COMMENT

THE INTERNATIONAL HUMAN RIGHTS TREATIES: SOME PROBLEMS OF POLICY AND INTERPRETATION

I. INTRODUCTION

Since his inauguration, President Carter has made a most striking departure from the policies of his Republican predecessors by elevating human rights to a central position in American foreign policy. The *realpolitik* of the Kissinger State Department was perceived by the new President to lack a basic concern for the human side of international affairs.⁵ Accordingly, the Carter Administration proclaimed early on that "[t]he undertaking to promote human rights is now an integral part of our foreign policy." ⁶ The human rights issue has since been raised in different contexts by various American officials.⁷ The intensity with which human rights violations in other countries have been attacked has varied, hinging on independent

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¹ See, e.g., Transcript of Ford-Carter Debate, N.Y. Times, Oct. 7, 1976, at 36, col. 1: ("Every time Mr. Ford speaks from a position of secrecy in negotiations and in secret treaties that have been pursued and achieved in supporting dictatorships, in ignoring human rights, we are weak . . . .") (comments of Mr. Carter). For an earlier view suggesting general disenchantment on the part of Democrats with the human rights policies of the Republican Administration, see International Protection of Human Rights: Hearings Before the Subcomm. on Int'l Organizations and Movements of the House Comm. on Foreign Relations, 93d Cong., 1st Sess. 220-22 (1973) (statement of Sen. Kennedy).

² The theoretical relevance of human rights to American foreign policy has best been expressed by Secretary of State Cyrus Vance:

> The human rights issue is really grounded in fundamental values which lie at the root of the founding of this country. The dignity of the individual and the protection of those rights is a very sacred right that is of great importance to Americans. And therefore it is something which should be of importance to us in our domestic lives and in the conduct of our foreign policy. It has to be interwoven into the fabric of our foreign policy, and this we believe can be done.

Secretary Vance Interviewed on "Face the Nation", 76 Dep't State Bull. 245, 246 (1977).

³ See, e.g., Human Rights: An Important Concern of U.S. Foreign Policy, 76 Dep't State Bull. 289, 290 (1977) (statement of Warren Christopher, Deputy Secretary of State).

⁴ See, e.g., President Carter's News Conference of Feb. 23, 76 Dep't State Bull. 251, 252 (1977); The Challenge to the Economic and Social Council: Advancing the Quality of Life in All Its Aspects, 76 Dep't State Bull. 494, 495-96 (1977) (address by U.N. Ambassador Andrew Young); Administration Recommends Senate Approval of Genocide Convention, 76 Dep't State Bull. 676, 677 (1977) (statement by Warren Christopher).

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considerations of international politics. It is clear, however, that the international human rights issue will remain for some time as an important consideration in the formulation and evaluation of American foreign policy.

Given this new emphasis by the United States on human rights in the world order, the exact scope of those rights should be examined, for important matters of domestic and international policy may turn on the answer. On March 17, 1977, President Carter told representatives of the United Nations that, as a demonstration of his commitment to the realization of human rights ideals, he would seek approval by the Senate of four U.N.-sponsored treaties on human rights. These treaties—the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Prevention and Punishment of the

4 The Department of State Bulletin offers a fascinating glimpse at how the fledgling Carter Administration handled the human rights issue in its foreign policy pronouncements. After well-publicized attacks were initially directed at specific human rights violations in other countries, e.g., 76 Dep't State Bull. 250 (1977) (Uganda), human rights statements were considerably muted as a result of adverse developments abroad, such as the restrictions placed on Americans living in Uganda, see Secretary Vance Interviewed on "Face the Nation", supra note 1, at 245-46, and the breakdown in SALT talks with the Soviet Union, see Secretary Vance Visits Moscow and Western Europe, 76 Dep't State Bull. 389 (1977). Statements on the subject have since been of a fairly general nature. See, e.g., Human Rights and Foreign Policy, 76 Dep't State Bull. 505 (1977) (address by Secretary Vance).

5 It is only since the Second World War, with the development of various treaties on the subject, that human rights have come to be generally viewed as a matter for international concern and protection. Previously, customary international law had afforded protection for human rights only to aliens within a state, and such rights could be vindicated only through the force or persuasion of the alien's home country. See, e.g., Luard, The Origins of International Concern Over Human Rights, in The International Protection of Human Rights 7-21 (E. Luard ed. 1967); Starr, International Protection of Human Rights and the United Nations Covenants, 1967 Wis. L. Rev. 863, 864 (1967).

6 Peace, Arms Control, World Economic Progress, Human Rights: Basic Priorities of U.S. Foreign Policy, 76 Dep't State Bull. 329, 332 (1977). President Carter later returned to the U.N. to sign two of the treaties that had not yet been given such a preliminary indication of approval by the United States. N.Y. Times, Oct. 6, 1977, at A2, col. 5. Actual ratification by the United States is possible only after Senate action in accordance with Article II, section 2 of the Constitution, providing that treaties may be entered into only "by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur."


Crime of Genocide—contain an exhaustive catalogue of asserted rights of human beings as individuals and as ethnic, racial, and national groups. The listed "rights" range from a familiar prohibition against cruel punishment to the novel right to rest and leisure, including periodic holidays with pay. By his pledge at the U.N., therefore, the President revealed that he was willing to give full content to the term "human rights," not only as a matter of American foreign policy, but also as a matter of international law binding the United States as a future party to the treaties.

There are several benefits which would follow from American ratification of these human rights treaties. First, the image of the United States abroad would be improved by eliminating the "embarrassing contradiction" between America's statements in support of human rights and its failure to ratify the treaties. America's moral position would be so much the stronger, because ratification might counteract previous attacks on its non-party status. Second, the position of the United States as a party to the treaties would enable it to influence their interpretation and application. Currently, the shaping of international human rights in this way is left to nations "not particularly known for their commitment to libertarian ideals." Third, ratification by the United States would presumably encourage other nations to accede to and implement the treaties, thereby expanding "the rule of law on an international scale." To the extent that human rights violations within a single state lead to inter-state conflict, the cause of international

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8 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter cited as Convention on Genocide].

See text accompanying notes 23-92 infra.

Covenant on Civil and Political Rights, supra note 7, art. 7, 21 U.N. GAOR, Supp. (No. 16) at 53.

Covenant on Economic, Social and Cultural Rights, supra note 8, art. 7, 21 U.N. GAOR, Supp. (No. 16) at 50.


Buergenthal, supra note 15, at 619. See also Gardner, supra note 14, at 908.

See also Starr, supra note 5, at 890.


The continuing conflict between Israel and her Arab neighbors, fueled in part by alleged deprivations of the rights of Palestinians who live within the Jewish
peace would be advanced by the increased respect for human rights signified by American accession to the treaties.

Substantial objections have, however, been raised against the treaties. They have been opposed on the constitutional grounds that the federal government lacks power under the Constitution to enter into treaties having human rights content and that specific provisions of the treaties offend substantive articles of the Constitution.

Beyond the constitutional problems, there are also objections based wholly on policy arguments. The purpose of this Comment is to consider the human rights treaties from a policy standpoint, leaving the constitutional questions to the commentators who have covered them so well.

A comprehensive policy analysis is not intended. Rather, one provision will be taken from each treaty state, is one example of the relationship between human rights and international peace. See International Protection of Human Rights: Hearings Before the Subcomm. on Int'l Organizations and Movements of the House Comm. on Foreign Relations, 93d Cong., 1st Sess. 587 (1973) (statement of Mr. Richardson).

Proponents of this constitutional argument generally assert that the United States may not enter into the human rights treaties because they involve (1) matters solely within the domestic jurisdiction of the United States, (2) matters not of international concern, and (3) powers reserved to the states by the Constitution. Guggenheim & Defeis, United States Participation in International Agreements Providing Rights for Women, 10 Loy. L.A.L. Rev. 1, 22-41 (1976). Although consideration of this argument is beyond the scope of this Comment, a review of the literature reveals that the supporters of human rights treaties have a strong rebuttal in the argument that there is nothing in the Constitution limiting the treaty power to matters not within the domestic jurisdiction of the United States. Indeed, except for treaties which codify customary international law, any treaty will necessarily remove an issue from purely domestic concern. Furthermore, a limitation on treaty subjects to matters of "international concern" is not spelled out in the Constitution, and although some cases support the limitation, it is incorrect to assume that human rights treaties have only domestic effect. Finally, states' rights should not be considered a limitation on the treaty power, because the treaty power in a sense represents a delegation of powers from the states to the federal government that is to be exercised in the treaty situation. Id. See generally Buergenthal, supra note 15, at 612-13; Gardner, supra note 14, at 907; Henkin, The Constitution, Treaties, and International Human Rights, 116 U. Pa. L. Rev. 1012, 1015-29 (1968); MacChesney, Should the United States Ratify the Covenants? A Question of Merits, Not of Constitutional Law, 62 Am. J. Int'l L. 912 (1968); Starr, supra note 5, at 887-89; Tuttle, Are the "Human Rights" Conventions Really Objectionable?, 3 Int'l Law. 385 (1969).

It is fairly clear that substantive provisions of a treaty may not "authorize what the Constitution forbids." Geofroy v. Riggs, 133 U.S. 258, 267 (1889). See Reid v. Covert, 354 U.S. 1 (1957). The human rights treaties may be vulnerable in this respect. Article 4 of the Convention on Racial Discrimination, for example, prohibits the dissimulation of certain ideas; this provision clearly contravenes the first amendment. See Bitker, The Constitutionality of International Agreements on Human Rights, 12 Santa Clara Law 279, 288 (1975). Even if certain treaty provisions are constitutionally invalid, however, the United States may still ratify the treaties without committing itself to violate the Constitution, simply by fashioning appropriate reservations as to those provisions. Id. 287-88. See text accompanying notes 204-12 infra. An entire treaty need not be rejected because of one section.

See notes 19-20 supra.
and assessed in light of the perceived interests of the United States and the world community. Of course, to the extent that other provisions of a given treaty are similar to the selected provision in content, impact or history, the present analysis is more generally applicable. The provisions discussed have been selected for their suggestiveness in relation to the broad problems that surround each of the human rights treaties. The policy assessment undertaken in this Comment is therefore intended to serve as a helpful beginning in deciding whether American accession to the treaties is truly a wise goal. Because the treaties are not lacking in internal ambiguities, basic methods of treaty interpretation, such as consideration of the context of the agreement and the treaty’s objects and purposes, as well as reference to the preparatory work (travaux préparatoires), will be brought to bear on the subject. Before particular provisions are considered, however, a review of the general structure and provisions of the four treaties would be useful.

II. THE TREATIES IN GENERAL

A. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly and opened for signature, ratification, and accession by states on December 16, 1966. It had been drafted by various groups and subgroups within the U.N. over a period exceeding ten years and was contemplated to be part of an international bill of rights supplementing the general purposes and structure of the United Nations as laid out in the U.N. Charter. The Covenant entered into force on March 23, 1976, three months after deposit of the thirty-fifth instrument of ratification by Czechoslovakia. See Hassan, The International Covenants on Human Rights: An Approach to Interpretation, 19 BUFF. L. REV. 35, 37-41 (1969). 23

25 Id. 512. Ratification of, or accession to, the human rights treaties is to be accomplished in accordance with the domestic law of the ratifying state; for the United States, this entails compliance with Article II, section 2 of the Constitution. See note 6 supra. The Secretary-General of the United Nations performs a depositary function with respect to instruments of ratification or accession. Each of the human rights treaties entered into force only after a certain number of such instruments had been deposited with the Secretary-General. See, e.g., Covenant on Civil and Political Rights, supra note 7, arts. 48-49, 21 U.N. GAOR, Supp. (No. 16) at 58.
The Covenant on Civil and Political Rights seeks to bind states-parties to the observance of various rights enumerated in the Universal Declaration of Human Rights but recognized there only as "a common standard of achievement for all peoples and all nations." Thus, the Covenant establishes positive obligations of states-parties with respect to civil and political rights, and noncompliance with these duties is deemed to be a violation of international law. The basic obligations of states-parties are set forth in article 2 as follows:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.

2. Each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

The third paragraph of article 2 compels states-parties to ensure an effective remedy, including means of adjudication and enforcement, to persons whose rights under the Covenant have been violated.

26 G.A. Res. 217A, U.N. Doc. A/810, at 71-77 (1948). The Declaration was seen as the first, non-binding part of an international bill of rights, with binding covenants and measures of implementation to follow. As stated by Eleanor Roosevelt, then Chairman of the Commission on Human Rights and a representative of the United States in the General Assembly:

[The Universal Declaration of Human Rights] is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms to serve as a common standard of achievement for all peoples of all nations.


28 States-parties to a treaty are bound by the rule of customary international law, pacta sunt servanda; that is, treaties must be observed. N. LeeCh, C. Oliver & J. Sweeney, The International Legal System 931 (1973) [hereinafter cited as LeeCh].

29 Article 4(1) provides, however, that "[i]n time of public emergency which threatens the life of the nation," states-parties may "take measures derogating from their obligations under the . . . Covenant to the extent strictly required by the exigencies of the situation . . . ." Covenant on Civil and Political Rights, supra note 9, art. 4, 21 U.N. GAOR, Supp. (No. 16) at 53. Such measures are themselves limited by the Covenant, however, and derogation from certain provisions is forbidden. Id.

30 Id. art. 2, 21 U.N. GAOR, Supp. (No. 16) at 53. The Covenant, dealing as it does predominantly with the political rights of individuals vis-a-vis the state, imposes direct obligations in regard to those rights only on the state as such.
The substantive rights guaranteed by the Covenant include many rights analogous or identical to those guaranteed by the Constitution of the United States. For example, it is provided that no one shall be subjected to “cruel, inhuman or degrading treatment or punishment”; 31 that slavery is prohibited; 32 that no one shall be subject to “arbitrary arrest or detention,” with trial or release to follow within a reasonable time after a valid arrest; 33 and that any accused person shall have the right to examine witnesses against him and shall not be compelled to incriminate himself. 34 In addition, freedom of movement, 35 freedom of religion, 36 the right of peaceful assembly 37 and the right to equal protection of the law 38 are all recognized and guaranteed. Other rights mentioned in the Covenant are not so familiar as a matter of American constitutional law. The Covenant guarantees the right of all peoples to self-determination. 39 Persons sentenced to death have the right to seek pardon or commutation of the sentence, and the death penalty is not to be imposed on individuals under eighteen years of age. 40 States-parties are to ensure “equality of rights and responsibilities of spouses as to marriage,” 41 and every child is given the right to acquire a nationality. 42 On the whole, however, the Covenant on Civil and Political Rights represents an international codification of rights already recognized under Anglo-American law.

Article 28 establishes a Human Rights Committee to oversee implementation of the substantive provisions of the Covenant. The Committee consists of eighteen members “of high moral character
and recognized competence in the field of human rights.” The members of the Committee are nominated and elected by states-parties with an eye toward achieving an “equitable geographical distribution of membership” and the “representation of the different forms of civilization and of the principal legal systems.” Although membership on the Committee is limited to citizens of states that have ratified the Covenant, those persons elected serve in an individual capacity and not as representatives of any particular state. The chief function of the Committee is to review periodic reports, submitted by states-parties pursuant to article 40, on measures adopted to effectuate the Covenant. The Committee is to transmit its own reports and general comments on these attempts to implement the Covenant to states-parties and, at its discretion, to the Economic and Social Council. There is also a procedure whereby the Committee will consider complaints by one party against another concerning implementation of the Covenant, provided both parties have recognized the competence of the Committee in this regard and the Committee has ascertained that all available domestic remedies have been exhausted or unreasonably delayed. In such a situation, an amicable solution to the dispute is to be reached through the intercession of the good offices of the Committee or of an ad hoc Conciliation Commission appointed by it.

B. The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights was adopted by the General Assembly on December 16, 1966 as the second step in the U.N.’s attempt to construct an effective international bill of rights. The Covenant entered into force on January 3, 1976 following the deposit of the thirty-fifth instru-

43 Id. art. 28, 21 U.N. GAOR, Supp. (No. 16) at 56.
44 Id. art. 31, 21 U.N. GAOR, Supp. (No. 16) at 56.
45 Id. art. 40, 21 U.N. GAOR, Supp. (No. 16) at 57.
46 Id. art. 41, 21 U.N. GAOR, Supp. (No. 16) at 57.
47 There is also an Optional Protocol to the International Covenant on Civil and Political Rights, 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976), which establishes a procedure for the handling of complaints by individuals under the Covenant on Civil and Political Rights. The Human Rights Committee will consider only those petitions which originate in states that are parties to the Protocol, and will forward its views after consideration is given to the views of both the state and the individual concerned. See Schwelb, supra note 24, at 514-15.
ment of ratification by Jamaica. Article 2 sets out the broad legal obligation imposed on states-parties by the Covenant:

1. Each State Party to the present Covenant undertakes to take steps . . . 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.49

A basic difference between the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights is thus immediately apparent, for the latter imposes present obligations under international law, while the former recognizes that the stage of economic development of a particular state-party may impede the implementation of some of the rights proclaimed therein.

This difference between the two Covenants is understandable, because many economic, social, and cultural rights are resource-oriented in nature. These rights include the right to work;50 the right to “just and favourable conditions of work” including rest, leisure, and periodic holidays with pay;51 the right to social security;52 the right to “continuous improvement of living conditions”;53 and the right to education.54 Other rights recognized by the Covenant on Economic, Social and Cultural Rights that are perhaps not dependent on the economic development of the state, though still novel in a bill of rights of the American variety, include

49 Id. art. 2, 21 U.N. GAOR, Supp. (No. 16) at 49. The nature of many of the rights in the Covenant on Economic, Social and Cultural Rights is such that their full enforcement will inevitably involve the imposition of obligations on private groups within states that have acceded to the Covenant. For example, the right to just and favorable conditions of work would be nugatory if it did not affect private employers within a given state-party. Ratification of the Covenant would not, however, result in the immediate imposition of obligations on citizens of the ratifying state because (1), as discussed in the text, the Covenant itself provides that the rights will be achieved progressively depending on the economic development of the particular state; and (2) the Covenant was not intended to be self-executing, and therefore domestic legislation would be necessary to implement the treaty provisions within a state-party. Schwelb, supra note 24, at 516. See Sei Fuji v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

50 Covenant on Economic, Social and Cultural Rights, supra note 8, art. 6, 21 U.N. GAOR, Supp. (No. 16) at 50.

51 Id. art. 7, 21 U.N. GAOR, Supp. (No. 16) at 50.

52 Id. art. 9, 21 U.N. GAOR, Supp. (No. 16) at 50.

53 Id. art. 11, 21 U.N. GAOR, Supp. (No. 16) at 50.

54 Id. art. 13, 21 U.N. GAOR, Supp. (No. 16) at 51.
the right to form and join trade unions\textsuperscript{55} and the right to “take part in cultural life.”\textsuperscript{56}

The jurisdiction to oversee implementation of the Covenant is vested in the Economic and Social Council of the United Nations, which is to receive periodic reports from states-parties concerning efforts to implement the Covenant.\textsuperscript{57} The Council, acting on these reports in conjunction with its Commission on Human Rights, may issue recommendations to the General Assembly or to specialized agencies of the U.N. as a means of furthering compliance with the Covenant.

\textbf{C. The International Convention on the Elimination of All Forms of Racial Discrimination}

The International Convention on the Elimination of All Forms of Racial Discrimination\textsuperscript{58} was adopted by the General Assembly on March 7, 1966 and entered into force on January 4, 1969. Simply stated, it represents “the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races.”\textsuperscript{59} To give full force to this idea, the Convention defines “racial discrimination” broadly to include “any distinction, exclusion, restriction or preference based on race . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise . . . of human rights and fundamental freedoms . . . in public life.”\textsuperscript{60} The Convention requires that states-parties condemn such discrimination and “undertake to pursue by all appropriate means and without delay a policy of eliminating [it] in all its forms . . . .”\textsuperscript{61} In particular, states-parties to the Convention are not to engage in any act of racial discrimination nor to sponsor, defend or support racial discrimination by any persons or organizations. Indeed, racial discrimination by private persons or organizations is to be prohibited.\textsuperscript{62} Racial segregation and \textit{apartheid} are

\textsuperscript{55} Id. art. 8, 21 U.N. GAOR, Supp. (No. 16) at 50.
\textsuperscript{56} Id. art. 15, 21 U.N. GAOR, Supp. (No. 16) at 51.
\textsuperscript{57} Id. art. 16, 21 U.N. GAOR, Supp. (No. 16) at 51.
\textsuperscript{60} Convention on Racial Discrimination, supra note 9, art. 1, 660 U.N.T.S. at 216. There is, however, an exception to the definition of racial discrimination for “[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups,” in the nature of affirmative action programs in the United States. Id. art. 1(4), 660 U.N.T.S. at 216.
\textsuperscript{61} Id. art. 2, 660 U.N.T.S. at 216, 218.
\textsuperscript{62} See id., 660 U.N.T.S. at 218.
expressly forbidden. Under article 5, states-parties agree to prohibit racial discrimination in the enjoyment of a number of civil and economic rights ranging from the right to own property to the right to social security and education. Furthermore, in a provision clearly presenting constitutional problems for the United States, states-parties are bound to “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred . . . .”

Measures for the implementation of the Convention include periodic reporting by parties to a Committee on the Elimination of Racial Discrimination, a procedure for interstate complaints to the Committee concerning noncompliance with the Convention, as well as a procedure for handling complaints of non-compliance by individuals against a state which has recognized the competence of the Committee to mediate in such a case. Article 22 of the Convention further provides that any dispute between states-parties that has not been settled by negotiation or through the above procedures shall be referred to the International Court of Justice for decision at the request of any of the disputants.

The enforcement mechanisms under the Convention on Racial Discrimination are clearly more far-reaching, and potentially more effective, than those set forth in either of the two Covenants already discussed. The latter two treaties contain no provision of general applicability concerning interstate complaints, and no provision at all relating to complaints by individuals. Moreover, the Conven-

63 Id. art. 3, 660 U.N.T.S. at 218.
64 Id. art. 4, 660 U.N.T.S. at 220.
65 Id. art. 9, 660 U.N.T.S. at 224, 226.
66 Id. arts. 11-13, 660 U.N.T.S. at 228, 228, 230. The competence of the Committee to consider inter-state complaints does not depend on its recognition by the disputing parties, unlike the procedure for inter-state complaints under the Covenant on Civil and Political Rights. See text accompanying note 46 supra.
68 Id. art. 22, 660 U.N.T.S. at 236, 238.
69 See text accompanying notes 43-47, 57 supra.
70 But cf. text accompanying notes 46-47 supra (Covenant on Civil and Political Rights provides for inter-state complaint settlement in limited situation where both parties recognize competence of the Human Rights Committee in this respect).
71 The Optional Protocol to the Covenant on Civil and Political Rights, 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1965) (entered into force Mar. 23, 1976), which provides for the handling of complaints by individuals against states-parties, is a treaty in its own right. In effect, it allows states to elect by ratification or failure to ratify whether they will be answerable to individuals for national actions that are violative of the Covenant. See note 47 supra. The Optional Protocol has not in any case had a widespread effect; as of June 1, 1976, there were only fourteen nations that had ratified the Protocol, as compared with 37 states-parties that had ratified the Covenant on Civil and Political Rights itself.
tion's establishment of jurisdiction in the International Court of Justice, a provision that is lacking in either Covenant, presents the possibility for binding judicial resolution on an international level of disputes otherwise unresolved.\textsuperscript{72}


The Convention on the Prevention and Punishment of the Crime of Genocide\textsuperscript{73} was adopted by the General Assembly on December 9, 1948 and entered into force on January 12, 1951. With the memory of Hitler's genocidal atrocities still fresh in the world's conscience, the original parties to the Convention desired to "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they [undertook] to prevent and to punish."\textsuperscript{74} Genocide is defined in the Convention as any of several acts, such as murder or the causation of serious bodily or mental harm, committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."\textsuperscript{75} Persons committing genocide, or certain related acts, are to be punished regardless of their official position in the country where the act occurs.\textsuperscript{76}

As one means of implementing the Convention, any state-party to the Convention on Genocide may call upon organs of the United Nations to act pursuant to Charter powers in order to prevent or suppress genocidal acts.\textsuperscript{77} Such powers include the ability of the General Assembly to make recommendations "for the peaceful adjustment of any situation . . . deem[ed] likely to impair the general welfare or friendly relations among nations,"\textsuperscript{78} and the power of the Security Council to determine the existence of a threat to the peace and to take appropriate measures, including armed force, to maintain or restore international peace and security.\textsuperscript{79} Furthermore, disputes between states-parties concerning interpretation or

\textsuperscript{72} Article 59 of the Statute of the International Court of Justice, [1970] U.N.Y.B. 1013, 1018, provides that the decision of the Court "has no binding force except between the parties and in respect of that particular case" (emphasis supplied).

\textsuperscript{73} 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

\textsuperscript{74} Convention on Genocide, supra note 10, art. I, 78 U.N.T.S. at 280.

\textsuperscript{75} Id. art. II, 78 U.N.T.S. at 280.

\textsuperscript{76} Id. art. IV, 78 U.N.T.S. at 280.

\textsuperscript{77} Id. art. VIII, 78 U.N.T.S. at 282.

\textsuperscript{78} U.N. CHARTER art. 14. The General Assembly's recommendations are not binding as such on any state, but they may bear the moral force of world opinion.

\textsuperscript{79} Id. arts. 39-42.
compliance may be submitted to the International Court of Justice at the request of any of the disputants.80

E. The Problem of Enforcement

As indicated by the general review of the treaties, the measures for implementation are not particularly effective. "The reluctance of states to accept third party decisionmaking for resolving international controversies and conflicts is at the root of this enforcement issue." 81 The Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights rely primarily on a system of reporting by states-parties as a means of overseeing compliance with their provisions; yet the U.N. bodies that receive those reports are limited to giving their views on the reports' contents to the states in question. These bodies may not even initiate inquiries into alleged violations of the Covenants.82 Furthermore, although the Covenant on Civil and Political Rights does provide for the hearing of inter-state complaints by the Human Rights Committee in cases where the states have consented to such a hearing, the Committee's final report is to relate only to the facts whether or not the parties themselves have been able to work out a satisfactory resolution of the dispute.83 Even when the inter-state complaint has been referred to an ad hoc Conciliation Commission

80 Convention on Genocide, supra note 10, art. IX, 78 U.N.T.S. at 252. This provision for jurisdiction in the International Court of Justice is again an improvement, in terms of the binding nature of any settlement, over the non-judicial methods of implementation contained in the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights. See text accompanying notes 69, 72 supra. Article VII of the Convention on Genocide provides that genocide and related acts shall not be considered political crimes for the purposes of extradition, thereby rendering inapplicable the general exception to extradition of suspected criminals as between states having a mutual extradition treaty for those who have committed political crimes. See generally Leech, supra note 28, at 281-82.


82 Nanda, supra note 81, at 313. Furthermore, the ability of the Economic and Social Council to make recommendations to the General Assembly or to the specialized agencies established by the Covenant on Economic, Social and Cultural Rights, see text accompanying notes 57-58 supra, appears to be directed toward aiding those agencies to take positive steps of a general nature in assisting states-parties to implement that Covenant, and not towards imposing sanctions for non-compliance. See Covenant on Economic, Social and Cultural Rights, supra note 8, arts. 21-22, 21 U.N. GAOR, Supp. (No. 16) at 52.

83 Nanda, supra note 81, at 318.
by the Human Rights Committee, the report of that Commission, which may embody recommendations for an amicable solution in keeping with international law, as well as findings of fact, need not be accepted by the disputing states.\footnote{64}

The Conventions on Racial Discrimination and Genocide contain enforcement provisions which on their face are stronger than those in either of the Covenants. Thus, the Convention on Racial Discrimination establishes jurisdiction in the Human Rights Committee, regardless of the consent of states to such jurisdiction, to hear inter-state complaints under that Convention. Again, however, the Committee’s final report in such cases is to contain only findings of fact and recommendations for an amicable solution; the disputing states remain free to reject those recommendations.\footnote{65} Moreover, the provision in the Convention on Racial Discrimination concerning complaints by individuals makes the hearing of such complaints dependent on the consent of the state that is the object of the complaint. Finally, even the International Court of Justice’s ultimate jurisdiction over inter-state disputes concerning the interpretation or application of the Conventions on Racial Discrimination and Genocide is weakened by the fact that such jurisdiction is subject to contrary reservation by any state upon ratifying the treaties.\footnote{66} Additionally, in the current state of international law, a judgment by the International Court of Justice does not as a practical matter always compel obedience by the states in question.\footnote{67}

In light of the feeble enforcement system behind the human rights treaties, it might be argued that the United States may safely accede to the treaties, and thereby gain the advantages of such a step,\footnote{68} without incurring any real obligations that are enforceable under international law, regardless of what the theoretical policy objections may be. Perhaps the simplest answer to this argument

\footnote{64 Id.}

\footnote{65 Racial Discrimination Convention, supra note 9, arts. 13(1) & (2), 660 U.N.T.S. at 230.}

\footnote{66 See notes 204-10 infra and accompanying text.}

\footnote{67 Article 94(1) of the U.N. Charter provides that “[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.” Although judgments of the International Court of Justice have been complied with in the great majority of cases, there have been instances, notably the Corfu Channel Case (United Kingdom v. Albania), [1949] I.C.J. 4, in which a party has ignored an adverse judgment with impunity. In no such case has recourse been had by the prevailing party to the U.N. Security Council to “decide upon measures to be taken to give effect to the judgment.” U.N. CHARTER art. 94, ¶ 2. The measures to be taken at such point are within the sole discretion of the Security Council. See Leech, supra note 28, at 85.}

\footnote{68 See text accompanying notes 14-18 supra.}
is that it has not satisfied opponents of the treaties who object to the idea of the United States' being a party to the treaties under any circumstances. Moreover, the United States might indeed be impelled to adhere to the spirit, if not the letter, of those treaties upon ratifying them. First, ratification would represent a moral commitment by the United States to implement the treaties. Ratification without intent to implement the treaties might well be seen by the world community as a cynical attempt on the part of the United States to use solemn international agreements solely for immediate propaganda gains. Second, because treaties in general are a part of the “supreme Law of the Land,” ratification of the human rights treaties would encourage legislators to take steps in furtherance of such supreme law. Thus, although the human rights treaties are not self-executing—that is, their simple ratification without more does not give them domestic effect—their ratification would create an impetus towards the passage of implementing legislation, which would be enforceable by domestic means. Finally, although the present lack of an effective international enforcement mechanism may well enable any state callously to disregard its international human rights obligations, the desideratum in this area is to foster respect for the rule of law by acceding only to treaties which the United States intends to comply with to the fullest. It therefore is in the interest of this nation to ratify the treaties only if a good faith effort at compliance is intended—or, in other words, it appears that the United States ought not ratify the human rights treaties without intending and then attempting to effecuate their provisions. An understanding of the policy issues involved in ratification is therefore necessary before such a commitment is made.

III. SELECTED PROBLEMS OF POLICY AND INTERPRETATION

A. The Covenant on Civil and Political Rights and the Right of Self-Determination

Article 1 of the International Covenant on Civil and Political Rights provides as follows:


81 Cf. Schroth & Mueller, supra note 15, at 181 (inability to live up to requirements of Convention on Racial Discrimination because of insufficient federal power should not be a cause of embarrassment in the future, because treaties are supreme law of the land and Congressional power to enforce thirteenth amendment has not been exploited to full potential).

82 See note 49 supra; Leech, supra note 28, at 1025-26.
1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right . . . . 93

1. The Interest of the United States

In considering whether to ratify the Covenant on Civil and Political Rights, it is important to consider the contemplated scope of the “right” of self-determination, and the definition of the “peoples” to whom it applies. The United States clearly has a strong interest in maintaining its integrity as a nation as currently constituted, and thus any proposed international legal norm designed to erode this integrity may be viewed as fundamentally unacceptable. The stability of national entities is an essential element in a peaceful world order and therefore the general principle is “that states want to preserve their territorial integrity, and exceptions to that rule are very rare.” 94

Self-preservation, the Supreme Court has recognized, is “the ultimate value of any society.” 95 The Civil War, the greatest crisis in American history, is the most obvious testimony to the United States’ unequivocal opposition to any fragmentation of the Republic. If the United States is to accede to the Covenant on Civil and Political Rights, it must be clear that the right of peoples to self-determination does not conflict with a proper interest in national integrity. As stated by one commentator, who feared an open-ended meaning of “peoples” and of the self-determination right:

If we wish to promote revolutions around the world, [recognition of a right of self-determination] would be one way of doing it. A consequence of this, however, might well be the promotion by outside groups of revolutions in

93 Covenant on Civil and Political Rights, supra note 7, art. 1, 21 U.N. GAOR, Supp. (No. 16) at 52.
94 V. van Dyke, Human Rights, the United States, and World Community 85 (1970).
this country . . . If we are now to admit that any group that can somehow identify itself as a "people" has the right to secede, this country might well fall apart.\(^9\)

The validity of such fears hinges, however, on the precise meaning of the terms "peoples" and "self-determination" in article 1, as intended by the Covenant's drafters and as carried into practice by political bodies of the United Nations.\(^8\) In this context, three concepts of self-determination may be relevant: (1) the right of a colonial country to gain its independence from the colonial power, (2) the right of an independent nation to maintain its independence against outside encroachment, and (3) the right of an ethnic or other minority within a recognized national unit to gain some degree of autonomy.\(^9\) Similarly, "peoples" as used in article 1 might mean either (1) groups predominant in recognized political areas which have historically been independent; or (2) ethnic or other minorities within a political unit, regardless of whether such minorities have historically been independent.\(^9\) If article 1 were taken to subsume the broadest concepts of self-determination and peoples mentioned above, the fear that the Covenant threatens national integrity would be well-founded, for those concepts in essence would allow any identifiable minority to secede from larger political units, no matter how great a claim to historical legitimacy those units might have. To determine what interpretation should be given to the ambiguous words used in the Covenant, it is necessary to examine the *travaux préparatoires* in order to discern the intent of the drafters.\(^10\)

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\(^8\)Because the provision for a right of self-determination precedes the imposition of obligations on states-parties in article 2, the self-determination right is arguably not governed by the later article and so is not binding on parties to the Covenant. Haight, *supra* note 96, at 115 (comments of Mr. Schwelb). This view appears to be incorrect; the *travaux préparatoires* reveal a desire on the part of the drafters to list the right of self-determination first simply because it was viewed as the "corner-stone of the whole edifice of human rights." 6 U.N. GAOR, C. 3 (397th mtg.) 299, U.N. Doc. A/C. 3/SR. 397 (1952) (remarks of Mr. Mufti).


\(^10\)See text accompanying note 22 *supra*. 
2. The Travaux and Other Sources

The earliest discussions in the United Nations on the right of self-determination make clear that many of the participating states were concerned solely with colonial conditions then prevailing in much of the world. Indeed, so great was this concern that some desired to omit reference to the right as a guarantee for the continued sovereignty of existing, non-colonial nations. Thus, an initial draft resolution presented to the Commission on Human Rights by the Soviet Union, which formed the basis for subsequent discussion, recognized the right to national self-determination and provided only that "States responsible for the administration of Non-Self-Governing Territories shall promote the fulfillment of this right . . . ." The Soviet representative, in explaining the draft, referred to "outworn ideas of colonialism" that were in natural opposition to the emerging right of self-determination.

The matter of rights of national minorities was raised, however, in two ways. First, the Soviet working draft provided in a separate paragraph that "[t]he State shall ensure to national minorities the right to use their native tongue and to have their national schools, libraries, museums and other cultural and educational institutions." The Soviet representative stated that this paragraph was designed to ensure the opportunity for cultural development so that a "people" (national minority) might become ready to exercise the right of self-determination. A related proposal by Yugoslavia provided that the right of self-determination includes the right of every person to participate, with all the members of a group inhabiting a compact territory, to which he belongs ethnically, culturally, historically or otherwise, in the free exercise of its right to self-determination, including the right to secede and to establish a politically and economically independent State . . . .

Both the Soviet and Yugoslav proposals failed to win the approval of the Commission on Human Rights, however, and so

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106 Id., U.N. Doc. A/C. 3/SR. 254 (1952) (emphasis supplied). This proposal was later amended to omit specific reference to a right of secession. It was still construed, however, to encompass an implied right of secession. Id. (261st mtg.), U.N. Doc. A/C. 3/SR. 261 (1952).
were never even raised in a body of larger representation.\textsuperscript{107} In opposing the Soviet minorities provision, the representative of Chile noted that it "presented grave problems particularly in the case of under-populated countries which had embarked on a policy of large-scale immigration. . . . \textit{Such a provision would retard the process of assimilation of immigrants into the community and \textit{would prevent the formation of a homogeneous society.}''\textsuperscript{108} The French representative pointed out that, in view of the encouragement it would likely give to irredentist movements within existing nations, the Soviet proposal "would tend to weaken the principle of self-determination by discouraging States from ratifying the covenant."\textsuperscript{109} Lebanon and India indicated that the subject of minorities in the Soviet draft was simply irrelevant.\textsuperscript{110}

The Yugoslav proposal was similarly opposed because of its potential for disrupting national unity, even after it had been amended to omit specific reference to acts of secession.\textsuperscript{111} The Greek representative stated that it would be dangerous to include wording which could be interpreted to allow "subversive activities."\textsuperscript{112} The representative from Australia remarked:

\begin{quote}
Such an article could hardly be inserted in a covenant which was intended to have the force of law if the article itself authorized action that was unlawful. As a matter of historical necessity many peoples had achieved their independence by revolutionary or subversive means and it might be that historical necessity would dictate the employment of similar means in some extreme cases in the future, but \textit{such a course of action could not be the subject of legal prescription.}\textsuperscript{113}
\end{quote}

The second way in which the minorities question arose was in the clash between Third World countries and the colonial powers of Western Europe concerning the situations in which the right to self-determination could be invoked. As noted, the primary focus

\textsuperscript{107} For a procedural history of the drafting of the article on self-determination up to its consideration by the General Assembly, see 10 U.N. GAOR, Draft Covenants Annotation 5-20, U.N. Doc. A/2989 (1955).
\textsuperscript{109} Id. at 4.
\textsuperscript{110} Id. at 8, 10. \textit{See id.} (259th mtg.) 5, U.N. Doc. E/CN. 4/SR. 259 (view of Uruguay that it was not appropriate to deal with the question of minorities in connection with self-determination).
\textsuperscript{111} \textit{See} note 116 supra.
\textsuperscript{113} Id. 11 (emphasis supplied).
of the Soviet working draft in the Commission on Human Rights was on the promotion of the right by colonial powers "responsible for the administration of Non-Self-Governing Territories." The guarantee of such a right for established nations against foreign intervention was not even mentioned. The Western European countries naturally resisted such a frontal assault on their colonial holdings, combined with lopsided duties imposed on them with regard to the right of self-determination. Instead, the colonial powers asserted that the right of self-determination should logically extend to a broader category of peoples, including identifiable groups having common ethnic or other backgrounds. France, for one, was unwilling to subscribe to the limited Soviet proposal because some states not responsible for non-self-governing territories "had among their populations heterogeneous elements that did not enjoy equal individual or collective rights with other national groups." 114 In reply to the Indian representative's assertion that the questions of minorities and self-determination should not be confused, the Belgian representative stated his belief that minorities properly defined should be able to aspire to self-government.116 A meaning given in this way to the right of self-determination, he believed, would put an end to such "arbitrary and opportunistic interpretations" as had been used by the Soviet Union in the colonial context.116

The early debates on the right of self-determination are thus replete with elements of irony. The Soviet Union argued for a limited right of self-determination so that the article would represent a resounding condemnation of colonialism. In later years a broader conception of the right might have been useful in fostering separatist movements with a Marxist orientation. The Western European countries desired a broader definition including the recog-


116 Id. (254th mtg.) 6, U.N. Doc. E/CN. 4/SR. 254. In rejoinder, Lebanon made the significant point that the Belgian representative had given the impression that the main purpose of the right to self-determination was to promote that right in relation to minorities within countries. That was the aspect of the question which most closely affected European countries . . . . nevertheless, the countries which had raised the question in the General Assembly were not European. It was therefore understandable that the pivot of the whole problem was not the position of minorities, but that of countries that had lost their independence as a result of aggression. The main issue was that of the Non-Self-Governing Territories . . . .

Id. 9.
nition of a right to self-determination for national minorities, so as to soften the anticolonial impact of the article. In fact, the recognition of such a right would subsequently have proven to be embarrassing for such Western nations as Spain, Great Britain and Canada, which have significant and vocal separatist movements.

In the end, neither the Western nor the Soviet position prevailed. Most of the states participating in the discussions of the Commission clearly disfavored a definition of peoples or conception of self-determination that reached national minorities of any sort.117 Furthermore, the Soviet proposal limiting the impact of article 1 to colonial situations yielded to an amendment by the United States requiring all states to promote the right of self-determination within extended territories which historically were not a part of the state promoting the right and to respect the maintenance of that right in other states.118 As so amended, article 1 was adopted by the Commission on Human Rights119 and sent to the General Assembly. There the Third Committee, following a discussion which reemphasized the roots of the right of self-determination in the colonial problem and the irrelevance of minorities and secessionist activities to the concept,120 reported out an article 1 with no substantive changes from the Commission's version and substantially as it appears today.

The interpretation of the right of peoples to self-determination as negating any right of minorities to secede is well-supported by commentators who have worked more from common sense than from the travaux préparatoires. Several have stressed the historical context of the development of the right, concluding that it was formulated in response to the territorial expansion of colonial

119 As reported by the Commission on Human Rights, article 1 read as follows:
   1. All peoples and all nations shall have the right of self-determination, namely, the right freely to determine their political, economic, social and cultural status.
   2. All States, including those having responsibility for the administration of Non-Self-Governing and Trust Territories and those controlling in whatsoever manner the exercise of that right by another people, shall promote the realization of that right in all their territories, and shall respect the maintenance of that right in other States . . . .
powers. Moreover, abstract analyses of the right to self-determination have led to the widely accepted proposition that self-determination also refers to "the right of the majority within a generally accepted political unit to the exercise of power..." In this view, "it is necessary to start with stable boundaries and to permit political change within them," for otherwise "all is in flux, and there is no constant factor at all; [and] to withdraw this proviso would encourage impermissible use of force across state boundaries, an outcome which the United Nations can hardly encourage..."  

It is apparent from the foregoing examination of the travaux, as well as of the predominant views of commentators, that the United States can have little policy objection to article 1 of the Covenant on Civil and Political Rights. The right of self-determination does not include the right of ethnic or other minorities to secede from recognized political units. The right was intended rather to preserve the sovereignty of existing states, whether currently dependent or independent. There is therefore no threat to the justifiable interest of the United States in self-preservation or national integrity.

B. The Covenant on Economic, Social and Cultural Rights and the Right to Periodic Holidays with Pay

Article 7 of the International Covenant on Economic, Social and Cultural Rights provides as follows:

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:

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

121 See, e.g., R. Higgins, supra note 99, at 90-106; V. van Dyke, supra note 94, at 86-87; Haight, supra note 96, at 105 (comments of Mr. Carey).
122 R. Higgins, supra note 99, at 105 (emphasis supplied).
123 Id. 104. See V. van Dyke, supra note 94, at 88.


124 Covenant on Economic, Social and Cultural Rights, supra note 8, art. 7, 21 U.N. GAOR, Supp. (No. 16) at 50.
1. The Right and States' Obligations

As pointed out previously, the obligations imposed on states-parties in relation to rights under the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights are qualitatively different. The former treaty guarantees immediate recognition and enforcement of civil and political rights, whereas the latter promises only that parties will take steps to achieve progressively the enumerated economic, social and cultural rights. Within the Covenant on Economic, Social and Cultural Rights itself, moreover, greater importance is attached to certain rights than to others, for in some articles it is stated that states-parties only recognize the right in question while in others states-parties both recognize and undertake to safeguard or achieve a right. The obligation of states to recognize rights under the Covenant is considerably less burdensome than the obligation imposed by an undertaking to safeguard those rights.

That this distinction is relevant to the article 7 right to paid holidays is made clear by the travaux préparatoires. Article 7 provides only that states-parties recognize the right to just and favorable work conditions, including paid holidays, but some representatives in the Commission on Human Rights would have preferred wording of a more binding quality. Thus, for example, the Soviet Union proposed that parties to the Covenant be placed under an obligation to "guarantee" to each worker the right to rest and leisure. The Soviet view was rejected, however, notably because it was feared that the imposition of too strong an obligation on states in this area would endanger the "freedom of trade unions and employers to bargain for the best terms they could get in the prevailing conditions."

Under article 7, therefore, parties to the Covenant

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125 See text accompanying notes 48-50 supra.
127 Compare art. 6 ("The States Parties ... recognize the right to work ... and will take appropriate steps to safeguard this right.") with art. 7 ("The States Parties ... recognize the right of everyone to the enjoyment of just and favourable conditions of work ... ").
simply recognize an abstract right to the described conditions and indicate at most that they will endeavor to achieve them.\textsuperscript{132} In view of the relatively light burden imposed on states-parties by article 7, the question arises whether the United States should ignore any policy-based objections to the right to paid holidays in deciding whether to ratify the Covenant on Economic, Social and Cultural Rights.

For several reasons, this course of action should be rejected. First, the United States is in as good a position as any nation to give full effect to the rights enumerated in the Covenant because these rights depend heavily on the economic development of the particular country. The United States would indeed be bound by the Covenant to do more than just recognize the right to paid holidays, because article 2 (1)\textsuperscript{133} of the Covenant seems to impose on states-parties an independent obligation\textsuperscript{134} to utilize up "to the maximum of its available resources" to achieve the full realization of the right. Furthermore, even if there is no such independent obligation under article 2 (1), ratification by the United States would represent a moral commitment to effectuate the rights in the Covenant. Finally, as discussed below,\textsuperscript{135} one of the policy objections to article 7 goes precisely to the very designation of "periodic holidays with pay" as a "right." Such objections cannot be dismissed simply because the burden on states-parties under article 7 may be light. The policy problems concerning the right to paid holidays must therefore be considered.

2. Policy Objections

a. Of Rights and Ideals

A basic objection, stemming more from philosophical than from practical considerations, relates to the designation of periodic

\textsuperscript{132} See V. van Dyke, \textit{supra} note 94, at 74. This description of states' obligations is applicable as well to the right to social security in article 9. \textit{See generally 7 U.N. ESCOR, CN. 4 (221st mtg.) 14-22, U.N. Doc. E/CN. 4/SR. 221 (1951).}

\textsuperscript{133} Article 2(1) reads as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, 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 . . .


\textsuperscript{134} See Fawcett, \textit{supra} note 126, at 129.

\textsuperscript{135} See text accompanying notes 136-43 infra.
holidays with pay as a right in any serious sense. In a larger context, this objection may be seen as part of a theoretical debate over the nature of fundamental rights of human beings. In the limited context of international law, the objection has focused on the practicability of immediate and effective implementation of various rights by states that recognize them as such. Maurice Cranston is the foremost proponent of the view that "a philosophically respectable concept of human rights has been muddied, obscured, and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category." According to Cranston, such "rights" as those to unemployment insurance and to paid holidays provided by the Covenant on Economic, Social and Cultural Rights differ fundamentally from the traditional rights to life, liberty and due process. The latter clearly can, and because of their nature should, be easily implemented by the state, which needs only to refrain from taking arbitrary action and to adopt certain procedural safeguards in order to assure those rights to its people. By contrast, it is impossible to translate economic, social and cultural "rights" into true positive rights, enjoyed by and fully assured to everyone, because factors beyond the effective control of the state, such as the uncertainty of economic conditions, are crucial to their achievement. Cranston asserts in conclusion that "[i]f it is impossible for a thing to be done, it is absurd to claim it as a right." Cranston's philosophical distinctions are not without practical significance. Too free a use of the term "right" in the Covenant on Economic, Social and Cultural Rights may cheapen the concept in other applications. By attaching the label "right" both to traditional human rights and to economic ideals, the Covenant may

136 See, e.g., Midgley, Natural Law and Fundamental Rights, 21 AM. J. JURIS. 144 (1976); Faust, Human Rights and the Ninth Amendment: A New Form of Guarantee, 60 CORNELL L.Q. 231 (1975); Comment, Toward Creating a Philosophy of Fundamental Human Rights, 6 COLUM. HUMAN RIGHTS L. REV. 473 (1974-75). Discussion of this larger debate is, of course, outside the scope of this Comment.


138 Id. 50.

139 Id. As support for this conclusion by way of analogy, Cranston points to the common law rule that a person could not be said to have a duty unless it were possible for him to perform its functions. Id. See V. Van Dyke, supra note 94, at 63.

Cranston also suggests that a test of "paramount importance" should be utilized in defining human rights. Under such a test, something can be said to be a human right only if depriving people of it amounts to a "grave affront to justice." Cranston, supra note 137, at 51-52.

140 By "ideal" is meant "something one can aim at, but cannot by definition immediately realize." Cranston, supra note 137, at 53.
foster the attitude on the part of some states that the traditional
economic rights are to be regarded in the same light as the new economic
rights; that is, as matters in the "twilight world of utopian aspiration." 141
The declaration in the Covenant of a right to periodic
holidays with pay is a prime example of the elevation of "ideals" to
the status of "rights." One commentator has observed: "[I]f the
definition of right is made to encompass not only what is im-
mediately realizable but [also] what it ought to be a goal of policy
to promote, then the naming of rights becomes a political matter
..." 142 The travaux préparatoires of the Covenant on Economic,
Social and Cultural Rights are full of examples of attempts by
various states to have employment provisions reflect certain political
viewpoints.143 In light of this fact, the United States should
scrutinize those provisions especially carefully before deciding on
ratification. If, after all, the Covenant represents nothing more
than a political "free-for-all," it is probably best avoided.

b. Inflexibility

It may be argued that the article 7 right to periodic holidays
with pay, as well as such provisions as the right to social security
in article 9, would introduce such inflexibility into the handling
of economic matters in the United States that the Covenant should
be rejected.144 This inflexibility could impede both governmental
and private responses to economic crises, because the rights in
question affect employment relations in the private sector at the
same time that they impose some degree of obligation on govern-
ments. Clearly, any such inability to deal flexibly with crisis situa-

141 Id. 52. After signing the Covenant on Civil and Political Rights and the
Covenant on Economic, Social and Cultural Rights at the United Nations, President
Carter himself lumped both Covenants together as "offering goals to be achieved"
in the way that the American Bill of Rights "set a lofty standard for liberty and
equality." N.Y. Times, Oct. 6, 1977, at A2, col. 5 (emphasis supplied). Of course,
to the extent that provisions of the Covenant on Civil and Political Rights trace our
Constitution and Bill of Rights, they are immediately achievable and indeed guar-
anteed in the United States. The more novel rights of the Covenant on Economic,
Social and Cultural Rights are ideals that are achievable sometime, if at all, in the
future.

142 V. VAN DYKE, supra note 94, at 63.

to be borne by the state); 7 U.N. ESCOR, CN. 4 (218th mtg.) 17, U.N. Doc.
E/CN. 4/SR. 218 (1951) (remarks of Mr. Kovalenko) (provision guaranteeing
economic rights would be in accord with constitutional provision of Ukrainian
S.S.R.).

144 Cf. Haight, supra note 96, at 101 (despite importance of work to the
individual, it is inappropriate to attempt to establish it as a legal norm by
international legislation).
tions is undesirable. Rather, a maximum degree of flexibility in the economic arena is to be sought after for both government and the private sector, as the circumstances which gave rise to a statutory right to social security in the United States so well demonstrate.\textsuperscript{145}

The drafters of the Covenant on Economic, Social and Cultural Rights anticipated the need for flexibility and arrived at formulations designed to preserve that value. Thus, although certain representatives argued for wording that would lock states-parties into a guarantee of particularly described rights,\textsuperscript{146} the preference was for more general descriptions with inherent flexibility.\textsuperscript{147} The concern about flexibility was especially pronounced in the debate over an article on social security, in which it was pointed out that "the concept of social security was continually developing and a rigid definition could only have a limiting effect."\textsuperscript{148} States were optima to be left to determine the system of social security best suited to their needs.\textsuperscript{149} The general phrasing of article 9 was therefore adopted.\textsuperscript{150} Similar concern for flexibility may have motivated the American representative to say, in another context, that it was "not appropriate to specify in a covenant on human rights the forms which international co-operation might take."\textsuperscript{151} This is the atmosphere in which article 7, with its "recognition" of the right to periodic paid holidays, was drafted. Therefore, objections to article 7 based on the inflexibility it imposes on government do not provide a reasonable ground for opposing the ratification of the Covenant. The right to paid holidays, and other

\begin{enumerate}
\item \textsuperscript{145} See \textit{79 Cong. Rec. 7783} (1935) (remarks of Sen. Norris); \textit{id. 13679-80} (remarks of Mr. Beiter).
\item \textsuperscript{146} See, e.g., \textit{7 U.N. ESCOR, CN. 4} (219th mtg.) 13, U.N. Doc. E/CN. 4/ SR. 219 (1951) (Soviet Union). The right to periodic paid holidays was given content by its proponents. The Uruguayan representative stated that he "wanted workers to be given consecutive holidays of not less than two weeks' duration at least once a year . . . ." \textit{11 U.N. GAOR, C. 3} (716th mtg.) 177, U.N. Doc. A/C. 3/ SR. 716 (1956).
\item \textsuperscript{147} See \textit{11 U.N. GAOR, C. 3} (713th mtg.) 158-59, U.N. Doc. A/C. 3/SR. 713 (1956) (remarks by Dutch and Chilean representatives). Article 2(1) of the Covenant, with its reference to "available resources," embodies this view to some extent. See note \textsuperscript{133} supra.
\item \textsuperscript{148} Id. See \textit{7 U.N. ESCOR, CN. 4} (221st mtg.) 17, U.N. Doc. E/CN. 4/ SR. 221 (1951) (remarks of Azmi Bey).
\item \textsuperscript{149} See \textit{79 Cong. Rec. 7783} (1935) (remarks of Sen. Norris).
\item \textsuperscript{150} Article 9 reads simply: "The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance." \textit{21 U.N. GAOR, Supp. (No. 16) at 50, U.N. Doc. A/6316} (1966).
\item \textsuperscript{151} Id. See \textit{7 U.N. ESCOR, CN. 4} (221st mtg.) 17, U.N. Doc. E/CN. 4/ SR. 221 (1951) (remarks of Azmi Bey).
\end{enumerate}
economic provisions in articles 6-9 of the Covenant, simply were not intended to set a rigid standard for states-parties to follow.

c. The Possibility of a Counterproductive Effect

Yet a third argument against the recognition of a right to periodic paid holidays is that, although formulated to advance the laudable goal of improving human welfare, it may ultimately prove counterproductive to that goal. The argument is that full enforcement and enjoyment of rights such as those embodied in article 7 require substantial investments of capital and resources. These resources are relatively scarce in countries with underdeveloped economies. A program of full enforcement might cause a diversion of the needed resources from development programs in order to secure immediate welfare goals, or increase unemployment as employers find the cost of labor too high under the circumstances. Either result is contrary to the general goals of economic welfare that formed the basis for the Covenant on Economic, Social and Cultural Rights in the first place, because both development and employment are economically beneficial. The right to paid holidays and similar entitlements imposing high costs for immediate welfare gains may therefore be counterproductive in the long run.152

Primary support for this view comes from domestic studies that show some correlation between the implementation of minimum wage laws and an increase in unemployment.153 Moreover, a study by the International Labour Office of the United Nations154 found that significant negative effects attached to the imposition of a minimum wage in developing countries. The study showed not only that adverse effects on employment can normally be expected when a minimum wage program is implemented,155 but also that there are negative effects on economic development due to (1) higher costs of production and higher prices; (2) diversion of


153 See, e.g., Legislative Reference Service (Lib. of Cong.), Impact of Minimum Wage Increases Enacted in 1961, 89th Cong., 2d Sess. 4-7 (1966); M. Zaidi, A Study of the Effects of the $1.25 Minimum Wage Under the Canada Labour (Standards) Code 73-85 (1970). A requirement of paid holidays, capable of imposing great costs on employers, is analogous to a minimum wage in terms of possible effects on employment, investment, and so on.

154 International Labour Office, supra note 152.

155 Id. 137-38. Cf. 7 U.N. ESCOR, CN. 4 (Communications Received) 5-6, U.N. Doc. E/CN. 4/CR. 20 (1951) (concerning proposal for covenant that “[t]he work of women . . . be strictly regulated in order to ensure their protection,” letter from Open Door International protests that such special measures “are prejudicial to those to whom they apply by actually lowering their possibilities of employment, salaries and economic position.”).
resources from investment to consumption; and (3) intensification of balance-of-payments difficulties, due to increased prices of products for sale abroad and increased demand for imports of consumer goods.\footnote{International Labour Office, supra note 152, at 136-37. See M. Friedman, Money and Economic Development 59 (1973). Cf. Commission of Inquiry into National Policy in International Economic Relations, International Economic Relations 33 (1934) (danger of unemployment and slowdown in exports in American industries operating at high comparative cost).} Possible factors to offset these negative effects were deemed to be generally lacking in developing countries.\footnote{Id. at 87-88.} 

A related point on the possible counterproductivity of rights listed in article 7 pertains to what may variously be called the "demonstration effect" or "revolution of rising expectations" produced by the recognition of such rights. W. D. Verwey has shown how, during the process of economic development in the Third World

we may sooner or later . . . expect set-backs in one or more economic sectors, both because of the sudden character of economic growth and the limited amount of resources. . . . Any deterioration then may provoke sharp reactions, since people can not afford a set-back. Inflation and depression create general unrest and may bring to the fore conflicts that in better times might have been evaded, because contending parties are then temporarily more satisfied. Political instability is the result.\footnote{W.D. Verwey, Economic Development, Peace, and International Law 87 (1972). As examples of this "setback effect", Verwey points to the wave of revolutions that swept colonial areas in the depression of 1929 and to his own studies showing a strong correlation between the frequency of military coups in Latin America and years of decline in both per capita GNP and value of world export. Id. 87-88.}

Verwey himself cites article 11 of the Covenant on Economic, Social and Cultural Rights as "a regulation of great polemological importance,"\footnote{Id. 89.} because the "continuous improvement of living conditions" there recognized as a right would entail a great risk of social instability upon setback.

Similarly, the simple recognition of the rights contained in article 7 or similar articles could by hypothesis result in increased social and political instability, even if particular states-parties were undergoing no actual current improvement subject to disappointing setback. To the extent that a declaration of the existence of such rights, accomplished by solemn adherence to the Covenant by all
nations great and small, increases worldwide expectations for improvement in standards of living and conditions of employment, surely the frustration of existing imperfect conditions would be intensified. In this sense, then, accession to the Covenant by a nation as important as the United States may actually increase the incidence of social unrest in the world. The foregoing discussion indicates that the possibility of a counterproductive effect resulting from provisions such as the right to paid holidays is not illusory. This possibility, rooted in the strain that article 7 type rights would place on the fragile economies of developing countries, has a bearing on American ratification of the Covenant because, to the extent that conditions falling short of general welfare goals in other countries produce or aggravate international tensions, the United States has a concrete interest in the establishment of realistic goals.

The possibility of counterproductive effect of the "periodic holidays with pay" provision thus seems great. Moreover, there is a real question as to whether the "right" to periodic paid holidays fits in with a proper philosophical concept of rights from an American policy viewpoint. These considerations combine to suggest that article 7 of the Covenant is unacceptable to the United States. Furthermore, to the extent that these criticisms can be made of other provisions of the Covenant (and it would appear from a casual review that this is likely) the entire Covenant becomes unattractive on policy grounds. With this in mind, it will be necessary to examine each provision of the Covenant before making a decision on ratification. Continued repetition of the problems raised by article 7 would justify rejection of the Covenant.

C. The Meaning of Racial Discrimination

Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination defines "racial discrimination" as

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160 See Luard, Conclusions in The International Protection of Human Rights 304, 316 (E. Luard ed. 1967) (desirable standards of achievement for nations, such as the right to social security, "may come to be regarded, because of the demonstration effect of western welfare states elsewhere and the revolution of expectations that results, as something like minima" to which all are entitled without condition).

161 It may be assumed, without altering this argument, that effective implementation of rights such as those established by article 7 would not adversely affect the economy of the United States.

162 See, e.g., W.D. Verwey, supra note 158, at 252-54 (1972); Fawcett, supra note 126, at 118.
any distinction, exclusion, restriction or preference based
on race, colour, descent, or national or ethnic origin which
has the purpose or effect of nullifying or impairing the
recognition, enjoyment or exercise, on an equal footing, of
human rights and fundamental freedoms in the political,
economic, social, cultural or any other field of public life.\textsuperscript{163}

Article 2 goes on to commit states-parties to "[undertaking] to
pursue by all appropriate means and without delay a policy of
eliminating racial discrimination in all its forms . . . ."\textsuperscript{164}

1. The Interest of the United States

There already exists a wideranging law designed to eradicate
racial discrimination in this country.\textsuperscript{165} The United States, how-
ever, still has an interest in the exact meaning of "racial discrim-
ination" as used in the Convention on Racial Discrimination, for
certain matters of American domestic policy embodied in the Civil
Rights Act of 1964 could be affected by it upon ratification. In
particular, if "racial discrimination" encompasses the actions of a
\textit{bona fide} private club in excluding certain persons on the basis of
race, then the Convention would operate to nullify 42 U.S.C.
\$ 2000a (e), which creates an exception to the equal access provi-
sions\textsuperscript{166} of the Act for any "private club or other establishment not
in fact open to the public."\textsuperscript{167}

The precise legislative rationale for the private club exception
is uncertain. On the one hand, the exception may have a two-
sided constitutional underpinning: first, that the first amendment
right of free association or the right of privacy requires such an
exception;\textsuperscript{168} and second, that the commerce power, which is gen-

\textsuperscript{163} 660 U.N.T.S. at 216.
\textsuperscript{164} Id. 216-18.
\textsuperscript{167} There is in turn an exception to the private club exception, which brings a
\textit{bona fide} private club within the mandate of the Act "to the extent that the
facilities of such establishment are made available to the customers or patrons of
an establishment" otherwise subject to the equal access provisions. 42 U.S.C.
\$ 2000a(e) (1970).
\textsuperscript{168} See H.R. REP. No. 914, 88th Cong., 2d Sess. 9, \textit{reprinted in} [1964] U.S.
CODE CONG. & AD. NEWS 2391, 2495 (views of Rep. McCulloch, et al.). \textit{See also}
NAACP v. Alabama, 357 U.S. 449, 460-61 (1958) (freedom of association);
& AD. NEWS 2355, 2363-64, \textit{quoting} Munn v. Illinois, 94 U.S. 113, 126 (1877)
not applicable to truly private establishments that presumably do not figure in people's interstate travel plans. On the other hand, some members of Congress may have felt the private club exception to be wise as a matter of policy, under a view that strictly private places should be able to manage their affairs without governmental interference even though this may not be constitutionally required. In any case, good reasons for the exception exist. A treaty that would abolish, upon implementation, the private club exception in American law should therefore be rejected.

This concern is not relieved by the terms of article 1, which speaks of racial discrimination as action impairing the enjoyment of certain rights and freedoms in "any . . . field of public life." Although initially this formulation seems to embody some sort of state action requirement, it is evident from the travaux préparatoires that no such limited scope for the definition of racial discrimination was intended. Moreover, more than one commentator has implied that the Convention's prohibitions reach the activities of private clubs. There is also evidence that at least one present state-party to the Convention construes it to cover such clubs. In light of this uncertainty regarding the full scope of

(“[w]hen, therefore, one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in the use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.”).

The fact that there are some bona fide private clubs which practice racially exclusionary policies should not contribute, as such, to the "nagging uncertainty of locating a decent place to eat or sleep" which is so inhibitive of the free flow of interstate commerce. See H.R. Rep. No. 914 (Part 2), 88th Cong., 1st Sess. 9, reprinted in [1964] U.S. Code Cong. & Ad. News 2391, 2495-2501 (views of Rep. McCulloch). It is, rather, the inability to gain access to public accommodations (surely outnumbering truly private clubs) which would create such "commercially-destructive" uncertainty.

Senator Humphrey, during the debates over Title II, expressed his judgment that "there should [not] be a Federal law which provides that a private club should be managed this way, or managed that way." 110 Cong. Rec. 6008, 6534 (1964).

See text accompanying notes 176-78 infra.


In 1971, Panama complained to the Committee on the Elimination of Racial Discrimination that the United States was following discriminatory policies in the Canal Zone. It was alleged in particular that the Panamanians' "right of access to any place or service" was being violated, and that "[s]chools, shops, cinemas, hotels, clubs, services and so on, were segregated." 26 U.N. GAOR, Supp. (No. 18) 14, U.N. Doc. A/8418 (1971) (emphasis supplied). The Committee decided that it was not competent to look into the complaint, because the United States was not a party to the Convention on Racial Discrimination. The Committee did, however,
forbidden racial discrimination under the Convention, it is necessary to examine the background of the Convention in order to determine finally whether it presents a conflict with American policy in this regard.

2. The Travaux and Other Sources

The use of the term "public life" in the definition of racial discrimination does not mean that there must be action by the state, direct or indirect, in order for the provisions of the Convention on Racial Discrimination to come into play. The definition, as contemplated by various bodies of the U.N., goes beyond the American constitutional idea of state action. In initially calling upon the Economic and Social Council to draft a convention on the subject, the Third Committee of the General Assembly cited resolution 1510, in which the Assembly had condemned "all manifestations and practices of racial, religious and national hatred in the political, economic, social, educational and cultural spheres of the life of society." 176 Although this sort of formulation, centering on manifestations of racial discrimination or superiority, was not embodied in the Convention as ultimately adopted, article 2(1)(d) 177 demonstrates that the Convention reaches not only state action or inaction but also "discrimination by any person, group or organization." The ostensibly restrictive phrase "public life" should not then be construed so as to mean state action; it would appear rather to be "a generic summation of all rights protectable by law, designed to be all inclusive in reach." 178

There still remains the question whether the definition of racial discrimination is so broad as to encompass the action of a bona fide private club in excluding individuals on the basis of race.

officially take note of the information that "certain forms of racial discrimination have been and are being systematically practised" in the Canal Zone, and referred the matter to the General Assembly. Id. 18.


177 Article 2(1)(d) reads as follows: "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization." 660 U.N.T.S. at 218 (emphasis supplied).

178 McDougal, Lasswell & Chen, supra note 174, at 1067. See also E.W. ViERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW 108 (1973) (Convention on Racial Discrimination "is restricted, according to its purpose, to race and related grounds, but covers in principle the entire legal order of a State-party").
Some commentators, pointing to the nature of certain rights guaranteed to all by the Convention regardless of race, have stressed how completely the Convention was intended to affect interpersonal relationships. Article 5, for example, prohibits discrimination in the enjoyment of assorted civil and economic rights, including the "right to marriage and choice of spouse," the "right to inherit," and the "right to equal participation in cultural activities." Combined with the state's obligation under 2(l)(d) to prohibit racial discrimination "by any persons, group or organization," these provisions seemingly entail extensive interference by the state with purely private relationships. From this it could be inferred that, under the Convention, states can and should forbid discrimination in such settings as bona fide private clubs.

This argument ignores, however, several factors that are crucial to a proper delineation of the scope of the Convention. First, article 5(f) provides for nondiscriminatory enjoyment of the "right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks." Certainly the specific mention of a prohibition against racial discrimination in places open to the public creates a strong presumption against the idea that any such prohibition was intended for purely private establishments left unmentioned in the Convention. The doctrine expressio unius est exclusio alterius is often invoked in statutory interpretation, and the Convention drafters could easily have avoided misinterpretation stemming from

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180 660 U.N.T.S. at 220, 222.

181 See Elkind, supra note 174, at 330-32. Elkind proposes a "life chances" test for discerning whether there is impermissible racial discrimination in a society. The test would include such questions as: "Are public facilities available to all and unsegregated? Are private clubs and organizations?" Id. 330 (emphasis supplied).

182 660 U.N.T.S. at 222 (emphasis supplied). This provision is comparable in effect to the general equal access sections in Title II of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000a(a) & (b) (1970).

183 See, e.g., Shurtleff v. United States, 189 U.S. 311, 316 (1903).

The representative of Italy, at a drafting session of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, made an interesting observation concerning the reach of the Convention:

[It] would be useful to specify the particular aspects of social life in which the State might be called upon to intervene in order to prevent discrimination. One should envisage . . . employment, education, personal safety, enjoyment of property, access to the courts, access to facilities intended for use by the public, etc.

that doctrine by a simple addition of words if their intent had been to include non-public places within the ban.

Second, the racial discrimination banned by article 2(1)(d) carries an inbuilt limitation to areas of "public life." Although that term does not import a state action requirement, it must mean something that is logically to be distinguished from a private sphere of life. The proper distinction should be precisely the one embodied in the civil rights law of the United States: "private" property may be regulated by the government only "when used in a manner to make it of public consequence, and to affect the community at large." In the United States, privately-owned accommodations for eating or lodging meet this test if opened to the public, but truly private clubs do not. The personal rights enumerated in article 5 of the Convention do not by their nature contradict this interpretation of the public-life/private-life distinction.

Finally, the travaux préparatoires seem to negate any implication that the drafters intended to prohibit racially exclusive private clubs; indeed, the travaux tend to support a public-life/private-life distinction such as that proposed above. In the early discussions

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185 See text accompanying notes 176-78 supra.
186 Cf. Advisory Opinion on Competence of the General Assembly Regarding Admission to the United Nations, [1950] I.C.J. 4, 8 (in treaty interpretation, the natural and ordinary meaning of words in their context is controlling unless the result is ambiguous or unreasonable). But see Elkind, supra note 60, at 317, which suggests that the term "public life," initially proposed by the Soviet Union, was not meant to be restrictive of the definition of racial discrimination. Because the state controls so many aspects of life in a socialist economy, there would from the Soviet viewpoint be little restriction on the reach of the Convention under such a definition. The fact remains, however, that the "public life" phrasing was adopted with the concurrence of many non-socialist nations and so it cannot be said that the term as adopted admits of no opposing concept of "private life."
189 Although the article 5 rights undoubtedly concern matters that are personal in nature, it cannot seriously be contended that they were meant to affect all private affairs that formerly were thought to be free from state interference. Thus, it is hard to believe that the prohibition against racial discrimination in the enjoyment of the "right to marriage and choice of spouse" means that race is an impermissible factor in making personal decisions on marriage. See Elkind, supra note 174, at 320. Rather, this particular provision of article 5 should be taken to mean that the law itself is to remain wholly neutral in the area of marriage and choice of spouse. Cf. Shelley v. Kraemer, 334 U.S. 1 (1948) (racially-restrictive covenants may not be enforced by courts pursuant to state common law policy).
190 See text accompanying notes 186-89 supra.
of a subcommittee of the Commission on Human Rights, for example, the representative of India stated that "[w]hile it might be difficult to wipe out racial discrimination in private relationships, States must be obliged [under the proposed Convention] to prevent it in public and semi-public activities." The Italian representative too, although taking "an uncompromising stand forbidding States to commit any act tainted with discrimination," favored a more flexible approach where private individuals were concerned.

One exchange in particular reveals the understanding of the drafters concerning the exact scope of "racial discrimination" in the Convention. At one point, the representative of the United States told of

one field in which he was profoundly convinced the State should not intervene, and that was the private lives of individuals. . . . [O]nly the moral persuasion of the government, the influence of the norms set forth in the [Universal Declaration of Human Rights] and the education of public opinion should be relied on in the attempt to abolish discrimination in that field . . . .

The representative of the Phillipines noted his sympathy with the American's ideas, but indicated that any fears along those lines were baseless because the "private lives of individuals" were beyond the definition of racial discrimination already adopted in the Convention.

Although the point is not totally free from doubt, it appears from the above considerations that the prohibitions of the Convention on Racial Discrimination do not cover the racially-exclusive policies of bona fide private clubs. The drafters' intent as revealed by the travaux préparatoires, the exclusive mention in article 5(f) of places open "for use by the general public," and the need to give some real meaning to the term "public life" in article 1, all combine to support this conclusion. There is therefore likely to be


193 Id. 13 (remarks of Mr. Abram).

194 Id. (remarks of Mr. Ingles). The definition to which the Filipino representative was referring was substantially similar to the present definition in article 1. See 20 U.N. ESCOR, CN. 4 (Report of Sub. 2) 21-23, U.N. Doc. E/CN. 4/873 (1964).
no conflict in this regard between the Convention and the policy embodied in the private club exception to Title II of the Civil Rights Act of 1964.

D. The Meaning of Genocide

Under article I of the Convention on the Prevention and Punishment of the Crime of Genocide, genocide is declared to be a crime under international law which states-parties "undertake to prevent and to punish." Article II defines genocide as any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.\footnote{Convention on Genocide, supra note 10, 78 U.N.T.S. at 280.}

The Convention on Genocide, being as focused in subject matter as it is, offers the fewest grounds of any of the international human rights treaties for policy objections. In the years immediately after World War II, the United Nations urgently perceived the need to "liberate mankind from such an odious scourge"\footnote{Id. Preamble ¶3, 78 U.N.T.S. at 278.} as was represented by Hitler's "Final Solution":

Genocide is a denial of the right of existence of entire human groups . . . , such denial . . . shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these groups, and is contrary to moral law and the spirit and aims of the United Nations.\footnote{4 U.N. ESCOR, Note by Secretary-General I, U.N. Doc. E/330 (1947) (quoting draft resolution of Sixth Committee adopted Dec. 11, 1946). See Advisory Opinion on Reservations to the Convention on Genocide, [1951] I.C.J. 15, 23.}
Accordingly, the General Assembly called for the drafting of a convention to prevent the recurrence of genocide on any scale,\(^{198}\) and in fact one was adopted within a relatively short period of time. Despite these laudable purposes, the Convention has been criticized to some extent for the vagueness of its definition of genocide and for the resultant possibility for political abuse.\(^{199}\) Moreover, it has been objected that the drafters, far from holding to a narrow view of the crime as represented by Hitler’s systematic massacre, “saw fit to write into the Genocide Convention ‘civil rights’ ideas, such as inflicting ‘mental harm’ on a group ‘in whole or in part.’”\(^{200}\)

In this connection, the United States has a general interest in treaty wording that is reasonably clear and in forestalling facile claims by domestic dissidents or foreign powers that it has committed crimes under international law. These interests are not, however, unduly impinged upon by the Convention on Genocide. The article II definition of genocide is not overly vague, at least no more so than many other treaties and statutes that are currently in force in the United States without great controversy. The definition uses terms such as “intent,” “killing” and “serious bodily harm,” which for the most part have common meaning from experience or logic.\(^{201}\) Furthermore, although any group or country could accuse the United States of violations under the Convention to further their own political ends, such accusations are not likely to be taken seriously by the world community because of the probable lack of any intent on the part of the United States to destroy human groups as such. Finally, undue significance should not be attached to the term “mental harm” in the article II definition. Its meaning could be appropriately refined by reservation\(^{202}\) upon American accession to the Convention. Fears concerning the Convention’s “civil rights” connotations are further allayed by the fact that the drafters rejected a notion of “cultural genocide,” such as


\(^{199}\) See V. Van Dyke, supra note 94, at 11–12.


\(^{201}\) With respect to terms that are vague by any standard, an understanding may be used to explain their meaning from the viewpoint of the United States. See text accompanying notes 213–15 infra.

\(^{202}\) See text accompanying note 216 infra.
the forced closing down of museums or newspapers of a particular cultural group, in arriving at the Convention in its final form.

Ratification of the Convention on Genocide is supported by basic moral considerations that call for the prevention of a second Holocaust. The asserted interests of the United States in refraining from ratification are insignificant. No policy objection should therefore keep the United States from becoming at long last a party to the Convention.

IV. THE USE OF RESERVATIONS AND UNDERSTANDINGS

Assuming that the United States desires to ratify one or more of the human rights treaties, any lingering objections or ambiguities of a relatively minor nature need not stand in the way. It is well recognized in treaty law that a state may, by the use of a reservation, accede to a treaty but only on the condition that a particular section of that treaty shall not apply to the reserving state or shall apply only in certain circumstances. Although the old rule was that a state could not actually become a treaty party unless its reservation was unanimously accepted by other parties, that rule has been altered significantly in the context of multilateral human rights treaties by the Advisory Opinion on Reservations to the Convention on Genocide. In that opinion, the International Court of Justice held that, because the Convention on Genocide was intended to be "universal in scope" with as many states adopting it as possible, objections to a reservation should not prevent the reserving state from becoming a party vis-à-vis non-objecting states-parties, provided that the reservation was "compatible with the object and purpose of the Convention." This rule is applicable as well to the other human rights treaties, because there is ample

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205 Leech, supra note 28, at 950.


207 Id. 24.

208 Id. 29. This is the rule embodied in article 19(c) of the Vienna Convention on the Law of Treaties, which is the product of the General Assembly's invitation to the International Law Commission to deal in treaty form with the various problems of interpretation of international agreements. U.N. Doc. A/CONF. 39/27 at 289 (opened for signature May 23, 1969). The Vienna Convention is not yet in force and the United States is not a signatory to it.
evidence of the drafters' intent to secure the widest possible adherence to them.\textsuperscript{209}

Reservations have already been used extensively in relation to the human rights treaties. Upon acceding to the Convention on Racial Discrimination, for example, the Soviet Union refused to recognize the force of article 22, which gives the International Court of Justice compulsory jurisdiction over disputes between states-parties.\textsuperscript{210} Similarly, the United Kingdom, Austria and France among others have made reservations concerning the degree to which freedoms of opinion and expression may be suppressed under the Convention on Racial Discrimination.\textsuperscript{211} The United States too, on signing the Convention on Racial Discrimination in 1966, warned that the following reservation would be essential to full ratification:

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States \ldots \textsuperscript{212}

Clarification of the meaning of particular sections of a treaty can also be accomplished by a unilateral statement of understanding on the part of a state that is acceding to the treaty. Such an understanding differs from a reservation in that an understanding is merely an interpretative statement that lends greater precision to the section in question, without changing its legal effect; a reservation is actually intended to alter the legal effect of a section vis-à-
vis the reserving state.\textsuperscript{213} An understanding in this sense is not subject to formal objection by other states that may render it inoperative, although a particular state may find the interpretation embodied in an understanding to be so objectionable that it will refuse to ratify the treaty or will make a reservation contradicting the understanding.\textsuperscript{214} Furthermore, an understanding as such does not have a binding international legal effect; rather, it preserves the position of the ratifying state in the event that actual interpretation is later called for in an international adjudication.\textsuperscript{215}

Reservations and understandings could of course be useful in resolving policy objections to a treaty, as well as in addressing constitutional problems. Thus, taking again the treaty sections focused on in part III of this Comment, the following statements, adopted by the Senate in conjunction with the ratification of the treaties, might be advisable in order to clarify both the American interpretation of the treaties and the conditions of ratification by this country:

Covenant on Civil and Political Right: “Nothing in this Covenant shall be taken to mean that the United States recognizes or will grant a right of self-determination to national, ethnic or other minorities located within the national boundaries of the United States. The right of the United States to protect its integrity as a national, political unit is preserved.”

Convention on Racial Discrimination: “The provisions of this Convention requiring states-parties to take steps to eliminate racial discrimination in private relations shall in no case be deemed to reach private clubs or other establishments not in fact open to the public, which are within the scope of 42 U.S.C. § 2000a (e).”

Convention on Genocide: “This ratification is made with the understanding that ‘mental harm’ in article II (b) of the Convention is to mean ‘permanent impairment of mental faculties.’”\textsuperscript{216}

These proposals are more in the nature of understandings than of reservations, because they merely clarify particular treaty provisions in a manner consistent with the travaux préparatoires and do not purport to alter the legal effect of those provisions. As understandings, therefore, they cannot be negated simply by the objec-

\textsuperscript{213} \textit{Restatement}, \textit{supra} note 204, § 124, Comment c. \textit{See} Bitker, \textit{supra} note 20, at 287-88.

\textsuperscript{214} \textit{Restatement}, \textit{supra} note 204, § 124, Comment c.

\textsuperscript{215} \textit{See id.} For the interpretative role that a unilateral statement of understanding may play internationally, see \textit{id.} § 147(1)(e).

\textsuperscript{216} This was the reservation recommended by the Nixon Administration when it tried, briefly and unsuccessfully, to have the Convention on Genocide ratified by the Senate in 1970-71. \textit{L. Sohn} & \textit{T. Buergenthal}, \textit{supra} note 200, at 971-72.
tions of other states-parties to the treaties. Even assuming that the proposals are to be judged as reservations, there is no reason why they would be rejected as "incompatible with the object and purpose" of the treaties, thereby rendering ineffective any American ratification based on them. They seem well within the range of reservation so far displayed and tolerated in practice.

The first and third statements merely spell out the meaning of certain treaty terms as understood by the United States and these meanings are not clearly inconsistent with the drafters' intentions. Moreover, though the proposed statement accompanying the Convention on Racial Discrimination would have more far-reaching, substantive effect, the Convention is the only human rights treaty that has a provision actually dealing with reservations; the two-thirds majority required to reject a reservation under its article 20 is "a most unlikely possibility in a world in which any formal protest against any reservation to any treaty is a rare event."

As for the Covenant on Economic, Social and Cultural Rights, a proposal for reservation applicable to its article 7 is not made here precisely because of the compatibility standard used to judge the validity of such reservations. As noted above, the policy arguments against the right to periodic holidays with pay concern the wisdom of recognizing such a right at all, and are relevant to many other provisions of the Covenant. Surely a reservation by the United States that purported to deny the existence or binding effect of such economic rights would have to be rejected as clearly incompatible with the purposes of a treaty designed primarily to secure those rights. Rather than trying to ratify behind the

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217 See text accompanying note 214 supra.


219 See text accompanying notes 210-11 supra.


221 See text accompanying notes 136-43, 152-62 supra.

222 There is one other doctrine of the law of treaties that is possibly relevant to the question whether the United States should ratify the Covenant on Economic, Social and Cultural Rights. It is generally said that a fundamental change in the circumstances that surrounded the making of a treaty may be adequate grounds for terminating, withdrawing from or suspending a treaty. E.g., R. Hecoms, supra note 99, at 344-46; Leech, supra note 28, at 988. The Vienna Convention on the Law of Treaties codifies and refines this rule, known as rebus sic stantibus, in article 62, which provides that the doctrine applies only if (1) the change of circumstances was not foreseen by the parties; (2) the existence of those circumstances was an essential basis for the consent of the parties to the treaty; (3) the change results in a radical transformation of national obligations under the treaty; and (4) the change was not caused by a breach on the part of the party invoking
shield of an ultimately ineffective reservation, the United States should study the objections to various provisions of the Covenant on Economic, Social and Cultural Rights that are suggested above and should ratify or not depending on how the policy considerations balance out in the end.

V. CONCLUSION

Against the background of a new emphasis placed by the Carter Administration on human rights in American foreign policy, this Comment has considered the advisability of American ratification of four international human rights treaties. In particular, one provision from each of the four treaties has been assessed in the light of possible policy objections. It has been concluded that the United States has no valid objection on policy grounds to the provisions singled out in the Covenant on Civil and Political Rights and the Conventions on Racial Discrimination and Genocide. The right of self-determination contained in the first treaty has been shown to offer no threat to the United States' interest in its national integrity. The definition of racial discrimination contained in the second treaty is not so broad that it would require elimination of the private club exception to Title II of the Civil Rights Act of 1964. The description of forbidden genocide in the third treaty is specific enough, and the disavowal of a notion of cultural genocide clear enough, that the United States need not fear an intolerable amount of politically motivated abuse of the treaty's provisions. In any event, appropriate reservations or understandings in connection with each of the three treaties could safeguard American interests in this regard.

The Covenant on Economic, Social and Cultural Rights presents a different case. There is a substantial question as to whether the concept of rights embodied in this treaty is appropriate. The

the doctrine. U.N. Doc. A/CONF. 39/27, art. 62 (opened for signature May 23, 1969). It could be argued that the United States may safely ratify the Covenant on Economic, Social and Cultural Rights and, in the event of some economic crisis that may render its obligations unduly burdensome, rely on rebus sic stantibus as a means of escaping those obligations. This putative safety valve is unsatisfactory as a basis for ratifying the Covenant, for two reasons. First, it does not answer the basic objections to characterizing many of the Covenant's provisions as rights in the first place. See text accompanying notes 162-63 supra. Second, the evidence is that rebus sic stantibus has never successfully been invoked as grounds for withdrawing from a treaty, and the emphasis is on a highly restrictive application of the concept. See R. Higgins, supra note 99, at 344; Leech, supra note 28, at 988; Lissitzyn, Treaties and Changed Circumstances (Rebus Sic Stantibus), 61 AM. J. INT'L L. 895 (1967); Reports of the International Law Commission, 61 AM. J. INT'L L. 248, 428-29 (1967). The protection afforded by the doctrine may therefore be illusory.
recognition of such rights might do irreparable damage to a philosophically respectable concept of rights, endangering the full enforcement of more fundamental and attainable rights. An attempt to realize many of the rights recognized in the Covenant might also be counterproductive to economic development. What is needed in any ratification hearing is an in-depth assessment of these various considerations. Given the similarity of many of the treaty provisions to the right to paid holidays in article 7, however, it is suggested that this Covenant is the least attractive candidate for ratification.

This Comment has not attempted a comprehensive study of the policy arguments against the human rights treaties. Nor is the serious attention given to selected objections meant to suggest that the United States should retreat from international human rights concerns into a neo-isolationism that is inappropriate in an increasingly interdependent world. Rather, it is hoped that the analysis undertaken here will be a helpful beginning to the full assessment that must take place before sensible ratification or sensible rejection can occur.