STATE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS *

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1. INTRODUCTION

Since 19 December 1966 when the International Covenant on Economic, Social and Cultural Rights was opened for signature, ratification, and accession, 85 states have bound themselves to its terms.[1] Thus, the status of the Covenant as an international agreement which gives rise to certain legal obligations on the part of states party to it, clearly stands firm.[2]

However, doubts have been raised regarding the accuracy of the Covenant's use of the term "rights",[3] primarily on the ground that most of the individual rights sought to be guaranteed in that instrument are incapable of legal enforcement at the domestic level.[4] The differentiation made on the basis of legal enforceability is traceable ultimately back to the tendency — manifested early and persistently in the modern history of human rights —

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[1] As at 31 December 1985, MULTILATERAL TREATIES DEPOSITED WITH THE U.N. SECRETARY-GENERAL (1986).

[2] The states that have become parties to the Covenant are: Afghanistan, Australia, Austria, Barbados, Belgium, Bolivia, Bulgaria, Byelorussian, Soviet Socialist Republic, Cameroon, Canada, Central African Republic, Chile, Colombia, Congo, Costa Rica, Cyprus, Czechoslovakia, Democratic Reople's Republic of Korea, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Gabon, Gambia, German Democratic Republic, Federal Republic of Germany, Greece, Guinea, Guyana, Honduras, Hungary, Iceland, India, Iran, Iraq, Italy, Jamaica, Japan, Jordan, Kenya, Lebanon, Libyan Arab Jamahiriya, Luxembourg, Madagascar, Mali, Mauritius, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Panama, Peru, Philippines, Poland, Portugal, Romania, Rwanda, Saint Vincent and the Grenadines, San Marino, Senegal, Solomon Islands, Spain, Sri Lanka, Surinam, Sweden, Syrian Arab Republic, Togo, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, Uruguay, Venezuela, Vietnam, Yugoslavia, Zaire and Zambia.

[3] Among others, Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights,* in 9 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 69 (1978). But Trubek has pointed out in his article, *Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs,* in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 205, 206 (Meron ed. 1984), that to speak of economic, social and cultural "rights" without qualification and clarification "is to employ a metaphor whose power to evoke images of law and law enforcement drawn from the municipal setting is, unfortunately, matched by its capacity to obscure what is really at stake."

[4] Vierdag, *supra,* at 103.

to establish a dichotomy between economic, social and cultural rights on the one hand and civil and political rights on the other,[5] despite equally persistent and early efforts to stress the organic unity between the two groups of rights.[6]

It is still possible, however, to meaningfully ascertain the legal ramifications of the Covenant on contracting states without having to discuss at length the issue of the legal character of the "rights" contained therein. Whether or not these are rights in a complete sense or are merely inchoate rights, the conclusion cannot be avoided that states party to the Covenant have assumed legal obligations relating to these rights. Thus, the focal point of analysis in this study will be on the obligations of states with respect to the "rights" in the Covenant rather than on the "rights" themselves.

State obligations under the Covenant have been examined at several levels. A number of studies have focused on the nature and scope of the individual obligations the Covenant imposes upon states.[7] Others have inquired into the international measures for insuring compliance with such obligations,[8] emphasizing the need for policing the performance of states parties to the Covenant.

In comparison, few have delved into the problem of how states can act in order to live up to their obligations under the Covenant.[9] The dearth

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[5] At first, economic, social and cultural rights were not considered for inclusion in the Covenant; after the General Assembly approved their inclusion, it was decided to draft two separate covenants, one on civil and political rights, and another on economic, social and cultural rights. For a historical summary of the evolution of the covenants up to 1956, refer to 10 U.N. GAOR Annex (Agenda Item 28, Part II) U.N. Doc. A/2929 (1955). Bossuyt presents arguments for differentiating the two groups of rights in *La Distinction Juridique Entre les Droits Civils et Politiques et les Droits Economiques, Sociaux et Culturels,* 8 HUM. RTS. J. 783 (1975). Other writers, including Vierdag, *supra* at 82 have pointed out that Bossuyt's analysis "is not quite an adequate one."

[6] Certain states opposed the inclusion of economic, social and cultural rights; the proposal to include them in the human rights covenant was presented by Australia, the Soviet Union and Yugoslavia. For a criticism of the attempt to create a bifurcation between the two groups of rights, see Szabo, *Historical Foundations of Human Rights and Subsequent Developments* in 1 THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS 11, 30 (Vasak ed., 1972).

[7] Alston and Quinn, *The Nature and Scope of States Parties Obligations Under the International Covenant on Economic, Social and Cultural Rights,* to be published in the May 1987 issue of the HUMAN RIGHTS QUARTERLY; Ramcharan, *The Content of the Legal Obligation to Implement Economic, Social and Cultural Rights,* in HUM. RTS. Q., May 1987.

[8] Schwelb, *Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights,* in 1 REVUE DE DROITS DE L'HOMME 363 (1966); Ramcharan, *Implementation of Economic, Social and Cultural Rights After the Entry Into Force of the International Covenant on Economic, Social and Cultural Rights,* 9 EASTERN AFRICA L. R. 27 (1976); and Ramcharan, *Implementation of the International Covenant of Economic, Social and Cultural Rights,* 23 NETHERLANDS INT'L. L. R. 151 (1976). Also, Jhabvala, *The Soviet Bloc's View of the Implementation of Human Rights Accords,* 7 HUM. RTS. Q. 461 (1985).

[9] The following articles, though they mention the Covenant on Economic, Social and Cultural Rights [hereafter CESCR], focus more on the Covenant on Civil and Political Rights [CCPR]: Graefarth, *How Different Countries Implement International Standards on Human Rights,* in 1984-85 CANADIAN HUM. RTS. Y.B. 3 (1985); and Tomuschat, *National Implementation of International Standards on Human Rights,* in *id.* at 31.

of studies along these lines is attributable, in part, to the lesser attention given until recent years to the Covenant on Eonomic, Social and Cultural rights as compared to the interest generated in the Covenant on Civil and Political Rights,[10] and principally to the lack of understanding of the nature of the major obligations under the former. The type of inquiry sought to be undertaken in this study would be superflous when one deals with obligations which are in all respects uniformly demandable from the contracting states as exemplified by most of the obligations contained in the Covenant on Civil and Political Rights.[11] However, with respect to obligations whose degree and schedule of demandability may differ from state to state depending on circumstances contemplated in the treaty, there may be a need for going through an intermediate process involving a determination of the steps that a state party to the treaty can take — steps which, under the relevant prevailing circumstances, would be deemed to be in keeping with the obligation that state has bound itself to observe. Since the Covenant on Economic, Social and Cultural Rights principally deals with obligations which are not susceptible of uniform and immediate implementation by all contracting states, the approach indicated above would be the most appropriate to employ.

The phrase "state implementation" as used in this paper retains its plain meaning, and should be distinguished from "international measures of implementation" or "measures of implementation" as either of the last two phrases is employed in United Nations documents.[12] The latter are used in a technical sense to refer to ". . . the organs and procedures contemplated and, in some cases, established for the promotion and supervision of the undertakings of States in the area of human rights. . . ."[13] It has been suggested that these legal instruments for ensuring compliance ought to be defined—more precisely—as international measures for control on observance of agreements or as measures intended to promote such observance, instead of implementation measures.[14]

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[10] Art. 15(4), Alston and Quinn (*supra* at 48) point out, does not impose any specific and binding obligation on states; a point which was specifically noted in the preparatory work. But this qualification takes it out of the application of the principle of progressive implementation.

[11] Note, however, that there has been a tendency to apply the principle of gradual implementation also to some rights found in the CCPR. *See* Jhabvala, *Domestic Implementation of the Covenant on Civil and Political Rights,* 32 NETHERLANDS INT'L. L. R. 461 (1985).

[12] Schwelb, *Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants* in MELANGES OFFERTS A POLYS MODINOS 270, 271 (1968).

[13] Capotorti, *The International Measures of Implementation Included in the Covenants on Human Rights,* in INTERNATIVNAL PROTECTION OF HUMAN RIGHTS 131, 132 (Proceedings of the Seventh Nobel Symposium, Eide and Schou ed. 1967).

[14] Capotorti, *id.* at 132. Schwelb, writing in *Notes on the Early Legislative History of the Measures of Implementation of the Human Rights Covenants* in MELANGES OFFERTS A POLYS MODINOS 270, 271-272 (1968) about the use of the phrase "measures of implementation," noted: "The term is even somewhat misleading. The implementation of the human rights referred to in the Charter or set forth in the various international instruments remains a responsibility of the individual States. Even the

In the light of previous studies undertaken on the nature and scope of the various obligations of states parties to the Covenant,[15] and international measures for ensuring performance of those obligations, this study hopes to help clarify to the signatory states what steps they can take in order to live up to their obligations. Such would call for the interpretation of the Covenant ". . . in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose",[16] and recourse "to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion"[17] as provided for in the Vienna Convention on the Law of Treaties. Additionally, since the Covenant was conceptualized with the aim of realizing the human rights objectives of the United Nations Charter, it is relevant to refer to subsequent international practice related to these objectives.[18]

Ascribing to and requiring of the contracting states good faith in the fulfillment of their obligations is consistent with the above principles. These states, had they other intentions, could as well have avoided any legal commitments by refraining from ratifying or acceding to the Covenant; instead, they rave voluntarily taken upon tthemselves the task of implementing its provisions.

The focus on state implementation, however, is not intended to indicate anything more than that the individual states are the indispensable instruments for the realization of human rights. As Prof. Capotorti puts it,

> ...There is in fact no doubt that the implementation of the agreements, in the sense of an action aimed to put in practice the obligations undertaken, is left with each single State Party. More particularly, so far as human rights are concerned, each State Party has to adopt a series of

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most advanced and far reaching of the relevant international arrangements, such as the European Convention on Human Rights of 1950, vest in the international organs only residuary, supplementary functions in giving effect to the international obligations of States."

[15] The latest studies include those which were presented at the Limburg Conference sponsored by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands), and the University of Cincinnati Urban Morgan Institute of Human Rights held at Maastricht from 2 to 6 June 1986 with 29 human rights experts from various countries and organizations attending. The proceedings of the Conference, including the papers presented, are reported in the May 1987 issue of the HUMAN RIGHTS QUARTERLY.

[16] Art. 31 (1), Vienna Convention of the Law of Treaties, U.N. Doc. A/CONF. 39/27, (1969). It may be gleaned from Art. 31(2) that the text of the treaty itself, including the preamble and annexes form part of the context for the purpose of the interpretation of the treaty.

[17] Art. 32, *id.*

[18] The Limburg Principles provides: "The International Covenant on Economic, Social and Cultural rights (hereafter the Covenant) should, in accordance with the Vienna Convention on the Law of Treaties (Vienna, 1969), be interpreted in good faith, taking into account the object and purpose, the ordinary meaning, the preparatory work and the *relevant practice.*" [emphasis supplied]

Human rights law is in a continuing process of evolving, thus the need to consider relevant practice.

> measures in its domestic sphere in order that the individuals under its jurisdiction might really enjoy those rights.[19]

In the following presentation, it is not proposed to deal with every state obligation in the Covenant, nor with each right it mentions. Because of the broad range of the contents of the Covenant, only a limited number can be dissected whenever concrete elucidation is called for. Discussion will be limited to state obligations relating to "rights" which are found in Part III of the Covenant and conform to generally accepted classifications of what are economic, social and cultural rights.[20] However, references will be made whenever necessary to obligations found in other parts of the Covenant.

2. Identification of State Obligations

Reference was previously made to obligations in the Covenant which are uniformly demandable against the contracting states as differentiated from those which may differ in terms of the schedule or degree of their demandability from one contracting state to another. Therefore, in order to arrive at an adequate analysis, it is necessary to isolate categories of obligations in the Covenant more basic than the ones mentioned, classify the different obligations into their proper categories, and clarify in what ways and why the obligations under the different categories may differ as to their demandability.

2.1. *Immediately and progressively demandable obligations*

For purposes of this paper, suffice it to recall that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights both contain rights which could actually be introduced and enforced by immediate state action as well as rights which "could in fact be legally enforced only after economic and social programmes of greater or less duration had been carried out."[1] It is in the latter sense that these rights are "programmatic."[2] Expressed in terms of state expenditure of resources, one group of rights requires minimal or no expenditures while the other requires a substantial commitment of resources. The core obligations contained in the Covenant on Civil and Political Rights concern the former set of rights, hence the decision to require their implementation *uno acto*. And since there are more of the

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[19] Capotorti, *id.* at 132.

[20] These are contained in Articles 6-15 of the CESCR.

[1] Statement of the Representative of Israel found in GAOR 6th Session (1951), Third Committee's 368th meeting (13 December 1951) at 129-130 (paragraph 25); also quoted in Vierdag, *supra* at 84; see also A/C.3/565 (1952) at paragraph 9.

[2] Brownlie, Principles of Public International Law 572 (1979). Schwelb, citing Jenks, employs the term "programmatic rights" in *Some Aspects of the International Covenants on Human Rights of December 1966* in International Protection of Human Rights 103, 108 (Eide and Schou eds. 1968).

latter type of rights which are covered under the Covenant on Economic, Social and Cultural Rights, its drafters saw fit to provide for an "umbrella clause"[3] in Article 2 which provides thus:

> 1. Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation especially economic and technical, to the maximum of 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 particularly the adoption of legislative measures.[4]

The formulation of Article 2(1) above recognizes, in view of varying state resources, the impossibility of making a demand of *all* states to make *all* the obligations in the Covenant *immediately* and *fully* demandable. It does, however, admit that there are obligations which can be made immediately and fully demandable of all states, thus establishing the notion of absolutely demandable obligations.

But although the focus of the "umbrella clause" is on progressively demandable obligations, it was not the intention of the drafters to totally exclude immediately demandable ones from the Covenant. While Article 2(1) was adopted in order to meet the need for a general article

> containing what was felt to be the firmest commitment which could reasonably be undertaken in relation to all the rights treated in the covenant,[5]

it was also clarified that the article's inclusion

> would not prevent the elaboration of what the obligation of the general article would signify in relation to any selected right, or even the imposition of stricter obligations in connection with such a right.[6]

The structural arrangement, too, of the Covenant may give the impression that the articles found in Part II, including Article 2(1), provide absolute rules applicable to all the rights contained in Part III.[7] However, it is vital to keep in mind that Article 2(1) is not the only standard for implementation against which the other provisions in Part III are to be read; as a rule, Article 2(1) applies to the succeeding articles, but an exception is where these require a stricter standard of performance than that found in the "umbrella clause." This view is confirmed by the dis-

[3] The use of the term "umbrella clause" is limited to Article 2(1). But all the provisions in Part II of the Covenant are "umbrella" articles in the sense that they impose general obligations on states which would be applicable to all the rights in Part III except where there is indication of their inapplicability in full or in part.

[4] Art. 2 (1).

[5] 10 U.N. GAOR Annex (Agenda Item 28 Part II) at 20 (paragraph 22), U.N. Doc. A/2929 (1955) [hereafter A/2929].

[6] *Id.*

[7] The International Covenant on Economic Social and Cultural Rights is divided into five parts and a preamble.

cussions on a subsequent provision which requires immediate implementation.[8]

Article 2(1) also lays down as the ultimate obligation of all states the full realization in time of all the rights in the Covenant, although the principle of progressive implementation admits of obligations which in the meantime are: (1) immediately and fully demandable of only some states; (2) immediately but not fully demandable of all states; (3) immediately but not fully demandable of only some states; (4) fully but not immediately demandable of all states; (5) fully but not immediately demandable of only some states; (6) neither immediately nor fully demandable of all states; and (7) neither immediately nor fully demandable of only some states. These different gradations in obligations have been introduced through, in addition to Article 2(1), provisions admitting of limitations.[9] Nowhere, however, is the idea advanced that the principle of progressive realization allows a state to claim that it has no obligation at all with respect to any of the rights in the Covenant.[10]

While it is helpful to understand the range of obligations covered by the progressive realization clause, the foregoing enumerated variations do not constitute the basis for structuring the discussion in this paper; a more wieldy classification system has been adopted instead.

2.1.1. Immediately demandable obligations

We find included in the category of immediately demandable obligations those which are couched in the same or similar language as used in the Covenant on Civil and Political Rights (but only such language in the CCPR as has been clearly accepted to denote immediate demandability) and obligations which, though differently worded, nevertheless do not require "the reaching of any particular stage of economic development and are independent of available resources and of economic and technical cooperation and assistance."

The phrase "undertake to ensure" echoes the unequivocal commitments found in Article 2(1) and (3) of the Covenant on Civil and Political Rights,[12] and is employed in the Covenant on Economic, Social and Cultural Rights to describe the obligation of a contracting state in relation to the equal right of men and women to the enjoyment of the rights contained in that

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[8] A/2929 at 106, paragraph 13 on trade-union rights.

[9] For a discussion of the extent of the limitations and possible derogations that may be allowed under the Covenant, consult Alston and Quinn, *supra* at 49. *See* Limburg Principles, paragraphs 46 and 47.

[10] Article 15(4), however, was not intended to have any binding effect as an obligation on the contracting parties.

[11] Schwelb, *Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights* in 1 HUMAN RIGHTS J. 363, 371 (1966).

[12] 999 U.N.T.S. 171.

Covenant (provided for in Article 3)[13] as well as the right to form trade unions and the right to strike (found in Article 8).[14] Literally, to ensure "is to make certain that a thing shall happen, to secure something to or for persons."[15] That it expresses, as used in the Covenant, immediate demandability is confirmed by the discussions of the Covenant's drafters, among whom the view prevailed

> that it was possible to require States parties to "ensure" the free exercise of the right to form and join trade unions, it being argued that that right could not be made subject to the "progressive" principle enunciated in article 2 since non-interference by States with trade unions was alone needed in order to grant the right.[16]

A related phrase is "undertake to guarantee" found in Article 2(2) with respect to the non-discriminatory exercise of the rights provided in the Covenant.[17] To guarantee "is to answer for the due fulfillment of something, to engage that something has happened or will happen;"[18] that binding promise is referred to as a guarantee. Examining closely the *travaux preparatoires,* Klerk[19] arrived at the same conclusion as Alston and Quinn[20] did: that the drafters of the Covenant "wished an immediate implementation of the non-discrimination principle."[21]

Even when used alone, whether as a verb or as a noun, "guarantee" carries with it the central element of immediacy. This is exemplified by its use as a noun in Article 14(3) of the Covenant on Civil and Political Rights in relation to the rights of a person who has been criminally charged.[22] The same word appears in the Covenant on Economic, Social and Cultural Rights in Article 7(a)(i) guaranteeing women conditions of work not inferior to those enjoyed by men.[23]

Alston and Quinn have pointed out that ". . . 'ensure' and 'guarantee' represent the highest rung of state obligations under the Covenant."[24] While this point is not open to dispute, a closer examination of the text of Articles 3 and 8, and 2(2) and 7(a)(i) also cited by the two writers shows that these words were in each case preceded by "undertake", and therefore suggests further that, whenever it precedes other words or appears

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13 CESCR, Art. 3.
14 CESCR, Art. 8.
15 Ramcharan, *supra* at 3.
16 A/2929 at 106, paragraph 13.
17 CESCR, Art. 2(2).
18 Ramcharan, *supra* at 3.
19 Klerk, *Working-paper on Article 2(2) and Article 3 of the International Covenant on Economic and Social Rights,* Limburg Conference Papers.
20 Alston and Quinn, *The Nature and Scope of States Parties Obligations Under the International Covenant on Economic, Social and Cultural Rights,* Limburg Conference Papers at 48.
21 Klerk, *supra* at 15.
22 CCPR, Art. 14(3).
23 CESCR, Art. 7(a) (i).
24 Alston and Quinn, *supra* at 48.

alone, "undertake", on its own, carries the same notion of immediacy as "ensure" and "guarantee." This interpretation is supported by the use of "undertake to submit" in relation to the reporting system established under the Covenant in Article 16(1).[25] Although the obligation in this article, contained in Part IV of the Covenant, is not related to a right, its language can be helpful in clarifying an obligation found in Part III. And there is no doubt that the obligation of every contracting state to submit reports is immediately demandable.[26]

The word "undertakes" appears alone in Article 14 with respect to the obligation—of a state which was unable to implement in its jurisdiction free primary education prior to becoming a party to the Covenant—to work out and adopt, within two years, a plan of action for progressive implementation.[27] In this instance, the adoption of a plan of action is an obligation which would have been immediately demandable except that the Covenant specified that it would become so only upon the lapse of a specified term—two years. Thus, the use of "undertake" in this case does not deviate from the trend of its denoting immediate demandability.

The word "undertake" precedes "to have respect for" in Article 13(3)[28] which is a near-mirror image of the provision on the liberty of parents over particular aspects of their children's education found in Article 18(4) of the Covenant on Civil and Political Rights save for the added right "to choose for their children schools other than those establish by the public authorities which conform to such minimum educational standards as may be laid down or approved by the State."[29] "Undertake" also precedes "to respect the freedom indispensable for scientific research and creative activity" in Article 15(3).[30]

In studying the above provisions, Alston and Quinn focused on the word "respect" without considering the words that preceded it.[31] While expressing the view that "the minimalist undertaking merely to 'respect' certain rights" may in some contexts give rise to "positive state duties," they came to the conclusion that "the word 'respect' probably represents the lowest rung of state obligations under the Covenant"[32] and, by implica-

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25 CESCR, Art. 16(1).

26 The Covenant, in Article 17(i) provides: "The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant. . ."

The obligation to submit reports, therefore, is immediately demandable in the sense that the contracting states can be required by the Ecosoc to submit, at any time determined in its programme, a particular part of the reports. The one year period this obligation requires commitment of state resources for its realization. Vierdag,

27 CESCR, Art. 14.

28 CESCR, Art. 13(3).

29 *Id.*

30 CESCR, Art. 15(3).

31 Alston and Quinn, *supra* at 46.

32 *Id.* at 48.

tion, may be taken to suggest that the rights contained in Articles 13(3) and 15(3) are not immediately demandable.

However, that the word "undertake" denotes immediate demandability is an interpretation not only advanced by other recognized authorities[33] in the field but also sufficiently buttressed by an examination of the nature of the obligations it covers in both Articles 13(3) and 15(3). As Schwelb points out, these are rights whose implementation does not require the attainment of a particular stage of economic or social development.[34] Of this nature are the rights to take part in cultural life,[34a] to enjoy the benefits of scientific progress,[35] and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author.[36] Hence, their implementation cannot be postponed. To echo the observation of the drafters of the Covenant on the right to trade unions, these provisions only require state non-interference for their realization. The distinction between immediately demandable obligations which require positive state action and those which require state abstention is an important one for purposes of implementation.[37]

Having established the consistent use of the word "undertake" in the above provisions of the Covenant, it is now possible to turn to a consideration of the exact meaning the same word has in Article 2(1), the "umbrella clause," where the phrase used is "undertakes to take steps. . ."[38] There is nothing to indicate why "undertakes" in this provision should take on a different meaning from that which it is given in the rest of the Covenant.

The only objection to an interpretation which takes this phrase to mean an immediately demandable obligation is that such may run counter to the concept of progressive implementation established in Article 2(1), the very same provision where "undertake" appears. But this apparently would not be the case, given no assertions of inherent contradictions between immediately demandable obligations and obligations of conduct, if the obligation which the state is required to undertake immediately is

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[33] Schwelb, *Some Aspects of the International Covenants on Human Rights of December 1966*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 103, 109 (1968); Vierdag, *supra* at 86.

[34] Schwelb, *Some Aspects of the Measures of Implementation of the International Covenant on Economic, Social and Cultural Rights* in 1 HUMAN RIGHTS J. 363, 371 (1966).

[34a] Art. 15(1)(a).

[35] Art. 15(1)(b).

[36] Art. 15(1)(c). There may be differences as to perception of whether or not this obligation requires commitment of state resources for its realization. Vierdag, *supra* classified this right as an immediately demandable one in footnote 61 on p. 86; Schwelb, however, did not include it as such in the examples he cited in his various works.

[37] The legal consequences of this distinction will be discussed in Chapter 3, *infra*.

[38] Art. 2(1).

correctly viewed as consisting of the actual adoption of a determinate range of steps tending to bring about the full realization of the rights in the Covenant. What those steps would be, however, is still controlled by the provision on progressive implementation. The *Limburg Principles* affirms the view that the obligation is to begin to take steps *immediately*.[39]

The above interpretation does not deviate from the meaning ascribed to it in the Covenant on Civil and Political Rights where each state

> *undertakes to take the necessary steps*... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."[40]

While the actual adoption of the necessary legislative measures may be taken within a reasonable time,[40a] the duty itself to take the necessary steps is immediately demandable.

2.1.2. Progressively demandable obligations

To carry out an obligation progressively, it is incumbent upon the state to observe the requirements of Article 2(1). Under this provision, the contracting state is obligated to take steps which

(a) commit the maximum of the state's available resources;
(b) are intended to achieve the full realization of the rights recognized in the Covenant;
(c) involve in the use of all appropriate means including legislation; and
(d) make use of individual state initiative as well as international assistance and cooperation.[41]

By their very nature, most of the rights whose realization is sought by the Covenant require the investment of state resources. Thus, it is readily apparent that because of the discrepancies in the resources available among states, the demandability of the obligations corresponding to these rights would vary from state to state. Implicit, too, in any discussion of the *tempo* and extent of implementation is the diversity in the socio-economic and cultural systems prevailing in the different states where implementation is to take place.

Resort to the progressive implementation clause was made in recognition of the unevenness observed among these relevant considerations from state

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[39] CCPR, Art. 2(2).
[40] Limburg Principles, paragraph 16.
[40a] Schacter, *The Obligation to Implement the Covenant In Domestic Law*, in THE INTERNATONAL BILL OF RIGHTS 311 (Henkin ed. 1981). The entire book focuses on Civil and Political Rights.
[41] *See* the Limburg Principles, paragraphs 16 to 34 for a view of the interpretative principles to be applied to these requirements under Art. 2(1).
[41] Alston and Quinn, *supra* at 31.

to state. An important consequence of this type of conceptualization is that a number of the obligations which are progressively demandable under the Covenant may still constitute immediately and fully demandable obligations for certain states,[42] thus giving rise to a hermaphroditic set of obligations. The transformation from one form to another is determined by the presence or absence of factors, made relevant through Article 2(1), foremost of which is the level of resources available to the state. However, the obligations which attain immediate and full demandability only relative to certain factors should be differentiated from the ones discussed in subsection 2.1.1 which are immediately and fully demandable in an absolute sense.[42a] The latter group's demandability from states is tightly insulated from any effects that the absence or presence of factors in Article 2(1) may have. Only where the obligations are insusceptible of immediate and full demandability in an absolute sense does the concept of progressive implementation control the nature of the steps and the pace at which they are to be taken by states, although in the Covenant this constitutes the rule rather than the exception.

Having previously identified the immediately and fully demandable obligations, one can arrive at a fair picture of the rights in Part III that are progressively demandable. The right to work,[43] the enjoyment of just and favourable conditions of work,[44] social security,[45] an adequate standard of living and freedom from hunger,[46] the highest attainable standard of physical and mental health,[47] education other than primary education,[48] appear on their face to be among the rights which are covered by the progressively demandable obligation clause. In all of the provisions where these rights are found, one of the principal obligations is to "recognize" each of the above rights. To recognize means "to acknowledge the validity or genuineness or character or claims or existence of; to accord notice or consideration to, discover or realize the nature of, treat as, acknowledge for, realize or admit that."[49] The obligation to recognize "triggers the application" of the "general obligation imposed under Article 2(1) to progessively achieve the rights 'recognized' in Part III of the Covenant."[50] A state party's adherence to the Covenant brings about the state's recognition of these rights in international law and serves as the mechanism for setting into motion the progressively implementable obligations of the Covenant. Ramcharan has pointed out that the state is further

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[42a] *Supra* at 9.
[43] Art. 6(1).
[44] Art. 7.
[45] Art. 9.
[46] Art. 11.
[47] Art. 12.
[48] Art. 13.
[49] Ramcharan, *supra* at 3.
[50] Alston and Quinn, *supra* at 47.

required to give recognition under domestic law to the rights in the Covenant.[51]

The term "recognize" also appears in Article 10 although this provision does not employ the word "rights"; instead it speaks of state protection or assistance or both to certain social unit or categories of individuals.[52] There is nothing to indicate that the obligation of the state specified in this article is not subject to Article 2's progressive implementation provision.

2.2. *Obligations of conduct and obligations of result*

The obligations of states in the Covenant also may, in addition to the immediately-progressively demandable dichotomy, be grouped into obligations of conduct and obligations of result. In a number of the obligations under the Covenant, the achievement or non-achievement of the indicated result is the basis for judging compliance with the obligation. But this principle does not apply with equal force to obligations—constituting another principal group of obligations in the Covenant—where a line of conduct taken as required by the obligation may not necessarily bring about the desired result although intended to do so.

In the original drafting group of the Covenant, the representative of France made clear the applicability to the obligations in the Covenant of the distinction in civil law between obligations of conduct and obligations of result.[53] In distinguishing *obligations de comportement* from *obligations de resultat*, a French writer pointed out: "Dans les premieres on s'oblige a une certaine conduite determinee tendant vers le resultat, dans la seconde on s'oblige directement au resultat lui-meme."[54] He went on to illustrate obligations of conduct by citing the obligation of a medical doctor toward a patient which is an obligation—not strictly to effect a cure, but—to treat the latter with the aim of effecting a cure. On the other hand, a vendor of an immovable is obliged—as his obligation is one of result—to effect the transfer of the ownership of a determinate immovable, and not merely to adopt a line of conduct that would tend to effect that result.[55]

The decision to structure the obligation as one of conduct, was the most appropriate that could have been adopted with respect to rights for whose full realization no particular sure-fire approaches have been identified. As observed in the Limburg Principles:

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[51] Ramcharan, *supra* at 6.
[52] Art. 10.
[53] U.N. Doc. E/CN.4/SR.270 at page 11.
[54] Reuter, *Principes de Droit International Public*, in 103 RECUEIL DES COURS (1961-II).
[55] *Id.*

> The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.[56]

2.2.1. Obligations of result

The undertaking in Article 2(2) on non-discrimination is an example of an obligation of result. Compliance with the obligation is judged on the basis of whether or not the result sought — non-discrimination — has been achieved. Falling within the same category are the obligations contained in: Article 3 relating to the equal right of men and women to the enjoyment of all the rights in the Covenant; Article 7(a)(1) to the guarantee therein of conditions of work for women not inferior to those enjoyed by men; Article 8 to the right to trade unions and to strike; Article 3 to the liberty of parents to determine certain aspects of the education of their children; Article 15(3) to the freedom indispensable for scientific research and creative activity; and Article 14 on the adoption of a detailed plan of action for the progressive implementation of compulsory and free primary education.

While most obligations of result in the Covenant are the very ones that are also immediately demandable, the two categories are not equivalent. One of the foremost immediately demandable obligations, the obligation to take steps under Article 2(1), is not an obligation of result since it is concerned not with the act of taking an isolated step or steps, but that the step or steps so taken are all part of a pattern of behavior tending to bring about the complete realization of the rights contained in the Covenant.

2.2.2. Obligations of conduct

The obligation established in Article 2(1) ". . . to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . ." establishes a general obligation to carry out a determinate line of conduct. That obligation applies, whether or not the language of the relevant subsequent provisions repeats that of Article 2(1), to provisions in Part III which contain progressively demandable obligations unless there are indications to the contrary in those provisions.[57] The right to social security in the Covenant clearly illustrates the case of an obligation of conduct. The desired end is enshrined in Article 9: "the right of everyone to social security including social insurance." The obligation to adhere to a line of conduct tending to bring about the full realization of that end is found in Article 2(1) as applied to Article 9.

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[56] Limburg Principles, paragraph 6.
[57] See discussion, *supra* at 7.
[58] Alston and Quinn, *supra* at 47 [emphasis supplied].

However, in studying Article 9, Alston and Quinn have arrived at an entirely different conclusion and are of the opinion that where

> the texts of the various rights are silent on the concrete steps to be taken by states in fulfillment of their obligations with regard to the rights 'recognized', the relevant obligations can best be understood as hybrids between obligations of result and obligations of conduct. *They are obligations of result in the sense that states must match their performance with their objective capacities.*[58]

According to their analysis, Article 9 would be a hybrid between an obligation of conduct and one of result. Note, however, that in the illustration of an obligation of conduct—that of a doctor toward his patient—it is clear that the doctor is obligated to match his performance with his objective capacities. That duty is inherent in an obligation of conduct and cannot be employed as a criterion for the exclusion of obligations from this same category.

In other articles of Part III of Covenant, the language of Article 2(1) is restated, though, in one form or another: Article 6(1) "take appropriate steps to safeguard"; Article 6(2) "steps to be taken . . . to achieve the full realization of this right"; Article 11(1) "take appropriate steps to ensure the realization of this right"; Article 13(2) "with a view to achieving the full realization of this right"; Article 14 "a detailed plan of action for the progressive implementation"; and Article 15 "steps to be taken . . . to achieve the full realization of this right". Article 9 does not repeat the language of Article 2(1) on progressive implementation; nevertheless, there is no express indication that Article 2(1) is not applicable.

2.3. *Elaborations: steps, subsidiary goals and means*

Alston and Quinn further made the observation that where

> the text of the various 'recognized' rights specify 'steps' to be taken for their achievement, then the obligations so created can truly be said to be obligations of conduct.[59]

In their note to this statement, they proceeded to identify the following as the articles containing clauses that "specify the steps to be taken by states":[60] 6(2), the right to work; 10(2) and (3), rights of the family; 11(2), freedom from hunger; 12(2), right to physical and mental health; 13(2), right to education; 14, the undertaking to work out a detailed plan to implement compulsory primary education where it does not exist; and 16(2), cultural rights.

There are several points, however, worth considering in relation to the foregoing. One point is that all these clauses together are perhaps better

[59] *Id.*
[60] *Id.*

described as elaborations, along the lines of the terms used for them in United Nations documents, rather than steps.[61]

Another is that, in addition to the articles enumerated above, Articles 7[62] and 13(1)[63] also contain elaborations.

A step is more restrictive in meaning for it refers to a stage in a gradual, regular, or orderly process; an elaboration, on the other hand, is any amplification or detail which has been worked out.[64] For instance, an elaboration may be in the form of subsidiary goals. Distinguishing between a step and a subsidiary goal is necessary in order to determine how a particular detail in one article is to be approached. If an item contains a subsidiary goal, then the application of Article 2(1) would call for the state to take steps toward the progressive realization of the enunciated sub-goal. Whether the resulting obligation is one of result or one of conduct will be determined in the same manner as the main goal, that is, depending on the interplay between Article 2(1) and the form that the performance is required to take under the Article where the item is found.

However, if an elaboration is a specified step, it becomes a legal necessity for a state to implement it sooner or later relative to the level of its resources. The state is not free to skirt the prescribed step because a determination has been made in the Covenant that the attainment of such a preliminary stage is imperative for the achievement of the right with which it is associated. The attainment of the step is therefore an obligation of result. Subsidiary goals, in contrast, may be achieved at the same time as the main goal; they are not stages that precede the actualization of the main goal.

A third point is that unlike Articles 9 and 14, Articles 7, 10, and 13 go beyond stating the desired end and/or the duty to adopt a line of conduct tending to achieve that end. Article 15(2) goes on to state that "the steps to be taken . . . shall include those necessary for the conservation, the development and the diffusion of science and culture." The same approach is taken in Article 12(2) where the phrase "the steps to be taken . . . shall include those necessary for", is followed by an enumeration of items. Essentially the same can be found in Article 11(2) to the extent that ". . . shall take . . . measures . . . which are needed" is followed by

> (a) To improve methods of production, conservation and distribution of food. . .

It is apparent from Articles 15(2), 12(2), and 11(2) that these articles, while going beyond the approach in Article 9, do not go, strictly,

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61 A/2929 at 20, paragraph 22.
62 On the right to just and favourable conditions of work.
63 On the right to education.
64 *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

to the extent of prescribing steps. Instead, they prescribe subsidiary goals or sub-ends, the attainment of which is closely related to the main goal or end. The said Articles make possible the application of the principle of progressive implementation to the enunciated subsidiary goals.[65]

Article 7 does not employ the same linguistic formula as Articles 12 and 15, but a closer look at its provisions may help clarify how the structure of its provisions are related to the other two. The relevant parts of Article 7 are quoted in the footnote.[66]

The elaborations in Article 7 are most reasonably construed as prescribing subsidiary goals and not steps. The language is general, as can be gleaned from the use of descriptives like "fair" wages and "equal" remuneration, "decent" living, "safe and healthy" working conditions, "equal" opportunity, and "reasonable" limitation. This supports the view that the items found in the article each make up a sub-goal toward which the state must direct its efforts.

The importance of their qualification as subsidiary goals is their subsequent characterization as obligations of conduct upon application of Article 2(1). That the right to work has been fleshed out in greater detail through conventions and recommendations[67] initiated by the International Labor Organization (ILO), thus living up to the obligation to adopt a line of conduct tending to achieve the goal, supports this interpretation. The drafting of the provisions relating to labor followed the recommendation of the ILO that " . . the rights should be stated as a 'brief clause of a general nature' thereby leaving the agencies free to design precise and detailed provisions necessary for effective implementation."[68] Obligations of conduct offer more flexibility than those of result.

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[65] The principle of progressive implementation is contained in Art. 2(1).

[66] The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:
(a) Remuneration which provides all workers as a minimum with:
(i) Fair wages and equal remuneration for work of equal value without distinction of any kind. . . with equal pay for equal work; and
(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
(b) Safe and healthy working conditions;
(c) Equal opportunity for everyone to be promoted in this employment to an appropriate higher level, subject to no consideration other than those of seniority and competence;
(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

[67] Jenks, *Human Rights, Social Justice and Peace: The Broader Significance of the I.L.O. Experience,* in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 227, 251 (Eide and Schou eds. 1968).

[68] Alston, citing the International Labor Organization's governing board, in *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights,* 18 COL. J. OF TRANSNATIONAL L. 80, 85 (1979).

The relevant portions of Article 13 on the right to education are quoted in the footnotes.[69] The elaborations in the first paragraph of this article are easily recognizable as goals because of the use of phrases like "education shall be directed to . . . and shall strengthen" and "education shall enable." In addition, as in Article 7, the modifiers employed are general in scope such as those found in "full development" and "participate effectively."

The elaborations contained in the second paragraph of Article 2, on the other hand, appear to be steps rather than sub-goals because of the rather detailed and relatively concrete enumeration relating to the different levels of education as well as fellowships and the material conditions of teaching staff.[70] The degree of specificity is specially pronounced in the provision that "Primary education shall be compulsory and available free to all."[71] The construction given is further supported by the nature of the right involved. If there are rights for the full realization of which specific steps have been identified as particularly successful, and therefore, can be prescribed in the Covenant, it is reasonable to think that the right of education is one of them considering the near-universal regard for education, with most states having made provisions for it in their territory.

Article 10, as was noted in section 2.1.2,[72] represents a unique case since it does not speak of a right; nevertheless, the major obligations contained therein are progressively demandable ones as a result of the application of Article 2(1). Article 10 also elaborates further on these obligations. To the first obligation, which is to accord the widest possible protection and assistance to the family, the Covenant adds that "Marriage must be entered into with the free consent of the intending spouses."[73] To the second obligation, which is to accord special protection to mothers during a reasonable period after childbirth, the Covenant adds the specification that "During such period working mothers should be accorded paid leave or leave with adequate social security benefits."[74] To the third obli-

[69] 2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all. . .;

(c) Higher education shall be made equally accessible to all, on the basis of capacity . . .;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

[70] Art. 12(2).

[71] Art. 13(2)(a).

[72] *Supra* at 16.

[73] Art. 10(1).

[74] Art. 10(2).

gation which is to take special measures of protection and assistance on behalf of all children and young persons, the Covenant adds:

> Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.[75]

The elaborations in Article 10 are all prescriptions of steps to be taken, except for that portion on the protection of children and young persons from economic and social exploitation which is actually a subsidiary goal. The former are specifically mandated steps as indicated either by the use of the word "must", or through the identification of the means to be taken which is through the passage of legislation. Although these steps are to be attained progressively, they are obligations of result.

Article 6 on the right to work perhaps illustrates best an obligation which is neither purely an obligation of conduct nor of result. The first paragraph of this article recognizes the right to work, thus triggering the application of Article 2(1). However, the second paragraph goes on to state thus:

> 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right *shall include* technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.[76]

As can be observed from its phraseology, this provision departs from others previously discussed in that it actually specifies what ought to be included among the steps to be taken for the full realization of the right. Specific steps follow the phrase "shall include", unlike in other articles previously examined where phrases like "necessary for" or "needed to" intervened between the words "shall include" and the succeeding words. These suggest, therefore, that the obligation is not entirely one of conduct, but also partly one of result because while their schedule of demandability is not specified, the enumerated steps will have to be adopted sooner or later as dictated by the prevailing circumstances. Other steps are not discounted but the steps enumerated in the Article are the minima which have to be complied with.

There are also articles which modify the nature of an obligation, whether one of result or conduct, by specifying the means for achieving particular sub-goals. Thus, in Article 11(2)(a), the Covenant provides

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[75] Art. 10(3).
[76] Art. 6(2).

> . . . improve methods of production, conservation and distribution of food *by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources*

In Article 13(2)(b) and (c), provisions are made to make secondary and higher education equally accessible to all "by every appropriate means, and in particular by the progressive introduction of free education."

Article 11(2)(b) also contains an elaboration requiring that the states concerned shall

> Take into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

However, this provision does not appear to have any additional significance except as a reiteration in a more definite context of a parallel provision in Article 11(1) which runs thus:

> The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.[77]

This, in turn, is a reiteration of the language found in Article 2(1).

3. EXECUTION OF STATE OBLIGATIONS

The identification of state obligations relating to the realization of the rights guaranteed in the Covenant on Economic, Social and Cultural Rights is an indispensable preliminary step to the execution of those obligations. The preceding chapter of this paper sought to facilitate an adequate understanding of a sizable sampling of obligations in the Covenant. The third chapter intends to build on the previous discussion and pursue the issue of how states can live up to their obligations. Initially, there will be a treatment of obligations found outside the Covenant which may have a substantial bearing on state implementation of the obligations therein. Afterwards, discussion will be trained on the domestic execution of the various categories of obligations, indicating the possible strategies that may be adopted, likely difficulties to be encountered and some solutions proposed.

3.1. *An Interplay of Obligations*

A point that was considered but may not have been sufficiently stressed in Chapter 2 has to be borne in mind, regarding the obligations contained in the Covenant: that, in actuality, the major categories of obligations,

[77] This provision will be considered again in Chapter 3, *infra* at section 3.4.

as to their demandability *ratione temporis*[1] and as to their being obligations of conduct or result,[2] intersect. Thus, there are immediately as well as progressively demandable obligations of conduct; immediately demandable as well as progressively demandable obligations of result; and hybrids of the foregoing.

An obligation in the Covenant, however, may also intersect with other obligations found therein as well as with obligations which find their legal anchor outside of its text, thus affecting the implementation of that particular obligation in the Covenant.[3] These obligations extraneous to the Covenant usually are provided for in international instruments falling within the framework of the human rights system established through the United Nations and international agencies, as well as other related arrangements.

Thus, due consideration must be given to state obligations under the U.N. Charter[4] and the Universal Declaration of Human Rights.[5] Particular attention should be paid to the interrelationship between the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. Not only are their most basic theoretical foundations the same but their adoption by the U.N. underwent a parallel development.[6] At a more particularized level, there are obligations in one covenant which also appear in the other. These include the liberty of parents to ensure the religious and moral education of their children appearing in Article 18(4) of the former and 13(3) of the latter; the requirement that a marriage must be entered into freely in 23(2) and 10(1) of the Covenants, respectively; and the taking of special measures of protection for and assistance to children and all young persons on a non-discriminatory basis in 24(1) and 10(3) of the Covenants, respectively. The implementation of an obligation under the provisions of one covenant will be intimately bound with the eventual fulfillment, if it does not simultaneously achieve full compliance, of the corresponding obligation in the other.

The intersection of obligations relating to certain rights found in several instruments is also illustrated by the principle of non-discrimination. In the Covenant on Economic, Social and Cultural Rights, the major provisions on non-discrimination is embodied in Article 2(2). However,

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1 *Supra* at section 2.1.

2 *Supra* at section 2.2.

3 The standards laid down in the Covenant with respect to some rights may not be the same or in conflict with those laid down in other human rights instruments. Resolving conflicts involving standards is not as easy as it may appear at first blush; but Meron considers possible conflict-resolution approaches.

4 Entered into force on 24 Oct. 1945.

5 U.N. G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

6 Both Covenants were drafted, approved by the General Assembly and opened for signature at the same time. For a general historical background, refer to Sohn, *A Short History of United Nations Documents of Human Rights*, in COMMISSION TO STUDY THE ORGANIZATION OF PEACE, THE UNITED NATIONS AND HUMAN RIGHTS 39 (1968).

in the implementation of Article 2(2), account has to be taken of more concrete provisions such as Article 3 on the equal right of men and women in the enjoyment of all the rights in the Covenant, Article 7(a)(i) on the guarantee for women of conditions of work not inferior to those enjoyed by men, Article 10(2) on special protection for working mothers, and Article 10(3) on special protection for children and young persons on a non-discriminatory basis. Furthermore, the non-discrimination obligations in the Covenant have to be related with Article 26[7] and Article 2(1)[8] of the Covenant on Civil and Political Rights. The application of the non-discrimination clause in these two Covenants additionally intersects with obligations in other international human rights instruments. Thus, due consideration has to be given to provisions of the International Convention on the Elimination of All Forms of Racial Discrimination[9] and the International Convention on the Elimination of All Forms of Discrimination Against Women,[10] as well as the actions taken by the international supervising bodies established under those instruments. In more narrowly delineated areas, implementation of the non-discriminating clause will have to be correlated with the Convention Against Discrimination in Education[11] and the United Nations Educational, Scientific and Cultural Organization's Recommendation Against Discrimination in Education,[12] and the Discrimination Convention on Employment and Occupation.[13]

In the case of the right to work in Article 7, its implementation will find concretization in the various conventions and recommendations formulated through the initiative of the International Labour Organization.[14] Pretty much the same can be said of the right to form and join trade unions found in Article 22(1) of the Covenant on Civil and Political Rights and Article 8(1)(a) of the Covenant on Economic, Social and Cultural Rights, and the latter Covenant's provision on the right to just and favourable conditions of work which has no equivalent in the former.[15]

Finally, agreements among states in the form of regional arrangements for the promotion or observance of these rights should also be taken into account. An example of an agreement on a limited area is the European agreement on social security which delineates particular measures.[16] A

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[7] On equal protection of the law without any discrimination.

[8] This is a provision parallel to Article 2(1) of the CESCR.

[9] 660 U.N.T.S. 195.

[10] U.N. Doc. A/RES/34/180.

[11] Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1966.

[12] *Id.*

[13] International Labour Organization Convention No. 111.

[14] INTERNATONAL LABOUR ORGANIZATION, CONVENTIONS AND RECOMMENDATIONS: 1919-1981 (1982).

[15] CESCR, Art. 7.

[16] European Code of Social Security and Protocol, 648 U.N. T.S. 235; see also European Convention on Social Security and Supplementary Agreement (1972), European T.S. No. 83.

more comprehensive document is the European Social Charter[17] which provides more detailed guarantees of certain economic, social and cultural rights than does the Covenant. Rather than being illustrations of the failures of the Covenant, all of these arrangements outside its framework, are still within its contemplation of international action being taken for the achievement of economic, social and cultural rights.[18]

3.2 *Determination of the Means of Execution*

The means of execution of international obligations in the domestic domain are normally left to the determination of the state concerned in the light of the peculiarities of, among others, its legal, political, economic, social, and cultural systems. However, states parties to an international agreement can and do, often, provide for the adoption of specific means or qualify the range of acceptable means that may be adopted. This attitude recognizes the crucial character of the means of execution. The adoption of one approach as opposed to others may spell the difference for the achievement or non-achievement of the desired end, fully or in part, immediately or indefinitely.

While the Covenant has an open-ended general provision regarding the means to be employed in its implementation, as indicated by the phrase "to take steps... by all appropriate means...,"[19] this does not indicate that the adoption of just about any means would suffice. It is implicit in the obligation that the means to be adopted must be that which is best suited under the circumstances for bringing about the full realization of the right in the soonest time possible,[20] and consistent with respect for and observance of the different rights enunciated in the International Bill of Rights. The first limitation is in accord with an interpretation is good faith of Article 2(1). The second limitation is derived from the principles enunciated in the Covenant's preamble.[21]

Article 6(2) of the Covenant contains an example of a limitation imposed directly on the selection of the means. It mandates that the steps to be taken to fully realize the right to work must be "under conditions safeguarding political and economic freedoms to the individual."[22]

Despite the acknowledged differences existing among states, it is still worthwhile discussing means of execution since there are techniques for implementation which are common among or adaptable to the peculiarities of different states. This statement perhaps accurately applies to legal tech-

17 529 U.N.T.S. 89.
18 Art. 23.
19 Art. 2(1).
20 Ramcharan, *supra* at 6.
21 Paragraphs 2-5, Preamble.
22 Art. 6(2).

niques considering that there are finite possibilities to what can be achieved through law as an instrument for the regulation of human behaviour.

3.2.1. Promotion of Human Rights

The role of programmes to promote economic, social and cultural rights has oftentimes been taken for granted. But these programmes are so basic to the full realization of specific rights that even in the absence of an explicit mandate to promote these rights, such an obligation should be read into the Covenant. Then again, it is not accurate to hold that the Covenant does not prescribe that obligation. The Covenant, in its preamble, refers to the duty of states to promote respect for and observance of human rights,[23] a duty established in the Charter of the United Nations which provides thus:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall *promote*:
>
> x x x x x x
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all. . .[24]

The Covenant itself, independent of other documents, indirectly prescribes promotion of human rights as a means of implementation by providing that each contracting state "undertakes to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the present Covenant *by all appropriate means* . . .[25] This provision, taken together with the reference to state obligations under the U.N. Charter to promote human rights, serves as an indication that promotional efforts are indispensable means which fall within the contemplation of the Covenant.

The same indicium is present in the Universal Declaration of Human Rights, an instrument referred to in the Covenant's preamble, which takes note that the members of the United Nations "have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms."[26]

The need for dispersal of information on and the heightening of knowledge among the people, including government officials, of the rights contained in the Covenant is essential. Complaints that little attention is being paid to economic, social and cultural rights, or that misconstructions

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[23] Paragraph 5.
[24] U.N. Charter, Art. 55 [emphasis supplied].
[25] Art. 2(1).
[26] Universal Declaration of Human Rights, Preamble, paragraph 6.

of the Covenant continue to prevail[27] are likely to recur if the issue of gaining public attention is not properly addressed. Whether in international or national fora, public awareness is critical in order to initiate and sustain progress in the realization of these rights.

The two human rights covenants, however, also recognize that besides the state, the individual also has "duties to other individuals and to the community to which he belongs, [and] is under a responsibility to strive for the promotion and observance of the rights" in the covenants.[28] By stating that individuals have such a duty, the contracting states by implication bind themselves herein to at least abstain from hindering efforts by individuals or groups of them to promote human rights, if said states are not in a position to provide assistance to individuals or groups of them in the performance of their obligation.

Because they constitute the first steps to the full realization of the rights in the Covenant, the contribution of promotional efforts should not be underestimated. They may become determinative of a state's ratification or accession to the Covenant which is necessary in order to render the obligations contained in that documents demandable against the state concerned. One can not ignore the force that an idea or ideas can generate once accepted by the public. Once popularized, the rights in the Covenant can also serve as yardsticks with which people can measure the effectiveness of their own governments. While it is for this very reason that some state governments may prevent the promotion of human rights, states which are genuinely committed to their full implementation should funnel more resources and energy into this type of activity.

3.2.2. Enforcing the Covenant Under Domestic Law

Consistent with the principle that states are free to choose the means for living up to their international obligations, a state has freedom to determine the effects of its treaty commitments within its domestic jurisdiction. Thus, a number of states provide for the direct application of treaties in the domestic plane, other states provide for a limited application, while others totally foreclose any form of immediate application.[29]

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[27] This is apparent, for example, in an examination of the reservations made by states upon ratification or accession to the Covenant which shows that some of them are unnecessary. They were made under the belief that the obligations reservations to which were then being made were immediately demandable obligations and the reserving states were not in a financial position to implement them. But in actuality, the obligations are progressively demandable ones and the financial incapacity of a state would have prevented their becoming immediately demandable from it. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra*, reservations made by Madagascar and Zambia.

[28] Preamble of the CESCR and CCPR, paragraph 5.

[29] Graefarth, *How Different Countries Implement International Standards on Human Rights*, in 1984-85 CANADIAN HUM. RTS. Y.B. 3, 8-11 (1985).

In municipal jurisdictions where direct application of treaties is provided for, ratification of or accession or succession by [hereafter referred to collectively as ratification] a state to the Covenant may give rise to the demandability of certain obligations from the state. Of course, the full extent of the effect will primarily depend on the municipal rules prevailing in that state. Thus, where a treaty may override contrary provisions in a constitution or a fundamental law of a state, the treaty will prevail in the domestic plane. Where a treaty has the same status as a fundamental law or constitution, it may override contrary provisions in the constitution unless special rules on repeal provide otherwise; in addition, the treaty will invalidate statutes running contrary to its provisions. Where a treaty is accorded the same status as a law, although it cannot prevail over contrary provisions in the fundamental law, it may nevertheless override existing statutes because the treaty will be of later enactment.

Even where these principles are accepted, however, they can only apply to some and not all obligations in the Covenant which are immediately demandable in an absolute sense. Among these immediately demandable obligations, it is essential to recall the distinction between those which merely require the state to abstain from acting and those which require it to take action in order to meet its obligations.[30] If the former, then the obligation immediately attaches in the domestic domain. This is best exemplified by the right to trade unions[31] and the right to strike.[32] Where the Covenant is accorded the same status as the constitution, the obligation to guarantee these rights may also override existing laws unless there exist special rules for repeal which are applicable.

On the other hand, where the immediately demandable obligation requires the state to take action, the ratification of the Covenant by itself does not ensure state action in the domestic domain. The state may still refuse to act accordingly within its internal jurisdiction. However, the obligation to take action remains immediately demandable in the international plane and state inaction will give rise to a breach of its international obligations.

The non-discrimination clause provides an example of an obligation which is immediately demandable and which obligates the state both to abstain from acting in a certain manner and to take positive action in certain fields. Thus, while the state is obliged not to practise discrimination, it is equally called upon to eliminate existing discriminatory practices including those embodied in legislation. As pointed out previously, however, the application of the Covenant's provision on this subject matter

30 *Supra* at 12. A conceptual treatment of the application of human rights covenants primarily in common law domestic systems can be found in Brudner, *The Domestic Enforcement of International Covenants on Human Rights: A Theoretical Framework*, 35 U. OF TORONTO L. J. 219 (1985).

31 Art. 8.

32 Art. 8.

would have to take into account other international agreements on discrimination.[33]

Klerk, in a study of the non-discrimination clause of the Covenant in relation to other international agreements, has arrived at the conclusion that unlike the Covenant, the other agreements allow the gradual elimination of discrimination.[34] These conflicting approaches are reconciled in the Limburg Principles in the following manner:

> Immediately upon becoming a party to the Covenant, states must eliminate *de jure* discrimination by abolishing all discriminatory law, regulations and practices (including acts of omission as well as commission) affecting the enjoyment of economic, social and cultural rights without delay.[35]
>
> *De facto* discrimination occurring as a result of the unequal enjoyment of economic, social and cultural rights, on account of a lack of resources or otherwise, should be brought to an end as speedily as possible.[36]

In terms of the demandability of the non-discrimination obligation in the domestic order, the above would indicate that the state—upon becoming a party to the Covenant which is made directly applicable by its internal law to the municipal plane—is immediately obligated to refrain from carrying out discriminatory practices including the passage of new laws which are discriminatory, unless, under the state's municipal laws, a more fundamental law or constitution which provides otherwise is not overriden by the Covenant. However, where there is direct application of the Covenant, the state can still not be compelled under its domestic law to repeal existing discriminatory enactments. Certainly, where the Covenant is provided with an overriding effect, there would be no need to take such action.

There are also states which admit direct application of international agreements in the domestic plane but make distinctions between self-executing and non-self-executing agreements.[37] If the treaty or some of its provisions are adjudged as non-self-executing, then it cannot be directly applied. Some states, in ratifying a treaty, may expressly provide that the treaty is not self-executing in its domestic jurisdiction in order to foreclose any issue on that score.[38]

In jurisdictions where the treaty has to undergo the process of incorporation into the domestic order, none of the obligations in the Covenant will have any effect until the state concerned has taken the appropriate

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33 *Supra* at 30.
34 Klerk, *supra* at 16.
35 Limburg Principles, paragraph 37.
36 *Id.*, at 38.
37 O'CONNEL, 1 INTERNATIONAL LAW 68 *et seq.* (1965).
38 The recommendation made by President Carter to the U.S. Senate on the ratification of the CESCR and CCPR is typical of this. *See* Letter of Transmittal to the Senate from the President of the United States, reproduced in U.S. RATIFICATION OF HUMAN RIGHTS TREATIES 85 (Lillich ed. 1981).

steps for incorporation. The obligations, however, may still find some application where, despite the lack of incorporation, the internal law of the state recognizes certain effects in the municipal plane of a duly-ratified treaty.[39]

A state which directly applies a treaty may, however, qualify the application of the Covenant by making reservations to it upon ratification. In this way, it may alter the domestic impact of certain obligations.[40]

The entire issue of the application of the Covenant in the domestic domain raises the question of whether or not states are obliged under the Covenant to effect its embodiment, by whatever means, in the municipal order. Alston and Quinn, upon an analysis of the Covenant and a comparison with the approach to the same questions in the Covenant on Civil and Political Rights, concluded that there is no requirement for incorporation for so long as the parties fulfill their obligations.[41] If this interpretation is to be followed, the view advanced by Ramcharan that part of the undertaking of states is to effect the recognition of the rights in the Covenant under domestic law[42] should not be read as requiring the incorporation in some form, of provisions of the Covenant.

3.2.3. Legislation: Substantive and Procedural

The Covenant may be made to undergo the process of incorporation or transformation in jurisdictions where there is no direct application of the Covenant in the domestic order. Incorporation is usually effected by an act of the legislature. The incorporating legislation may be a special one which directly incorporates the Covenant; or it may be a regular statute which embodies only such relevant provisions or substance of the Covenant as have been deemed necessary to incorporate by the state.

A state which does not recognize direct application of the Covenant may also prefer to incorporate the guarantees of the Covenant in its constitution or fundamental law. Just as in the process of incorporation by legislation, a state may opt to adopt the provisions as they are exactly found in the Covenant, or to reformulate the provisions of the Covenant using a different or similar phraseology. Another alternative that a state

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[39] Graefarth, *supra* at 9.

[40] See MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra*, for record of reservations made by states. Schachter, however, in assessing (*supra* at 321) the recommendation of the U.S. president to the Senate, has raised the question "whether a whole series of reservations admittedly designed to avoid any need to modify United States law can be regarded as in conformity with the object and purpose of the Covenant." *See* also Henkin, *The Covenant on Civil and Political Rights;* Weston, *U.S. Ratification of the International Covenant on Economic, Social and Cultural Rights With or Without Qualifications;* both in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES 20 (Lillich ed. 1981).

[41] Alston and Quinn, *supra* at 20.

[42] Ramcharan, *supra* at 6.

may exercise is to accord the Covenant with the same status as its fundamental law upon incorporation into the domestic order.

However, the extent of the legal impact on the domestic law of an incorporation of the Covenant *in toto* through special legislation, or its complete embodiment in the fundamental law, or its enjoyment of a status equal to that of a fundamental law, would depend on the nature of the state obligation in the Covenant. Should any of these approaches be followed, only immediately demandable obligations requiring the state to refrain from committing certain acts would have absolute effects in the domestic scene, the same effect that the direct application of treaties in the municipal domain would have.

The methods of incorporation mentioned in the preceding paragraph as well as the direct application of the Covenant in the domestic domain would have, with respect to immediately demandable obligations, certain advantages over a technique of incorporation which is selective or limited to reflecting the substance of the provisions of the Covenant while maintaining the Covenant itself outside of the domestic domain. The former set of approaches would account for greater consistency in implementation across states considering that it is the same obligation which is being executed. Professor Tomuschat's observations[43] regarding the advantages of direct incorporation of the Covenant on Civil and Political Rights would also be applicable if limited only to immediately demandable obligations in the Covenant presently under study: (1) conformity between a country's international commitments and implementation of these commitments in practice is much better secured since the same instrument is applied in the domestic order; (2) upon the Covenant's becoming a part of the domestic legal order, it would have a higher degree of legal stability and reliability than the other technique which keeps treaties outside the national legal order; and (3) according legal status within the domestic domain to state obligations in the Covenant would allow individuals in the state concerned to contribute to the enforcement of the Covenant.

Techniques which have the same effect as the direct application of the Covenant in the domestic legal sphere, though, would not offer the preceding advantages when applied to immediately demandable obligations which require positive actions and progressively attainable obligations in the Covenant. In the first case, while what is required to be performed is clear to the state concerned, the element of legal compulsion is absent in the domestic plane and the state may still opt for non-performance.

Progressively demandable obligations would have an even lesser impact upon the domestic order. The Covenant does not indicate all the steps to be taken in these cases; instead, the task of their determination devolves

43 Tomuschat, *National Implementation of Inteenational Standards on Human Rights,* in CANADIAN HUM. RTS. Y.B. 31 (1985).

upon the states themselves. Thus, the "programmatic" character of the obligations is retained in the domestic plane. Neither the direct application of the Covenant nor the adoption of the different techniques for incorporation which have the same effect as direct application would be adequate for enforcing these obligations in the municipal sphere. Incorporation of the substance of the Covenant would also fail in offering any improvement over the other techniques if the "programmatic" character of the obligations is carried over by the incorporating statute into the domestic sphere.

As it is, several national constitutions, especially those formulated in the middle of the twentieth century, provide for economic, social and cultural rights.[44] The Universal Declaration of Human Rights had a profound impact on constitution-making, although even before its promulgation in 1948 several countries had felt the need to include in their charters principles relating to these rights which are now found in the Covenant.[45]

The inclusion of such rights in the constitution of a state does not necessarily indicate compliance with the state's international obligations. Indeed, it is possible that certain obligations in the Covenant are more faithfully carried out by some states which have no reference at all to these obligations in their constitutions.[46]

Regardless of its inadequacies, the adoption *in toto* or of the substance of the progressive obligations of the Covenant in national constitutions may still serve some useful purpose in the domestic plane. As expressions of national policies or principles, they may be useful in arguing in favor of the constitutionality of positive measures designed to realize economic, social and cultural rights. They may also be invoked to fill in the gaps in case of controversy arising from ambiguities in legislative enactments.

The embodiment in a constitution of the Covenant's provisions, be they containing progressively or immediately demandable obligations, does serve yet another important purpose. Since the study of the constitution is normally required or encouraged by individual state governments, the study of economic, social and cultural rights which are embodied in the constitution can be promoted more effectively than if they were contained in an

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[44] GANJI, THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROBLEMS, POLICIES, PROGRESS 7 (1975).

[45] *Id.* at 7. Among the latest countries to adopt detailed provisions on economic, social and cultural rights in their constitutions is Portugal in its 1976 constitution. *See* Thomashausen, *Basic Rights, Liberty, and their Protection under the New Portuguese Constitution of 1976,* 1 HUM. RTS. L. J. (1980); also text of the Constitution of the Portuguese Republic *id.* at 416. The 1987 Constitution of the Republic of the Philippines also contains provisions on economic, social and cultural rights; but most of these guarantees require legislative action for their implementation.

[46] Ganji, *supra:* "The exploration of constitutional and similar measures must be conceived merely as a background to the main task of assessing the extent to which the economic, social and cultural rights. . . are effectively put into practice. It should accordingly not be assumed that mention of a norm here necessarily means that it has been translated into reality, or, on the contrary, that its absence from the constitution is necessarily a sign of inaction."

entirely separate document like the Covenant. In that way, they may also function more effectively as the people's yardsticks for measuring the effectiveness of their government. This would be particularly true if the immediately demandable obligations requiring the state to refrain from certain acts are embodied in the constitution in exactly the same language as they are found in the Covenant.

The technique of incorporation which involves legislating measures implementing the substance of the Covenant would be an appropriate approach to progressively demandable obligations and immediately demandable ones requiring affirmative measures. Ordinary statutory enactments have the advantage in that they can reformulate and fill in the unspecified aspects of these obligations in a manner which would render them more legally precise for purposes of implementation in the domestic legal order, employing language and techniques well-established in the local jurisdiction.[47]

This technique, however, suffers from a disadvantage when employed alone. Where the statute does not embody the obligations in the Covenant in the same language in which it is found in that instrument, there may occur gaps between the norms developed at the international level and those at the national level. Thus, even if, in fact, existing legislation in a state fully guarantees the rights found in the Covenant, steps ought to be taken to conceptually align national guarantees with those at the international level.[48]

Given the diversity in the approaches presented and the varying advantages they offer in the implementation of the different categories of obligations in the Covenant, it appears that the most appropriate technique that can be adopted toward the Covenant as an *entire* instrument is to apply or incorporate the Covenant directly, and to promulgate the required legislation implementing the progressively demandable obligations and the immediately demandable ones which require affirmative action. In this way, implementation of the Covenant benefits from the advantages offered by the different techniques.

While legislation is not prescribed as the only acceptable means for implementing the provisions of the Covenant, nevertheless special stress is placed on it considering that a number of the obligations can best be carried out when there is a law which mandates it. The emphasis is evident from the words in the Covenant "by all appropriate means, including *particularly* the adoption of legislative measures."[49]

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[47] Tomuschat, *supra* at 47.

[48] Opsahl, *Human Rights Today: International Obligations and National Implementation*, in 23 SCANDINAVIAN STUDIES IN LAW 149, 166 (1979).

[49] Art. 2(1) [emphasis supplied].

As much as possible, legislation must aim at making the obligations in the Covenant enforceable in the domestic domain. For immediately demandable obligations of result, this requires achieving the enforceability of all aspects of the obligation; for progressively demandable obligations, this may mean achieving the enforceability of certain aspects of the obligation. For obligations to be considered enforceable, administrative and judicial remedies must be provided.

Certain obligations in the Covenant render themselves easily susceptible of domestic legal enforcement. Thus, the immediately demandable obligations, whether they require abstention from or taking action, can easily be translated into enforceable rights in the domestic jurisdiction through the legislative process. As may be gleaned from related previous discussions, embodying *verbatim* in a statute the Covenant's immediately demandable obligations requiring the state to abstain from certain acts would produce immediately effects in the domestic domain. A state, though, may choose to extend further its implementation of these obligations; it may decide to classify the prohibited acts as penal in character and impose criminal penalties and civil liabilities. The latter statutory enactments would be similar to those that a state would have to promulgate in fulfillment of its immediately demandable obligations requiring positive action to be taken.

Thus, with respect to its obligation to abstain from acting in a discriminatory manner under the non-discrimination clause, the state can pass laws declaring illegal all discriminatory practices. It can, on the other hand, meet its obligation to take action by passing measures which repeal existing statutes allowing or prescribing discriminatory measures. The state also can go further by imposing criminal penalties and civil damages on individuals or entities found guilty of violating the anti-discriminatory laws.

Common legislative standards can be prescribed by the contracting states. As the experience of the ILO has shown with labor-related obligations, states can be made to adhere to measures and standards which have been commonly identified and agreed upon.

However, just as inclusion of the Covenant in the fundamental law does not guarantee compliance with obligations therein, the presence alone in statute-books of laws providing for substantive guarantees of economic, social and cultural rights found in the Covenant does not indicate full compliance with the state's international obligations. It is equally important that these laws are implemented and observed. Courts constitute the fora of last resort; administrative implementation would be more decisive in an earlier instance.

The executive branch of government plays a crucial role in promoting the observance of the standards laid down in the relevant legislation; it may

also be instrumental in formulating more detailed rules of implementation. It would have to see to it that these laws and rules are observed, monitor their effectiveness, and initiate the proper administrative measures that would compel observance. Actions by administrative bodies are not only available *ex post facto* (after violations have been committed, such as the imposition of administrative fines and the filing of the proper criminal charges), but they are as much concerned with the promotion of the conditions that would eliminate or minimize violations.

Certain administrative problems would have to be surmounted in the implementation of the Covenant. Where the Covenant is directly applied in the domestic order without undergoing incorporation by legislation, it may be necessary to publish the provisions of the Covenant in official publications of that local jurisdiction[50] in order to facilitate referral by government officials to and execution of its provisions which contain immediately demandable obligations requiring state abstention from certain acts. Of course, this problem can be minimized if a state passes laws incorporating the Covenant since states normally provide for the publication of such enactments.

In certain states where the use of institutions like the office of the ombudsman[51] or human rights committees or procurators[52] has been established, arministrative observance in the domestic domain of obligations in the Covenant may be brought under the supervision of these bodies. Where administrative remedies are insufficient, judicial remedies may be provided for by the legislature.

The obligation of states insofar as the content of legislative measures are concerned covers not only substantive rights, but also procedural rights that would make those substantive rights accessible to the people, especially the disadvantaged who are the least able to exercise them. Without procedural safeguards, substantive rights guaranteed in legislation may not be of any practical significance. The liberalization of rules governing the standing of parties before courts, in order to allow for class suits, taxpayer's suits and *parens patriae* action, is along this direction. Because of its implications in the domestic order, it is appropriate to discuss here an innovation introduced by the Indian Supreme Court which has perhaps liberalized the rules on standing farther than most national courts have, to allow for the vindication of economic rights.

The traditional rule of standing in India, of Anglo-Saxon derivation, confined access to the judicial process only to those who had suffered a legal injury.[53] But the Indian Supreme Court has held that

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[50] Tomuschat, *supra* at 52.
[51] Opsahl, *supra* at 176.
[52] Graefarth, *supra* at 29.
[53] *People's Union for Democratic Rights and Others v. Union of India and Others*, 1 SUPREME COURT REPORTS 456, 478 (1983).

> where a person or class of persons to whom legal injury is caused or legal wrong is done by reason of poverty, disability or socially or economically disadvantaged position [is] not able to approach the Court for judicial redress, any member of the public acting bona fide and not out of any extraneous motivation may move the Court for judicial redress of the legal injury. . . and the judicial process may be set in motion by any public spirited individual or institution even by addressing a letter to the court.[54]

In the case of *People's Union for Democratic Rights and Others v. Union of India and Others*,[55] petitioner was an organization formed for the purpose of "protecting democratic rights." It sent a letter to one of the Supreme Court justices complaining of violation of various labour laws including the Minimum Wages Act, the Equal Remuneration Act and the Employment of Children Acts, the Contract Labour Act and the Interestate Migrant Workmen Act by the respondents or their agents and seeking judicial interference in construction projects for the Asian Games hosted by India. The Supreme Court treated the letter as a writ petition and sustained the legal standing of the petitioner to bring suit by way of public interest litigation.[56]

Public interest litigation has been formulated through judicial legislation of the strength of the reasoning that although

> the task of restructuring the social and economic order so that the social and economic rights become a meaningful reality for the poor and lowly sections of the community is one which legitimately belongs to the legislature and the executive. . . mere initiation of social and economic rescue programmes by the executive and the legislature would not be enough and it is only through multi-dimensional strategies including public interest litigation that these social and economic rescue programmes can be made effective.[57]

Where courts are unwilling or unable to engage in any form of judicial activism, the legislature ought to be able to provide in law for a procedural remedy like public interest litigation.

A caveat, however, is in order. The existence of courts as well as the provision of judicial remedies do not fully ensure full compliance with the Covenant. Courts can sometimes be intimidated from carrying out their duties, or their decisions ignored. Oftentimes, it takes a healthy interaction among a host of factors to guarantee the effective functioning of the courts as means for vindicating the rights in the Covenant.

3.2.4. Other means

While legislation may be necessary in many cases in order to render obligations in the Covenant demandable in the domestic domain, their having

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[54] *Id.* at 466.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 469.

been rendered demandable may nevertheless remain far too short of the full realization of the rights in the Covenant.

The Covenant represents an entire set of values about humanity and the individual human being. For the full realization of the rights in the Covenant, these values must inhere in the economic, social and cultural matrices of each state. In these realms, the limitations on government action may require a different approach toward the implementation of their obligations in the Covenant. Consider that states differ with respect to the scope of government regulation. There are areas where a state may have traditionally refrained from intruding, or would face considerable resistance if it dared intrude, or be ineffectual despite its intrusion. Many aspects of life today remain unregulated by governments, and would unduly tax their resources should these aspects be brought under state control or regulation.

Individuals and non-governmental organizations and institutions ought to be most actively involved in this phase of the implementation of the covenant. They are not likely to face the same handicaps as governments in working for the acceptance of the values contained in the Covenant, and can be more flexible in developing new approaches. In these efforts, governments should provide the essential wherewithal if they can, or at least allow the unhampered involvement of individuals and non-governmental entities.

Where the prevailing values in a society coincide with those in the Covenant or are supportive of them, the rights in the Covenant are more likely to attain both *de jure* and *de facto* realization. The chances are also high in states where social values are at least not antagonistic toward those in the Covenant. Difficulties ought to be expected, however, where the accepted values are diametrically opposed to those represented by the Covenant.

As has been shown by developments in a number of countries, legal remedies may be insufficient to overcome obstacles embedded in the economic, cultural or social fabric of the state. The application of the law may be hampered by the absence of an identifiable individual or institution which the law can hold responsible, or where there is one, the law may lack the legal or sheer raw power to compel it to change or modify prevailing values in order that these will conform with the values enshrined in the Covenant.

The relative autonomy of certain areas of life from government intervention can frustrate the efforts of the most well-intentioned state to fully implement the Covenant. For instance, despite the enactment and application of various legal techniques and the achievement of a high degree of

material development, racial tensions persist in some multi-racial societies.[58] Despite legislation declaring it illegal and subject to criminal prosecution, the practice continues unabated in certain countires, of parents marrying off their children at such a tender age that they are far from able to comprehend the nature of the relationship they are forced into or to express their free consent to the marriage.

In certain parts of the world, race and ethnic tribal origins have been obstacles to the full realization of economic, social and cultural rights. On the other hand, in regions where racial and ethnic distinctions constitute no hindrance, sex, religion, national origin or social class may form the walls that need to be broken down. Caste, language or economic class may also be significant factors in other places. Where these factors are intertwined, implementation of the Covenant becomes an extremely challenging if not arduous task.

For the less developed countries, modernization has not provided the necessary force with which to hurdle the obstacles they face in bringing about the full realization of the rights in the Covenant. In a number of instances, uneven modernization has only exacerbated problems by heightenin the tension between traditional and modern values and provoking a reactionary response from the former; nor has modernization achieved a more equitable distribution of resources. Instead, members of the traditional elites or of newly emerged ones have absorbed the windfall profits from commercialization.[59]

Educational and teaching measures may provide the means for overcoming these difficulties. Formal and non-formal types of education, as well as the different media of communication should be fully employed in such efforts. The role of science and technology in the development of new values also ought not to be ignored. And the possibility always exists that the very same factors which serve as obstacles in the realization of the rights in the Covenant contain elements within them which are consonant with or promotive of these rights. These can serve to facilitate the ultimate acceptance of the Covenant's values.[59a]

Most importantly, the involvement of the people "in the conduct of public affairs and mass participation in the decision-making processes remain decisive requirements for developing awareness of human rights standards."[60] For purposes of the Covenant, a "concerted national effort to invoke the

[58] The U.S. experience with racism vividly shows that legislative measures may not be enough to eliminate discrimination.

[59] Ganji, *supra* at 108.

[59a] Khushalani discusses concepts of human rights found in traditional Asian and African cultural systems in *Human Rights in Asia and Africa*, 4 HUM. RTS. L. J. 403 (1983).

[60] Graefarth, *supra* at 29.

full participation of all sectors of society is, therefore, indispensable..."[61] The premises for such participation are just socio-economic policies[61a] which allow as great a mass of individuals as possible to partake equitably in the wealth of the state concerned. States which are concerned about readjustments in the international econonmic order should be able to set the pace themselves by effecting the necessary structural changes within their own respective domestic jurisdictions. Desired alterations in the international stratum, even if successfully effected, will not redound to the benefit of human beings within states if inequity persists on the level of the latter.

Because of the interrelationship between economic, social and cultural elements in society, measures introduced by states in one are likely to produce effects in related fields. Thus, the more successes are registered in a particular area, the more likely that these would facilitate implementation in the others.

The process of implementation, however, would be gradual and long-drawn in many instances primarily because of the unique composition of every society. Thus, it becomes the primary obligation of the state and its population to identify the areas where change must and can be effected, and the measures or plans of action that would be appropriate under the circumstances.

The issues identified in this subsection of the paper are particularly identified with progressively demandable obligations whose implementation is to be treated in finer detail in the following section.

In initially discussing the means available for implementing the Covenant, reference was made to the basic need for the promotion of economic, social and cultural rights in order to encourage states, through their people, to ratify the Covenant. Where there has been ratification but legal solutions are inadequate, resort to educational efforts are once again suggested. Promotional efforts may yet prove to be the alpha and the omega of the Covenant's implementation process.

3.3. *Planning for Implementation*

A significant number of obligations in the Covenant are not immediately demandable; instead they are progressively demandable obligations of conduct or result. The implementation of both types of obligations are similar in that they require long-term planning and the commitment of resources. However, progressively demandable obligations of conduct may be more difficult to ascertain whenever there are no specific steps indicated in the Covenant or other international instruments that are guaranteed to

[61] Limburg Principles, paragraph 11.

[61a] Kartaskin, *Economic, Social and Cultural Rights*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS III, 113 (1932).

bring about the goal desired in the Covenant. This consideration should, therefore be kept in mind in the planning process.

A state which has ratified or is about to ratify the Covenant, after acquainting itself with the nature of the obligations contained in that instrument, ought to examine the legal ramifications that ratification has or will have on the domestic legal order. If incorporation is made necessary under the municipal laws, then it should be carried out immediately upon ratification. Those obligations in the Covenant which, under the laws of the state, acquire immediate enforceability within the domestic domain upon ratification or incorporation, should be implemented in the manner appropriate to their nature, that is, whether they are obligations requiring state action or abstention.[62]

Then, a state ought to identify which among the progressively demandable obligations in the Covenant are guaranteed under prevailing municipal laws and assess the extent to which these guarantees comply with the requirement of full realization in the Covenant. A state will thus be in a position to develop a programme of action specifying the steps which will be necessary to bring about complete compliance with the Covenant.

The usual practice is first to determine the amount of resources that would be available for a programme, and based on the resources available, formulate reasonable targets and determine the particular steps and means to be employed. In planning for the implementation of the obligations in the Covenant, this strategy should be modified. A state should first determine the steps required and ascertain the amount of resources that would be needed to carry out the programme of action. Then it should carry out a stock-taking of its resources that are available to be used for this purpose, and make a comparison between the amount needed and the amount locally available. If the local resources are inadequate, this item of information should be relayed to the international community so that the latter is provided with an opportunity to make available the needed resources.

Based on information regarding the amount of national and international resources available, a state can then scale down its tentative programme of action and its schedule of application to take into account any inadequacy in resources.

In determining the steps for implementation, a state can first turn to the Covenant for the steps and means that it may specify. Where there are none prescribed or the formulations are broadly framed, as is usually the case, the state concerned can turn to international conventions touching on specific areas of the Covenant and recommendations formulated through the initiative of international specialized agencies. It may also find useful more concrete approaches developed through regional arrangements such

62 *Supra* at 41 *et seq.*

as the European Social Charter.[63] A state may also look for guidance as to the methods developed by other states which have been found effective. While a state should exercise care in seeing to it that the approaches implemented in other states are adopted by it only if these are adaptable to its own particular situation, it should not reject such approaches outright.

However, where conditions or factors are substantially unique to a state, it falls upon that state and its people to identify the areas where changes can be effected, the steps and means to be employed, and the pace of implementation.

Certain general limitations on the implementation process need, however, to be observed in all cases. Article 4 which restricts the state's freedom to limit the enjoyment of the rights in the Covenant

> only to such limitations as are determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society[64]

will be applicable to the implementing steps. The state is also prohibited in the process of implementation from restricting the rights recognized or existing in any country "on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent."[65]

The state should be in a position at the time of the drafting of the programme of action to project itself into the future and specify in the programme any derogation or limitation allowed in the Covenant which it may invoke, and the justifications for invoking them. It may also indicate the anticipated difficulties and provide alternative measures where these are available.

The programme of action should also provide for a monitoring system that would enable the state to assess the effectiveness of the program, in its various aspects. The program should also afford flexibility to the state so that it can effect modifications in the programme with changes in the factors relevant to implementation such as an increase or decrease in resources available.

Popular participation in the entire exercise of executing the obligations in the Covenant can be achieved by involving the public and government units at the lowest levels in the formulation, application and review of the programme of action.[66] Individuals and non-governmental entities can take the lead in gaining and sustaining public interest and involvement.

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[63] Generally, HARRIS, THE EUROPEAN SOCIAL CHARTER (1984).
[64] Art. 4.
[65] Art. 5(2).
[66] This coincides with paragraph 76 of the Limburg Principles which states in part: "States parties should view their reporting obligations as an opportunity for broad public discussion on goals and policies designed to realize economic, social and cultural rights. . ."

3.4. *International Components of Domestic Implementation*

The national implementation of the Covenant is not entirely a state's exclusive concern. Since it is an international document that is being applied, the steps that a state takes form part of the evolving interpretation and practice in the field of human rights.

While the freedom of the individual contracting parties is preserved in the Covenant, it mandates that they take steps individually and *through international assistance and cooperation especially economic and technical*..."[67] This finds reiteration in Article 11(1) on the right to an adequate standard of living in the words "recognizing to this effect the essential importance of international co-operation based on free consent." Article 11(2) on the right to food mandates the state to take, "individually and through international co-operation, the measures, including specific programmes..."[68] It also requires states to consider "the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."[69]

International assistance and cooperation can be provided at various stages of the implementation process. The United Nations can extend technical and legal assistance to states in the mapping of their obligations under the Covenant. The international specialized agencies can make recommendations on the identification of the resources relevant to the realization of the rights in the Covenant and on the conduct of the survey of resources. While most states conduct regular data-gathering activities, and use such data as a basis for their national development programmes, there is a need to relate such data and programmes to the performance of the state's obligations under the Covenant. The agencies can also suggest the use of reliable statistical and other methods in the implementation process, and verifiable indicia of success or failure of particular aspects of the programme of action. Of course, these agencies led by the ILO have been responsible for developing common standards for application by states in their respective national domains.

The reporting system established under Article 16 provides the meeting point for the implementation of the Covenant at both international and national levels.[70] Although traditionally viewed as a system of international supervision of state compliance with their obligations, Article 16 is also useful for the state which seeks to execute its obligations. Thus, states reports "on the measures which they have adopted and the progress made in achieving the observance of the rights recognized"[71] in the Covenant,

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[67] Art. 2(1) [emphasis supplied].
[68] Art. 2(1).
[69] Art. 11(2)(b).
[70] Art. 16(1).
[71] Limburg Principles, paragraph 2.

ought to include the respective programmes of action formulated by the states concerned. The most basic measure which a state can adopt particularly toward the progressively demandable obligations is to formulate a programme of action.

Any deficiencies in the amount of resources available to a state for the execution of its obligations can therefore be brought to the attention of the international community through the state's report. This can prevent other states from excusing themselves from their duty[72] to extend whatever assistance they can by claiming that they were unaware of the needs of the reporting state. The report is submitted to the U.N. Secretary-General for consideration by the Ecosoc.[73] The report is also transmitted to the specialized agencies[74] which can then evaluate and make recommendations on the aspects of the programme of implementation which fall within their competence.

The Ecosoc, in turn, refers the state report to the Committee on Economic, Social and Cultural Rights established in 1985 and composed of "experts with recognized competence in the field of human rights, serving in their personal capacity."[75] The present frame of reference of the Committee limits it to the consideration of the reports submitted by the states and to the making of suggestions and recommendations "of a general nature" on the basis of its consideration of the reports and those submitted by the specialized agencies.[76]

However, this arrangement may not be the most desirable one. While the Ecosoc itself is limited to making recommendations of a general nature[77] and the Human Rights Commission (in matters referred to it by the Ecosoc) is also limited to general recommendations,[78] the restriction need not be imposed on the Committee. The Committee derives its existence from the Ecosoc[79] and not the Covenant, and it also considers the reports of specialized agencies which are not limited by the Covenant to the making of comments of a general nature. The Ecosoc should also consider, for purposes of analyzing state reports, making use of the non-governmental organizations network it has established by allowing these entities to submit their own reports to the Committee. Thus, there will be a confluence of contributions from both national and international levels, and from governmental and non-governmental entities. The recommendations of the Committee, after all, are still to be submitted to the Ecosoc.

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[72] Art. 16(2)(a) and Art. 21.
[73] Art. 22.
[74] Ecosoc Resolution 1985/17 (28 May 1985).
[75] *Id.* For an extended discussion on the possible roles the Committee can play, *see* Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, Limburg Conference Papers.
[76] Art. 21.
[77] Art. 19.
[78] Ecosoc Res. 1985/17, *supra.*
[79] Art. 17(2).

The reluctance of some states to the above scheme can be overcome if enough stress is placed on the forum that Article 16 provides to the contracting states, for a continuing dialogue among states on issues such as the establishment of a new economic order and the right to development.[80] Reporting states can raise proposed solutions to fundamental obstacles to the full achievement of economic, social and cultural rights in accordance with the Covenant's provision that "Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Covenant."[81]

For those who are concerned with monitoring the compliance of states, the submission of programmes of action would enable the international community to pass judgment on a state's compliance based on its performance relative to a programme which the state itself formulated. The Ecosoc can require the submission of such programmes of action under the Covenant's provision that states shall furnish their reports in stages, "in accordance with a programme to be established by the..." Ecosoc.[82] The discussions in the Working Group of the Commission on Human Rights which drafted the Covenant indicate that "the word 'program' related to a programme for the timing, form and *substance* of the reports."[83]

It is necessary to encourage states to look at the reporting system in the Covenant from a more positive viewpoint. Perhaps it is time once again to stress, as a UNESCO representative once did, that everyone ought to regard implementation as a form of assistance which excludes any idea of blame and instead suggests rehabilitation and aid.[84]

4. CONCLUSION

The discussions on the identification of state obligations confirm the position taken by a number of writers that the obligations contained in the Covenant have greater binding force than they have been generally perceived to have.[1] Perhaps what accounts for the underestimation of the binding character of these obligations is the failure to apprehend that there are different kinds of obligations prescribed, depending on a number of factors including the differences in the material and non-material conditions prevailing in the various states, as well as the certainty—or the lack of it—of realizing the rights in the Covenant through the adoption of prescribed uniform methods.

Immediately demandable obligations are typical of most obligations in other international instruments and should accordingly be complied with

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[80] Limburg Principles, paragraph 30.
[81] Art. 17(2).
[82] Art. 17(1).
[83] E/Cn.4/A.15/SR.2 at page 33.
[84] E/CN.4/SR.241 at page 16.
[1] Ramcharan, The Content of the Legal Obligation to Implement Economic, Social and Cultural Rights, *supra* at 8.

by states. However, the implementation of progressively demandable obligations may require rigorous planning beforehand. And since the Covenant contains more obligations which are progressively demandable than immediately demandable ones, more emphasis should be placed in promoting the former than is presently given to them.

The state is the principal organ of implementation of the rights guaranteed in the Covenant. Ultimately, it is responsible for the realization of these rights in the domestic plane. Its responsibilities are more pronounced when the obligations to be implemented are progressively demandable obligations since the Covenant makes it the additional responsibility of the state to determine most of the means and steps to be taken to fulfill them. Otherwise known as programmatic rights, a reasonable approach to their implementation is to adopt a programme of action, taking into account the particular conditions prevailing in a state that would affect the entire process or any of its phases. The burden of the state is most pronounced with respect to progressively demandable obligations of conduct, because unlike progressively demandable obligations of result, the first one does not specify any steps to be taken. The hiatus can be, in part, filled in by formulating standards and identifying the proper steps with the help of international agencies.

Public involvement in the different stages of implementation is indispensable and necessary; it is the responsibility of the state to encourage and support the involvement of its people. Since the people themselves are the ones who are ultimately to enjoy the rights guaranteed in the Covenant, they are in the best position to contribute to its implementation.

While states are relatively free to choose the means most appropriate for the implementation of the provisions of the Covenant, it is imperative that the Covenant's implementation at the municipal level should be coordinated with its development at the international level since both are inseparable aspects of one process: human rights law-making. The reporting system under Article 16 of the Covenant provides the link between the national and international dimensions of the implementation process. The report, which should include the state's programme of action, will enable the international community to participate in a constructive manner by affording other states and international agencies an opportunity to offer material and technical assistance whenever and wherever needed. It will also provide states with a forum for threshing out difficulties in implementation which are rooted in the dynamics of inter-state relationships. It will provide as well a more just basis for judging state compliance with progressively demandable obligations since states themselves will formulate the programme against which their performance is to be compared. Finally, since there are no uniform and failure-proof approaches that can be prescribed for the full realization of many of these rights, states can expect their difficulties to be received with a great deal more of understanding.