertook, inter alia, to guarantee "the effective exercise" of economic, social and cultural rights and to consider acceding to the International Covenant on Economic, Social and Cultural Rights. These undertakings seem to warrant renewed consideration of proposals that have been made at various times over the past quarter of a century for the United States to ratify the Covenant on Economic, Social and Cultural Rights.

. . . The thrust of the analysis that follows is to endorse the call for U.S. ratification of the Covenant on Economic, Social and Cultural Rights but to suggest at the same time that the strategy that will be required if success is to be achieved is very

different from that pursued so far by the proponents of ratification.

In the past, the tendency has been to portray the Covenant as though it did not differ significantly from the other treaties whose ratification was being advocated. Two different reasons suggest themselves as possible explanations for that tendency. The first is that it was assumed that the best hope of achieving ratification of a potentially controversial Covenant was to smuggle it through as part of a "package" of treaties, the majority of which would presumably be endorsed fairly readily because of their similarity to the U.S. Bill of Rights. A second, alternative, explanation is that it was assumed that the Covenant could be "sold" as part of a package deal largely because it could convincingly be portrayed as being devoid of any substantive practical or legal significance. . . .

There is good reason, however, to question whether the Covenant can, or should, be "sold" to the U.S. Senate on the basis of either of these two approaches. In the first place, despite having been around since 1966, the Covenant has failed to attract any significant domestic support, even from within the human rights community . . .. Of even greater relevance is the extent to which it seems to be viewed with suspicion by many Americans, who tend to think of it less as an international treaty seeking to promote the satisfaction of basic material needs than as a "Covenant on Uneconomic, Socialist and Collective Rights." Only by facing that reality, and by taking it as a starting point for an open and animated public debate, is there any real prospect of securing the broad-based support and momentum without which the Senate is unlikely ever to act. . . .

. . . [T]he obstacles to be overcome to secure ratification of the Covenant on Economic, Social and Cultural Rights are . . . formidable. They arise essentially from the absence of clear agreement on values between the United States and the international community when it comes to the very concept of economic, social and cultural rights. The lack of the necessary community of values is most clearly attested to by the fact that the U.S. Government [in the Reagan and first Bush administrations], for almost a decade, . . . categorically denied that there is any such thing as an economic, a social or a cultural human right. . . .

The second obstacle is rather more complex and will prove considerably more difficult to overcome. It derives from the conjunction of two factors. The first is that the nature of the obligations contained in the Covenant on Economic, Social and Cultural Rights, while by no means the object of precise agreement among governments or scholars, is nevertheless considerably more substantial and demanding than has been assumed in most of the ratification debate in the United States so far. Moreover, as the "jurisprudence" relating to individual economic, social and cultural rights becomes clearer, and as the recently established Committee on Economic, Social and Cultural Rights begins to generate a deeper and more widely shared understanding of the nature of the obligations in the

Covenant, a decision by the United States to ratify will take on more and more significance. The second complicating factor is the lack of consensus within the United States as to the desirability, or philosophical and political acceptability, of the domestic recognition of economic, social and cultural rights. . . .

I. AN OVERVIEW OF THE RIGHTS AND OBLIGATIONS

The Covenant is sometimes described by its critics as though it were really a "holidays with pay treaty." . . . [A]lthough the right to take an occasional break from work (a sabbath, in religious terms) is an important one, it is perhaps less self-evidently fundamental than several of the other rights dealt with. They include the right to work, which, notwithstanding allegations to the contrary, has always been interpreted by international organizations so as to avoid the implication that a job is guaranteed by the state to all and sundry. The relevant provision, however, does indicate that the job in question should be freely chosen or accepted (Art. 6(1)) and that appropriate policies should be pursued "under conditions safeguarding fundamental political and economic freedoms to the individual" (Art. 6(2)). The link between the two sets of rights is thus strongly reaffirmed.

Articles 7 and 8 deal with conditions of work . . .. Article 9 provides for the right to social security -- exactly the term the United States has opted for since the Great Depression. Article 10 confirms the importance of the family as a social group and calls for special protection for children and young persons and for mothers during a reasonable period before and after childbirth. None of these provisions appear to be controversial or out of step with widespread practice in the United States. The same can be said of Article 15, which in most respects raises issues that seem more relevant to the Covenant on Civil and Political Rights. . . . The remaining articles (Arts. 11-14), however, are more problematic from a U.S. perspective. In essence, they deal with the rights to food, clothing and housing, the right of access to physical and mental health care, and the right to education. In terms of the "ratifiability" of the Covenants by the United States, the issues raised by that cluster of rights are twofold. Is the United States prepared to commit itself to the general proposition that there is indeed a human right to each of these social goods or, put differently, to the satisfaction of each of these basic human needs? And, even if it is, is it prepared to accept the specific level of obligation in that regard provided for by the Covenant? . . .

The Covenant makes clear that the responsibility for monitoring and promoting the implementation of the various rights is principally incumbent upon the state party itself. . . . The sole international implementation mechanism provided for in the Covenant consists of the duty assumed by each state party to report . . .. The procedure is based on the assumption that a constructive dialogue between the Committee and the state party, in a nonadversarial, cooperative spirit, is the most productive means of prompting the government concerned to take the requisite

action. . . . Although . . . the principal thrust of the implementation provisions of the Covenant is to emphasize the responsibility of the state party itself, the element of international accountability is not thereby rendered irrelevant or meaningless. . . .

II. THE FOREIGN POLICY OBSTACLE: U.S. REJECTION OF ECONOMIC, SOCIAL AND CULTURAL "RIGHTS" AS RIGHTS

In the early days of the Reagan administration, an internal memorandum of the Department of State on human rights policy was leaked to the press and reprinted in full in the New York Times. The memorandum, which was apparently approved by then Secretary of State Alexander Haig, has subsequently been shown to have had a major impact on U.S. policy. It . . . endorsed the unqualified rejection of economic, social and cultural "rights" as rights. Human rights were to be explicitly defined for the purposes of future U.S. policy as "meaning political rights and civil liberties." To entrench this highly restrictive definition, the memorandum urged that the administration "move away from 'human rights' as a term, and begin to speak of 'individual rights,' 'political rights' and 'civil liberties.'" This strategy of simply defining economic rights out of existence was rapidly put into place by deleting the sections dealing with "economic and social rights" from the first of the State Department's annual Country Reports on Human Rights Practices . . .. This deletion was strongly defended by Assistant Secretary of State Elliott Abrams in a congressional hearing to review the report. His arguments were buttressed by both pragmatic and philosophical considerations.

. . . In brief, Abrams invoked the public/private distinction: "The great men who founded the modern concern for human rights . . . established separate spheres of public and private life . . .. Social, economic and cultural life was left in the private sphere . . .." Without so labeling them, Abrams used the distinction between positive and negative categories of rights and concluded that "the rights that no government can violate [i.e., civil and political rights] should not be watered down to the status of rights that governments should do their best to secure [i.e., economic, social and cultural rights]." . . .

Another strand in the arguments used against economic and social rights in recent years by U.S. officials has been to portray the issue as one of East versus West. This argument has been expressed by Assistant Secretary Schifter in the following terms:

Critics of the Western democracies used to contend that, while emphasizing free speech and a free press, the democracies ignored such basic needs as food, jobs, housing and medical care. These critics, particularly those affiliated with the Soviet bloc, stressed that their governments guaranteed citizens the right to obtain these basic needs. Supporters in democracies responded that, people needed, not

guarantees of food, jobs, housing and medical care, but delivery of these benefits.

But the "critics" of whom he speaks have not assailed "the Western democracies" in general, since, with the sole exception of the United States, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle. [The author cited Australia, the Netherlands, Greece, Portugal, Spain, Switzerland, the Scandinavian countries, and 13 Latin American countries as examples of Western democracies which have championed the economic, social, and cultural rights enumerated in various documents.]

. . . If . . . the debate needs to be pursued in geopolitical terms, it is between the United States on the one hand, and most of the rest of the world on the other. It is not principally between East and West.

III. THE DOMESTIC POLICY OBSTACLE

The Nature of the Obligations Imposed by the Covenant

[Article 2(1) states: "Each State Party to the present Covenant undertakes to take steps, . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . .." The Carter Administration proposed the following understanding when it transmitted the Covenant to the Senate for its advice and consent: "The United States understands paragraph (1) of Article 2 as establishing that the provisions of Articles 2 through 15 of this Covenant describe goals to be achieved progressively rather than through immediate implementation."]

. . . A careful analysis of the Covenant reveals that the most general obligation of an immediate nature is . . . "to begin immediately to take steps towards full realization of the rights contained in the Covenant." . . . But the proposed U.S. understanding would remove even the need for the adoption of formal legal provisions. . . . The starting point for a program to implement economic and social rights is to ascertain, as precisely as possible, the nature of the existing situation with respect to each right, so as to identify more clearly the problems that need to be addressed and provide a basis for principled policy making. Thus, to take the case of the right to adequate food, an immediate and feasible step that the United States could take would be to adopt legislation requiring the various levels of government to collaborate periodically on a detailed survey of the nutritional status of the American people, with particular emphasis on the situation of the most vulnerable and disadvantaged groups and regions. Such a survey could then constitute the basis for carefully targeted legislative, administrative and practical measures aimed at enhancing realization of the right.

[The author next discussed the "guarantee" language of Article 2(2) and the "ensure" language of Article 3. The author also discussed the obligations imposed in Part III of the Covenant. For a discussion of that terminology, see the discussion supra at 7-13.] The undertakings "to guarantee" and "to ensure" cannot reasonably be construed as mere declarations of goals to be achieved in the distant future. . . .

In sum, the understanding proposed by the Carter Administration to the effect that all of the substantive provisions of the Covenant "describe goals to be achieved progressively rather than through immediate implementation" is manifestly incorrect and would be incompatible with the basic object and purpose of the Covenant. Accordingly, it cannot serve as an appropriate basis for future public or congressional debate over ratification of the Covenant. Rather, the starting point for such a debate . . . must be recognition of the fact that a significant range of obligations would flow from ratification.

Domestic Acceptability of an Economic, Social and Cultural Rights Ideology

Another issue that was treated in a rather cavalier fashion . . . is the extent to which acceptance of even a fairly low level of obligation with respect to economic, social and cultural rights is likely to be acceptable in domestic political terms in the United States. That issue, in turn, is linked to whether existing U.S. domestic policies can be said to reflect a commitment to securing, even on the basis of progressive realization, the enjoyment of a full range of economic, social and cultural rights for each and every American citizen. . . .

. . . [T]he acceptability within the United States of a "rights psychology" in the economic and social domain is much less apparent. However, before moving to that issue, it is important to dispose of a separate, although related, issue that can sometimes mistakenly dominate discussions of this subject. [Alston noted that several U.S. officials believe U.S. domestic policy and practice ensures, to a large extent, the economic, social, and cultural rights enshrined in the Covenant.] In fact, such claims stand in marked contrast to the findings of most serious studies of U.S. economic and social policy. . . .

Nevertheless, the performance of the United States . . . is not, and should not be permitted to become, the principal issue in the present context. If universally applicable minimum standards were required to be met before a state could qualify to ratify the Covenant, those standards either would preclude ratification by the great majority of states or would be ludicrously low . . .. But, for the most part, there are no such universal benchmarks, and each state is required, in effect, to do its utmost in light of its own situation at the time of ratification.

The issue at hand, therefore, concerns not the actual extent to which economic, social and cultural rights are currently being enjoyed in the United States but,

rather, the acceptability of using the notion of human rights (with whatever implications that may have) as one of the principal underpinnings of future American policy endeavors in this domain. . . . [C]onsiderable evidence points to a deep-seated reluctance on the part of the U.S. Government to embrace the concept of economic, social and cultural rights, let alone to do so within the framework of an international treaty that imposes a degree of accountability in that regard. . . . The conclusion to be drawn . . . is not necessarily that the concept of economic, social and cultural rights is, by definition, incompatible with the philosophy of the American people or even of recent U.S. administrations. Rather, it is that the acceptability to the American people and their political representatives in the U.S. Senate of the assumptions implicit, and the obligations explicit, in the Covenant cannot readily be assumed. . . .

IV. SOME CONSEQUENCES OF NONRATIFICATION OF THE COVENANT . . .

Perhaps most troubling of all about this approach is the set of political and historical misrepresentations on which it is based. Take the following assertion: Much of the confusion in Western thinking about what is and is not a human right stems from the gradual abolition, under Jimmy Carter's Administration, of the demarcation line between the Anglo-American concept of the Rights of Man (political and civil liberties) and the Soviet-Third World concept of "social and economic rights."

This analysis is wrong on every count. The confusion in question is not in "Western" thinking but in American policy since 1981, a policy that has not been supported by even a single other Western government. . . . Similarly, it was not Jimmy Carter who abolished the distinction between the two concepts but Franklin Delano Roosevelt, who actively advocated the recognition of economic and social rights, and Harry Truman, whose administration voted to adopt the Universal Declaration of Human Rights (in 1948), which accepted the equality of the two sets of rights. References to "the Anglo-American concept of the Rights of Man" not only ignore that part of U.S. history, but also overlook the enthusiastic support by British governments of various political persuasions for economic and social rights (embodied in the concept of the welfare state), as well as the nature of the French, German, Mexican and other contributions to the original concept. . . . The principal purpose of the present analysis, however, is . . . to emphasize the long-term lack of viability of seeking to rely on international human rights standards in the context of both East-West and North-South relations and at the same time misrepresenting and undermining those standards. While ratification of the Covenant is not indispensable to remedying that situation, its continuing rejection and active disparagement will compound an already unacceptable position.

V. THE U.S. HUMAN RIGHTS COMMUNITY AND RATIFICATION OF THE

COVENANT . . .

[One] principal shortcoming of the debate so far has been the tendency to present the issue as though acceptance of an obligation to recognize, and to move purposefully toward the progressive implementation of, a wide range of economic, social and cultural rights were, to put it colloquially, "no big deal." In fact, such a decision would be a very big deal in the light of the attitudes and approaches that have prevailed in the United States . . ..

The Carter administration's proposed "understanding," which was explicitly designed to neutralize any impact that ratification might have been expected to have in the normal course of events, could only with the utmost difficulty be characterized as having been put forward in good faith. On careful examination, it is inconsistent with the legal language used in the Covenant and it cannot readily be reconciled with the very nature and purpose of the act of assuming international human rights obligations. The understanding seems to have been accepted by some of the proponents of ratification largely for tactical reasons, on the grounds that it would be easier to give substance to the obligations of the Covenant after ratification was achieved, rather than before. But there is no reason to believe that recognition of the rights in question can be achieved by stealth, and no justification for believing that it should be.

On the contrary, the ratification debate . . . is going to have to confront the hard issues with a much greater degree of openness and sophistication than has so far been the case. To take but one example: Is there reason to conclude, as an eminent international lawyer and human rights advocate has argued, "that the full achievement of . . . economic and social rights entails a loss of individual liberties which is unacceptable to the western liberal democracies"? And, if so, on what basis and by what means can the obligations contained in the Covenant be interpreted and applied so as to avoid, or at least minimize, such undesirable consequences? It is on issues such as these that the future debate will need to focus.

NOTES AND QUESTIONS

1. According to Alston what are the advantages of ratification for the U.S.? What are the disadvantages? What obstacles must be overcome to secure ratification?

2. Not all commentators agree with Alston's strategy to encourage U.S. ratification of the treaty. Many proponents of ratification advocate the "stealth" method criticized by Alston at the beginning of his article. They argue that stealth is necessary to avoid alarming conservative contingents in the Senate and elsewhere, which might mount a vigorous campaign to oppose the Senate's consenting to the

treaty. Also, a vigorous public debate may make it impossible to obtain the Senate's advice and consent to ratification, because the Senate usually acts on treaties by consensus or not at all. Moreover, they argue that lack of an organized and powerful lobby in favor of ratification makes Alston's strategy unlikely to succeed. Proponents of the stealth strategy encourage ratification, even if it is achieved only through the use of reservations, declarations, and understandings, because those qualifications may be ineffective after ratification to the extent they are inconsistent with the object and purpose of the treaty. Does Alston convincingly counter those arguments?

3. Does the recognition of rights encourage governments to conform their practices accordingly? Do methods of implementing rights under the Covenant on Economic, Social and Cultural Rights fully address the Reagan and Bush administrations' argument that capability for immediate implementation is necessary for claims to be defined as rights? Do methods of implementing rights under the Covenant on Economic, Social and Cultural Rights fully address the Reagan and Bush administrations' argument that capability for immediate implementation is necessary for claims to be defined as rights? See American Association For The Advancement Of Science And Physicians For Human Rights, Human Rights And Health: The Legacy Of Apartheid (Audrey R. Chapman and Leonard S. Rubenstein, ed. 1998); Mary Dowell-Jones, Contextualising the International Covenant on Economic, Social and Cultural Rights: Assessing the Economic Deficit (2004); Sofia Gruskin, Perspectives on Health and Human Rights (2005); Virginia A. Leary, Justiciability and Beyond; Complaint Procedures and the Right to Health, 55 IJC REV. 105 (1995); Isfahan Merali & Valerie Oosterveld, Giving Meaning to Economic, Social, and Cultural Rights (2001); Brigit C.A. Toebes, The Right To Health As A Human Right (1999); Brigit Toebes, Towards an Improved Understanding of the International Human Right to Health, 21 Hum. Rts. Q. 661 (1999); United Nations, Committee on Economic, Social and Cultural Rights, Concluding observations of the UN Committee on Economic, Social and Cultural Rights: Eighth to Twenty-Seventh Sessions (1993-2001) (2003).

4. The Reagan and first Bush administrations argued that viewing economic and social goals as rights leads governments to deny civil and political rights in the search for distributive justice. Were that assertion true, is it a valid objection to recognizing economic, social, and cultural rights? Or does it merely reflect the view that civil and political guarantees are more important than economic fairness? Should governments strive to provide both civil and political rights and economic, social, and cultural rights? See Rhoda Howard, The Full Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights, 5 Hum. Rts. Q. 467 (1983); Barbara Stark, Urban Despair and Nietzsche's "Eternal Return:" From the Municipal Rhetoric of Economic Justice to the International Law of Economic Rights, 28 Vand J. Transnat'l L. 185 (1995); Craig Scott, Reaching Beyond

(Without Abandoning) the Category of "Economic, Social and Cultural Rights," 21 Hum. Rts. Q. 633 (1999).

5. The U.S. view of economic, social, and cultural rights has not always been negative. President Carter signed the Covenant on Economic, Social and Cultural Rights and submitted it to the Senate for advice and consent. His administration viewed human rights as falling into three broad categories: rights that protect the integrity of the person; rights that guarantee fulfillment of basic economic and social needs; and rights that protect civil and political liberties. The administration promoted protection of all categories of rights as being complementary and mutually reinforcing. See Cyrus Vance, Human Rights and Foreign Policy, 7 Ga. J. Int'l & Comp. L. 223 (1977). Since leaving office, President Carter has established a human rights center in Atlanta that is well-known both for its work on elections observations and its efforts to promote the right to health in the developing world. President Carter personally is known for his work on the right to housing with Habitat for Humanity.

6. Recall Alston's discussion of the East-West and North-South division. He is criticizing the view, first expressed during the Cold War, that "economic and social rights" are an Eastern creation. Since the breakup of the Soviet Union and the dismantling of Eastern European governments the East-West split largely has disappeared. In its place is a growing debate over human rights between the developed countries of the North and those of the South. The South has argued for the right to development and for greater attention to economic, social, and cultural rights. Some governments also assert that human rights must be interpreted in the cultural context of each region and that a Western European definition of human rights should not be rigidly imposed on the South. For a discussion of the North-South debate over human rights, see Philip Alston, Human Rights in 1993: How Far Has the United Nations Come and Where Should it go From Here? (memorandum distributed at the Vienna Conference on Human Rights, June 1993). These issues also arise in the context of debates over the relationship between trade and human rights Connie de la Vega, Human Rights and Trade Inconsistent Application of Treaty Law in the United States, 9 UCLA J. Int'l & Foreign Aff. 1 (2004); Janet Dine, Companies, international trade, and human rights (2005); Human rights and international trade (Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi Bonanomi, eds. 2005); . International trade and human rights: foundations and conceptual issues (Frederick M. Abbott, Christine Breining-Kaufmann, and Thomas Cottier, eds. 2006); Tarek F. Maassarani, WTO-GATT, Economic Growth, and the Human Rights Trade-Off, 28 Environs Envtl. L. 7 pol'y j. 269 (2005); Christina Ochoa, Advancing the language of human rights a global economic order: An analysis of a discourse, 23 B.C. Third World L.J. 57 (2003).

7. If the U.S. were a party to the Covenant on Economic, Social and Cultural Rights, would the U.S. violate its obligations by:
(a) reducing the distribution of food stamps?

(b) increasing the co-payment charge for medicine under the Medicare program for the elderly?
(c) spending vast sums on national defense and notably less on aid to families with dependent children?
(d) failing to provide adequate housing for the homeless?

8. In light of General Comment No. 24 and the U.S. response, supra at 51-54, is U.S. ratification of the Covenant on Economic, Social and Cultural Rights more or less likely?

9. For support of U.S. ratification of the Covenant on Economic, Social and Cultural Rights, see J. Kenneth Blackwell, Howard Tolley, Jr., The U.N. Commission on Human Rights, 14 Hum. Rts. Q. 485 (1992) (book review). For further reading, see Philip Harvey, Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously, 33 Colum. Hum. Rts. L. Rev. 363 (2002);Natalie Hevener Kaufman & David Whiteman, Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment, 10 Hum. Rts. Q. 309 (1988); A. Glenn Mower, Human Rights And American Foreign Policy: The Carter And Regan Experience 37-40 (1987). For criticism of the inclusion of economic, social, and cultural rights, see Joshua Muravchik, The Uncertain Crusade: Jimmy Carter And The Dilemmas Of Human Rights Policy 88-105 (1986).

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5. Ratification -- With or Without Qualifications?

Four Treaties Pertaining to Human Rights: Message From the President of the United States, 95th Cong., 2d Sess. at VIII-XI (1978):
[Ed. Note: In its transmission of the Covenant on Economic, Social and Cultural Rights to the Senate for advice and consent, the Carter Administration suggested the following reservations, understandings, and declarations.]

The International Covenant on Economic, Social and Cultural Rights sets forth a number of rights which, while for the most part in accord with United States law and practice, are nevertheless formulated as statements of goals to be achieved progressively rather than implemented immediately. . . .

Article 1 affirms in general terms the right of all peoples to self-determination, and the right to freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. This is consonant with United States policy.

Paragraph (1) of Article 2 sets forth the basic obligation of States Parties "to take

steps," individually and through international assistance and cooperation, "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized" by the Covenant "by all appropriate means, including legislative measures." In view of the terms of paragraph (1) of Article 2, and the nature of the rights set forth in Articles 1 through 15 of the Covenant, the following statement is recommended:

"The United States understands paragraph (1) of Article 2 as establishing that the provisions of Articles 1 through 15 of this Covenant describe goals to be achieved progressively rather than through immediate implementation."

It is also understood that paragraph (1) of Article 2, as well as Article 11, which calls for States Parties to take steps individually and through international cooperation to guard against hunger, import no legally binding obligation to provide aid to foreign countries.

Paragraph (2) of Article 2 forbids discrimination of any sort based on [enumerated characteristics]. United States and international law permit certain limited discrimination against non-nationals in appropriate cases (e.g., ownership of land or of means of communication). It is understood that this paragraph also permits reasonable distinctions based on citizenship. Paragraph (3) of Article 2 provides that developing countries, with due regard to human rights and their national economy, may determine to what extent they will guarantee the economic rights recognized in the Covenant to non-nationals. Of related significance is Article 25, which provides that nothing in the Covenant is to be interpreted as impairing the "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources." With respect to paragraph (3) of Article 2 and to Article 25, the following declaration is recommended:

"The United States declares that nothing in the Covenant derogates from the equal obligation of all States to fulfill their responsibilities under international law. The United States understands that under the Covenant everyone has the right to own property alone as well as in association with others, and that no one shall be arbitrarily deprived of his property."

This declaration and understanding will make clear the United States position regarding property rights, and expresses the view of the United States that discrimination by developing countries against nonnationals or actions affecting their property or contractual rights may only be carried out in accordance with the governing rules of international law. Under international law, any taking of private property must be nondiscriminatory and for a public purpose, and must be accompanied by prompt, adequate, and effective compensation. . . .

Paragraph (1) of Article 5 provides that nothing in the Covenant may be interpreted

as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized in the Covenant, or at their limitation to a greater extent than provided for in the Covenant. This clause raises in indirect fashion the problem of freedom of speech, and accordingly, the following statement is recommended:

"The Constitution of the United States and Article 19 of the International Covenant on Civil and Political Rights contain provisions for the protection of individual rights, including the right to free speech, and nothing in this Covenant shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States." . . .

Articles 6 through 9 of the Covenant list certain economic rights, including the right to work (Article 6), to favorable working conditions (Article 7), to organize unions (Article 8), and to social security (Article 9). Some of the standards established under these articles may not readily be translated into legally enforceable rights, while others are in accord with United States policy, but have not yet been fully achieved. It is accordingly important to make clear that these provisions are understood to be goals whose realization will be sought rather than obligations requiring immediate implementation.

Similarly, Articles 10 through 14 detail certain social rights, among them the right to protection of the family, including standards for maternity leave (Article 10), the right of freedom from hunger (Article 11), the right to physical and mental health (Article 12), and the right to education (Articles 13 and 14). Article 15 provides for certain cultural rights, all of which are appropriately protected by United States law and policy. . . .

Articles 26 through 31 are the final clauses. Article 28 states that "The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions." In view of the nature of the United States federal system, this Article is not acceptable as formulated. With respect to Article 28, the following reservation is recommended:

"The United States shall progressively implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant." In addition, it is further recommended that a declaration indicate the non-self-executing nature of Articles 1 through 15 of the Covenant.

NOTES AND QUESTIONS

1. Is the first paragraph of the above excerpt accurate in stating that the Covenant is "for the most part in accord with United States law and practice"? What about the final sentence of the second paragraph?

2. Do you agree that the qualifications are consistent with the object and purpose of the treaty?

3. Do you think that economic, social, and cultural concerns are goals, not rights?

4. How does the U.S. reference to Article 8 as a "goal[] whose realization will be sought" compare to China's reservation to the same article, quoted in note 4 at 38? How does the proposed U.S. reservation to Article 5 compare to China's approach to Article 8?

Burns Weston, U.S. Ratification of the International Covenant on Economic, Social and Cultural Rights: With or Without Qualifications, in U.S. Ratification of the Human Rights Treaties: With or Without Reservations? 27, 30-38 (Richard B. Lillich ed. 1981):

I. The Two Reservations

A. Free Speech

The first proposed reservation pertains to Article 5(1) of the [Economic, Social and Cultural Rights] covenant . . .. Correctly, the Carter Administration has perceived a potential conflict with the First Amendment free-speech guarantees of our Constitution. Accordingly, because a treaty cannot be ratified by the Senate if it conflicts with the Constitution, the administration has recommended [a] reservation . . .. The trouble with th[e] reservation is that, while appropriate in referring to the Constitution, it goes too far in referring also to the "laws and practice of the United States."

In the first place, this additional reference is unnecessary. Free speech laws and practices in the U.S. are constitutionally protected; therefore, they would be protected by a reservation limited in reference to the U.S. Constitution only. Secondly, as our colleague David Weissbrodt from the University of Minnesota has recently pointed out, this additional reference could be used perversely to authorize U.S. "laws and practice" that would be less protective of free speech than Article 19 of the International Covenant on Civil and Political Rights. Because Article 19 could be interpreted to prohibit "laws and practice" that heretofore have been sanctioned by our Supreme Court -- for example, authorization of police surveillance of peaceful demonstrations -- the proposed reservation actually may

offer less free-speech protection than is afforded by the covenants. Accordingly, the reservation could be used to prevent any treaty-based improvement in U.S. laws and practice.

In sum, insofar as the free speech reservation refers to "laws and practice of the United States," it is superfluous and probably very shortsighted. Furthermore, because it signals to the world that we will abide by the covenant so long as such adherence does not require any improvement in our own free speech practices, it encourages other countries to make similar status quo reservations -- reservations that, in turn, would seriously jeopardize the protection of free speech as envisioned in the Civil and Political Covenant. Therefore, the proposed reservation should be revised so as to exclude reference to the "laws and practice of the United States."

B. States' Rights

The second reservation pertains to Article 28 of the . . . covenant, which stipulates that "the provisions of the present Covenant shall extend to all parts of federal States without any limitation or exceptions." According to the Carter Administration, which seems to fear some violation of states' rights or some inconsistency with our federal system, this provision requires [a] reservation . . . limit[ing] the impact of the covenant on state governments within the U.S.

In thus proceeding, however, the Carter Administration has forgotten our constitutional history and consequently has reopened old wounds. In a phrase, this proposed states' rights reservation constitutes a legal/historical anachronism. In addition to the fact that the U.S. Supreme Court has unequivocally upheld the power of the federal government to make treaties in respect of matters that otherwise would be the sole prerogative of the separate states, the recent trend of constitutional decision, at least since the early 1950s, has been to resolve virtually all states' rights doubts in favor of federal power -- via the commerce clause and via the thirteenth, fourteenth, and fifteenth amendments. Moreover, there is absolutely no question that the U.S. government has the authority to enter into human rights treaties per se.

But the real objection to the proposed states' rights reservation is that it could be not just a silly anachronism but a costly one, both domestically and internationally. Domestically, there is the possibility that it would refuel politically retrogressive (perhaps even racist) divisions that, in turn, could call into question even the limited international human rights commitments that have so far been made by the U.S. and internationally, because the reservation is so explicitly contrary to the language and intent of Article 28, it could vitiate the covenant in major part. . . . Thus, assuming that the states' rights reservation were to be perceived -- as well it might -- as fundamentally incompatible with Article 28, it could be legitimately maintained that no agreement has been reached and therefore no binding treaty established.

As I see it, then, the proposed states' rights reservation should be ruled out entirely. So also should any equivalent alternatives, since the matter of federalism, especially in the human rights field, is best left up to our courts on a case-by-case basis.

II. The Three Understandings

A. Progressive Implementation

. . . The Carter Administration's stipulated understanding of [Article 2(1)] is that Articles 1 through 15 of the covenant "describe goals to be achieved progressively rather than through immediate implementation." In the end, this proposed understanding might prove only redundant, and therefore harmless for being superfluous. However, by adding the language of nonimmediacy – i.e., "rather than through immediate implementation" -- it is possible that it could be interpreted to justify unwarranted delays, much too deliberate speed, in taking immediate steps toward the progressive achievement of the goals enumerated. Also, at the very least, it communicates an embarrassing foot-dragging that scarcely is in keeping with a full and constructive commitment to the human rights cause. Accordingly, the understanding should be dropped entirely.

B. Foreign Aid

Again with reference to Article 2(1) . . ., the Carter Administration asserts an understanding that the covenant does not require foreign economic aid . . .. Because Article 2(1) does not actually impose a duty to give foreign economic aid, this understanding surely would instill or reinforce an impression of Scrooge-like churlishness on the part of the U.S. in relation to the meeting of basic human needs, and it provides unfortunate grist for the anti-American propaganda mill. This proposed understanding, too, should be stricken from the record.

C. Citizenship Discrimination

The third and final understanding proposed by the Carter Administration relates to Article 2(2) . . . forbidding discrimination in implementation of the covenant . . .. The proposed understanding is that this language "permits reasonable distinctions based on citizenship" -- for instance, in ownership of land or of means of communication (two examples expressly mentioned in the Carter transmittal message). Presumably, this proposed understanding is designed to protect domestically based U.S. industries and assets from foreign control. This seems clear. Not so clear, however, is how one should respond to it -- bearing in mind that, if retained, it would invite equivalent and probably even more far-reaching understandings from other States Parties to the Covenant. The answer, I believe,

must necessarily depend on one's views about the global economic system. If one believes that it is desirable to foster conditions conducive to direct U.S. capital investment abroad, particularly in the developing world where anti-U.S. and anticapitalist sentiment may be strong, then probably the understanding should be discarded . . .. If, on the other hand, one believes that the export of U.S. capitalism is not always or even usually in the best interests of the host countries involved, then probably it should be retained. The decision here is more ideological than legal.

III. The Two Declarations

A. Private Property Rights . . .

In response to [Articles 2(3) and 25], the Carter Administration proposes [a] combined declaration and understanding . . .. In other words the right to own private property, one of the fundamental -- and often stridently espoused -- tenets of U.S. law and policy, is given special protection.

Of course, there can be no objection to requiring all states to fulfill their responsibilities under international law. However, considering the dangers of ethnocentrism, I have serious misgivings when it comes to insisting that "everyone has the right to own property," particularly in an increasingly ideologically divided world. Also, for similar reasons, I have misgivings about the Department of State's express gloss on the declaration, namely, that "under international law, any taking of private property . . . must be accompanied by prompt, adequate, and effective compensation." My point is that the international law of state responsibility, early fashioned by a Western capital-exporting world and now subject to the pressures of a Third World movement for a "new international economic order," is changing rapidly. It is by no means clear that the Department's views of international law in this realm are today either accurate or justified.

On the other hand, given the exemption extended to the "developing countries" under Article 2(3) of the covenant, some safeguards do seem justified. The ultimate purpose of international legal decision -- and so, international human rights decision -- is and should be the reconciliation and accommodation of competing points of view and interests. Accordingly, I would revise the Carter Administration's property rights declaration and understanding to read as follows: "The United States declares that nothing in the Covenant derogates from the equal obligation of all States to fulfill their responsibilities under international law relative to foreign private wealth ownership, including the duty to ensure that no one shall be arbitrarily deprived of his property." Such a declaration, I believe, would be judiciously appropriate.

B. Non-Self-Executing Treaty

Finally, despite a constitutional supremacy clause tradition that says that treaties,

as part of the supreme law of our land, may sometimes be considered applicable by the courts without special implementing legislation, the Carter Administration proposes to declare that "the provisions of Articles 1 through 15 of the [Economic and Social] Covenant are not self-executing." More than any other qualifying statement, this one, in my view, does the most harm. In effect, it [undermines] the covenant . . .. Contrary to the language of the covenant that conveys a clear self-executing intent, in particular as regards the obligation to take steps toward the progressive realization of the rights enumerated, the proposed declaration would require intermediate legislative action to implement the covenant's provisions, and, accordingly, the covenant would have little or no effect beyond that of a lofty policy pronouncement. No one could sue in court to enforce its provisions; no one could use the covenant as a source of genuinely binding law. For these and related reasons, therefore, this declaration should be stricken -- assuming, that is, that it is not already too late. By attempting to remove the issue of the self-executing nature of the covenant from the courts, where traditionally this issue ultimately has resided, President Carter may have given away too much too soon and thereby have dealt a severe blow to the human rights movement with which he has become so closely identified.

NOTES AND QUESTIONS

1. Do you agree with Weston's recommendations? Hurst Hannum commented on those views in U.S. Ratification of the Human Rights Treaties: With or Without Reservation 39-40 (Richard Lillich ed. 1981). Other views of interest are those of Louis Henkin, id., at 20; Clyde Ferguson, id., at 41; Thomas Buergenthal, id., at 47; the general discussion, id., at 68-81; and especially Arthur Rovine and Jack Goldklang, id., at 54 (defending the reservations, understandings, and declarations). See also Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. Pa. L. Rev. 399 (2000); Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law, 100 Harv. L. Rev. 815 (1997); Ryan Goodman, Human Rights Treaties, Invalid Reservations and State Consent, 96 Am. J. Int'l L.531 (2002); Carlos Manuel Vazquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695 (1995).

2. How do Weston's comments compare with Alston's in his article urging U.S. ratification of the Covenant? Do you think Alston is too critical with respect to the U.S. qualifications? Or is Weston too accepting?

F. TREATY RATIFICATION IN THE CONTEXT OF GLOBALIZATION

Since the promulgation of the Covenant on Economic, Social and Cultural Rights in 1966, there has been a growing concern with the human rights implications of economic globalization and the potential impact on all aspects of human rights engendered by global economic forces that are not adequately constrained either by national borders or by international legal and normative mechanisms. In 1992 the United Nations Conference on Environment and Development adopted the Rio Declaration and Agenda 21. The Rio Declaration emphasized sustainable development in Principles 3 stating, "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." Agenda 21 focused on meeting the substantive challenges of sustainable development including: sustainable development, land-resource use, combating deforestation, halting the spread of deserts, protecting the mountain ecosystems, meeting agriculture needs without destroying the land, sustaining biological diversity, managing biotechnology in an environmentally sound manner, safeguarding the ocean's resources, protecting and managing freshwater resources, using toxic chemicals safely, managing hazardous wastes, seeking solutions to solid waste problems, and managing radioactive waste.

In 2000 the Commission on Human Rights and the Economic and Social Council named J. Oloka-Onyango and Deepika Udagama as Special Rapporteurs to study the effect of globalization on economic, social and cultural rights. The 2003 final report focused on the impact of the the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), and the World Trade Organization (WTO). These organizations share a goal of furthering international trade and economic development. The actions of the organizations, individually and collectively, affect fundamental rights such as the right to food, a healthy environment, health care, freedom of association to form trade unions, etc. The founding documents of the IMF, World Bank, and WTO do not explicitly mention human rights, but all call for "development" and "balanced growth" which could be read as an implicit recognition of human rights. Gabrielle Marceau, Councellor for the Legal Affairs Division of the WTO Secretariat, has expressed her view that: "[T]he WTO Agreement [does not exist] in a hermetically sealed system, closed off from general international law and human rights law. On the contrary, States must implement all of their obligations in good faith, including human rights and WTO treaty obligations." Further Article 31(3)(c) of the Vienna Convention provides that when interpreting one treaty, one must consider "any relevant rules of international law applicable in the relations between the parties." Hence the agreements creating the IMF, World Bank, and WTO should be read in light of the prior ratifications of the U.N. Charter and other various human rights treaties. Article 103 of the U.N. Charter also notes that the obligations of parties under the U.N. Charter prevail over any competing international obligations.

Despite the human rights obligations of the IMF, World Bank, and WTO the

activities of the organizations in practice have been the focus of much criticism. The IMF and World Bank tend to emphasize overall wealth in developing countries while ignoring the unequal distributions of the benefits of the economic growth. While there may be some variation in the structural adjustment conditions applied by the IMF to particular countries, an ILO study of the consequences of structural adjustment on trade union rights has noted that decreases in the number and salary of civil servants; increases in the cost of utilities, food, and housing; declines in social services; and increases in the suffering of the poor. The World Bank's own Operations Evaluation Department noted that income inequality grew in the vast majority of former Soviet-bloc countries during the period they received World Bank assistance.

In 1994 the WTO produced the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The TRIPS Agreement requires WTO States to protect intellectual property and gives the WTO the power to impose reciprocal sanctions. In light of human rights norms, the TRIPS Agreement is both over- and under-protective of intellectual property. The TRIPS Agreement is used to justify patent protection on drugs used to treat the HIV/AIDS pandemic. The patent protections on these drugs have kept them out of the reach of many persons in developing nations. One particularly visible example of this problem occurred when the Pharmaceutical Manufacturers Association of South Africa sued the South African government in South Africa's Constitutional Court. Pharmaceutical Mfrs. Ass'n of South Africa v. President of the Republic of South Africa, Case No. 4183/98 (High Court of South Africa 1998). The pharmaceutical manufacturers' alleged that an amendment to South Africa's patent laws infringed on the manufacturers' property rights and conflicted with TRIPS-mandated patent protection for medicines, including medicines used in treating HIV/AIDS patients. The pharmaceutical manufacturers settled their suit in April 2001, in light of the South African government's agreement to consult a pharmaceutical working group before implementing its new laws. The pharmaceutical group's decision to drop their complaint was prompted in part by strong global protest to the suit and the resulting embarrassment of the large pharmaceutical manufacturers.

As the Committee on Economic, Social and Cultural Rights noted, "Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life of dignity." While the TRIPS Agreement may be over-protective with respect to HIV/AIDS drugs, it has insufficiently protected traditional knowledge and indigenous culture.

In 2003 the Sub-Commission on the Promotion and Protection of Human Rights addressed another aspect of globalization by unanimously adopting the Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Norms addressed a broad range of rights,

including the right to equal opportunity and non-discriminatory treatment, right to security of persons, rights of workers, respect for national sovereignty and human rights, economic and social rights, obligations with respect to consumer protection, and obligations with regard to environmental protection. The Norms directly addressed the human rights responsibilities of transnational corporations and other business enterprises. The Norms prompted the U.N. Commission on Human Rights to appoint a Special Representative to the Secretary General (SRSG) on human rights and transnational corporations and other business enterprises, who has reviewed related initiatives including the U.N. Global Compact, the OECD Guidelines for Multinational Enterprises, the ILO Declaration on Fundamental Principles and Rights at Work, the Tripartite Declaration of Principles Concerning Multinational Enterprises, the Fair Labor Association, the Extractive Industries Transparency Initiative, the Kimberly Process Certification Scheme, the Voluntary Principles on Security and Human Rights, and the Equator Principles. The SRSG has noted "there can be little doubt that these arrangements have weaknesses as well. One is that most choose their own definitions and standards of human rights, influenced by but rarely based directly on internationally agreed standards. . . . Moreover, these initiatives tend not to include determined laggards, who constitute the biggest problem . . .. Finally, even when taken together these "fragments" leave many areas of human rights uncovered. The challenge for the human rights community, then, is to make the promotion and protection of human rights a more standard and uniform corporate practice." The Norms responded to that challenge, but the SRSG has expressed a preference for the U.N. Global Compact and similar voluntary initiatives. See chapter 2, supra

NOTES

1. For further reading on the realization of economic, social, and cultural rights in the context of globalization, see Kurt Mills, Human Rights in the Emerging Global Order: A New Sovereignty? (1998); Human Rights In Global Politics (Tim Dunne & Nicholas J. Wheeler eds., 1999); The Realization of Economic, Social and Cultural Rights, Report of the Secretary-General, U.N. Doc. E/CN.4/Sub.2/1996/12 (1996) (report of a study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities); J. Oloka-Onyango and Deepika Udagama, Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice, U.N. Doc. E/CN.4/Sub.2/1999/11 (1999); J. Oloka-Onyango and Deepika Udagama, Globalization and its Full Impact on the Full Enjoyment of Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/14 (2003); David Weissbrodt and Kell Schoff, Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7, 5 Minn. Intell. Prop. Rev. 1 (2004); Larry Catá Becker, Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law, 37 Colum. Hum. Rts. L. Rev. 287 (2006);

Trade-Related Aspects of Intellectual Property Rights, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994) [TRIPS Agreement]; Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

2. How is China's ratification of the Covenant on Economic, Social and Cultural Rights in February 2001 related to the debate over the human rights dimension of economic globalization? Recall the controversy over China's membership in the World Trade Organization and whether U.S. trade with China should be conditioned on its human rights record. What is the significance in this debate of China's reservation to Article 8 of the Covenant, which guarantees the right to form independent trade unions?

3. International financial institutions, specifically the International Monetary Fund (IMF), sometimes oblige debtor states to reduce levels of social spending (including subsidies for basic food commodities) in order to qualify for international financial assistance. This process is referred to as "structural adjustment". For example, during the Asian economic crisis of the late 1990s, poverty in states such as Indonesia rose dramatically under the pressures of the international financial system and specific measures required by the IMF. Increased levels of poverty were later reflected in social indicators such as increased rates of infant mortality. How can the policies of the IMF be reconciled with the obligations of developing states to achieve progressive realization of their obligations under the Covenant? Is short-term retrogression in meeting basic needs justifiable upon the hope or projection that structural adjustment and free market economic policies will eventually lead to greater prosperity and thus greater capacity to fulfil the Covenant's obligations? How do the obligations imposed by the Covenant address the distributive impacts of structural adjustment and market economies?

4. The financial difficulties of developing nations are partially attributable to their international debt. Some of that debt was incurred by non-democratic regimes for spending on military procurement. What are the human rights implications of the movement for debt relief for these states?