Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para. 2

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I. Introduction

The International Covenant on Civil and Political Rights of 1966 (ICCPR) contains a comprehensive catalogue of civil and political rights which the States parties pursuant to its article 2 para. 1 have accepted to "respect and to ensure".[1] The enjoyment of these rights depends on the implementation measures taken by the States parties. In fact, domestic implementation is the primary mechanism envisaged by the Covenant to give effect to the rights of individuals that it enshrines while international implementation, that is the reporting system[2] as well as the inter-state[3] and individual complaint system,[4] is set up as a secondary means of implementation providing for a control system.[5]

The way States parties need to implement the Covenant domestically is outlined in article 2 para. 2.[6] This article has given rise to a num-

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1 International Covenant on Civil and Political Rights, 16 December 1966, UNTS Vol. 999 No. 14668, *ILM* 6 (1967), 368 et seq., entered into force 23 March 1976, (hereinafter ICCPR or Covenant).

2 Pursuant to article 40 of the ICCPR the States parties to the Covenant undertake to submit periodic reports on the measures adopted which give effect to the Covenant rights and on the progress made in the enjoyment of those rights.

3 Pursuant to article 41 of the ICCPR a State party to the Covenant may declare that it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State party claims that another State party is not fulfilling its obligations under the Covenant.

4 The individual complaint system is set up by the Optional Protocol. Pursuant to article 1 of this Protocol, States parties to it recognize the competence of the Committee to receive and consider communications from individuals claiming to be victims of a violation of any of the Covenant rights. Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, UNTS Vol. 999 No. 14668, entered into force 23 March 1976, (hereinafter Optional Protocol).

5 Pursuant to arts 2 and 5 para. 2 lit.(b) of the Optional Protocol domestic remedies need to be exhausted before an individual may submit a communication to the Human Rights Committee.

6 Article 2 para. 2 provides:
"Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

ber of questions as to when and to what extent the Covenant requires a particular act of implementation. The starting point for answering this question is that, considering the objective of the Covenant, the rights of individuals (and the corresponding obligation of the States parties) are to become reality in law and practice. The challenge faced when implementing the Covenant becomes apparent if one considers the vast differences between the legal systems of the States parties to the Covenant throughout the world. The Covenant provides standards envisaged as a common denominator with which the legal systems of the States parties need to be harmonized.

A dominant issue as to the implementation of the Covenant is whether it creates only duties of result, as the duty to refrain from human rights violations, or also duties of conduct, as the enactment of specific safeguards against violations.[7] The ILC in its Draft Articles on State Responsibility, adopted on first reading, in arts 20 and 21, distinguished between "an international obligation requiring the adoption of a particular course of conduct" and "an international obligation requiring the achievement of a specified result".[8] According to the ILC "[t]here is a breach by a State of an international obligation requiring it to achieve, *by means of its own choice*, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation."[9] (emphasis added). Hence, while an obligation of result leaves open the means to be adopted to achieve the mandatory result, an obligation of conduct determines specifically the action through which

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7 For a detailed account of this classification of international duties, see B.G. Ramcharan, "The Emerging Jurisprudence of the Human Rights Committee", *Dalhousie Law Journal* 6 (1980), 7 et seq., (14 – 20).

8 Arts 20, 21 of the Draft Articles on State Responsibility adopted on first reading at its 48th Sess. 1996, ILC Report 1996, in: GAOR 51st Sess., Suppl. 10, Doc. A/51/10 Chapter 3, State Responsibility. Recently, these articles were deleted by the drafting Committee of the ILC on second reading. See draft articles provisionally adopted by the Drafting Committee on second reading Doc. A/CN.4/L.600. For the discussion of the ILC on the deletion of arts 20, 21 see Report of the ILC, in: GAOR 54th Sess., Suppl. 10, Doc. A/54/10, paras 132-186. Cf also Wolfrum who distinguishes a third category, namely goal-oriented obligations. R. Wolfrum, "Means of ensuring compliance with and enforcement of international environmental law", *RdC* 272 (1998), 25 et seq., (34).

9 Article 21, note 208, para. 1, ILC Report, see above.

a result shall be achieved.[10] Most of the Covenant provisions, however, contain substantive rights of individuals without spelling out a particular course of conduct and thus seem to constitute obligations of result.[11] This does not put into question that states are under an obligation to provide for an implementation of the said rights and that this implementation has to be effective.[12] Article 2 para. 2 explicitly mandates the adoption of legislative or other measures to give effect to the rights recognized. However, the required conduct, that is the adoption of "legislative or other measures" does not seem to be a particular one, whereas the aforementioned draft article 20 of the ILC speaks of a "particular course of conduct". Some commentators have argued that article 2 para. 2 of the Covenant speaking of "the necessary steps, in accordance with its constitutional processes" leaves the States parties so much leeway in the implementation of the Covenant that it hardly differs from a mere obligation of result.[13] Taking the different constitutional processes of States parties into consideration article 2 para. 2 seems to leave the choice how to implement the Covenant to the States parties as long as

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10 For example, article 20 para. 1 of the Covenant obliges the States parties to prohibit any propaganda for war "by law". While the overall goal is to preserve freedom, a particular course of conduct, that is the adoption of legislation prohibiting propaganda for war, is mandated. The mere non-adoption of this course of conduct is a breach of the international obligation irrespective of the consequences of the non-adoption of legislation. The obligation is breached even if no specific instance of war propaganda has been found.

11 For example, article 22 para. 1 of the Covenant sets out: "Everyone shall have the right to freedom of association with others, including the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests." Pursuant to article 12 para. 2 "[e]veryone shall be free to leave any country, including his own". These provisions do not spell out any particular measures how to implement the respective rights.

12 According to Schachter, article 2 para. 1 establishes an obligation of result. See in this respect O. Schachter, " The Obligation to implement the Covenant in Domestic Law", in: L. Henkin (ed.), *The International Bill of Rights*, 1981, 311 et seq., (311); see also Ramcharan, see note 7, 11 et seq.; F. Capotorti, "The International Measures of Implementation including the Covenants on Human Rights"; in: A. Eide/ A. Schou (eds), *International Protection of Human Rights*, 1968, 311 et seq., (312).

13 M. Nowak, *UN Covenant on Civil and Political Rights*, CCPR Commentary, 1993, 54.

the Covenant rights become effective.[14] Accordingly, the ILC in 1977 named this provision as an example for an obligation of result, which does not require recourse to a specified means by indicating a preference for one means or another.[15]

Meanwhile there seems to be a trend towards the assumption of obligations of conduct apart from the obligations of result in the area of human rights. While the ILC treated article 2 para. 1 of the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) in 1977, which is similar to article 2 para. 2 of the ICCPR, as an obligation of result, members of the Commission recently pointed out that this provision "*contain[s] a delicate mix of obligations of conduct and obligations of result.*"[16] Others maintained that the trend to incorporate human rights into domestic legislation, the need for international regulation of certain human rights offences, the growing global acceptance of certain democratic values and the joint efforts to promote

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14 According to O'Flaherty it is the prerogative of each State party to choose its own manner of incorporation or implementation. M. O'Flaherty, "The Reporting Obligation under Article 40 of the International Covenant on Civil and Political Rights: Lessons to be learned from consideration by the Human Rights Committee of Ireland's First Report", *HRQ* 16 (1994), 515 et seq., (534).

15 The ILC explained: "There can be no doubt that [in the case of Article 2 (2) of the Covenant] legislative means are expressly indicated at the international level as being the most normal and appropriate for achieving the purpose of the Covenant in question, though recourse to such means is not specifically or exclusively required. The State is free to employ some other means if it so desires, provided that those means also enable it to achieve in concrete the full realization of the individual rights provided for by the Covenant". ILC Report on its 29th Sess., *ILCYB* 1977, Vol. 2, Part Two, 21.

16 Article 2 para. 1 of the International Covenant on Economic, Social and Cultural Rights reads:
"Each State Party to the present Covenant undertakes to take steps ... with a view to achieving progressively the full realization of the rights recognized in the present Covenant *by all appropriate means, including particularly the adoption of legislative measures.*" (emphasis added), 16 December 1966, UNTS Vol. 993 No. 14531, *ILM* 6 (1967), 360 et seq., entered into force 3 January 1976, (hereinafter ICESCR). For the earlier qualification of article 2 para. 1, cf. ILC Report on its 29th Session, *ILCYB* 1977, Vol. 2, Part Two, 20-21, para. 8. For the new qualification by some ILC members, cf. Report of the ILC, in: GAOR 54th Sess., Suppl. 10, Doc. A/54/10, para. 152.

the rule of law had greatly restricted the margin in which states were free to choose the means of fulfilling their international obligations.[17] It has to be kept in mind that article 2 para. 1 ICCPR obliges States parties "to respect and to ensure". It imposes an independent obligation apart from the respective rights.[18] Opsahl refers to it as a "double duty of implementation".[19] The implementation of the Covenant requires that the rights are not violated (respected) and that they are ensured. The latter obligation requires active measures of implementation apart from the negative duty of forbearance. The Human Rights Committee over the years has specified and elaborated a variety of the measures to be adopted by the States parties to the ICCPR. As will be explained below, nowadays, its is no longer enough not to infringe upon the rights protected but it is required to guarantee them by means of a specified conduct.

As to the form in which the Covenant needs to be implemented the question which will be addressed first is the one of immediate obligation. To understand this four different mechanisms are to be distinguished. An immediate obligation means a duty to implement the obligations undertaken under a treaty upon becoming a State party. Differently, the term directly applicable is used if a norm of international law can be applied by domestic courts. If this is the case by virtue of domestic law the norm is described as "self-executing". This term is to be distinguished from the term "self-operative" which is used to describe a norm which, as a matter of international law, does not require any further steps.

Given the wording of article 2 para. 2 of the Covenant "... each State Party to the present Covenant undertakes to take the necessary steps..." and the fact that the catalogue of civil and political rights of the Covenant is so comprehensive that virtually no State party can claim to be in full compliance with the Covenant the question arises whether the Covenant creates immediate obligations of implementation or whether it merely envisages a progressive implementation process.

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17 Report of the ILC, in: GAOR 54th Sess., Suppl. 10, Doc. A/54/10, para. 160.

18 This is why the Human Rights Committee, if it finds a violation of a Covenant right also cites article 2 as a provision violated.

19 T. Opsahl, "International Obligations and National Implementation", *Scandinavian Studies in Law* 23 (1979), 149 et seq., (159).

II. Obligation to Implement: Immediate or Progressive Obligation?

There is an assumption that civil and political rights create immediate state obligations while economic, social and cultural rights require a progressive implementation.[20] An immediate obligation means a duty to implement the obligations undertaken under a treaty upon becoming a State party to the Covenant irrespective of the available resources. A progressive implementation, however, entails a mere promotional type of commitment to enhance a certain objective and to realize it progressively depending on the availability of the necessary resources.

A comparison with the ICESCR[21] seems to support the assumption that the ICCPR creates immediate and stringent (i.e. unconditional) obligations of implementation. Article 2 para. 1 of the ICESCR requires the States parties "to take steps" to achieve the full realization of the rights recognized in the ICESCR "progressively".[22] The wording of article 2 para. 1 of the ICCPR is different. It provides that each State party undertakes to "respect and to ensure" the Covenant rights without making reference to progressive realization as in the ICESCR.[23]

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20 Doc. A/CONF.32/5, para. 63 (1967); ILO Doc. G.B. 174/21/7. This difference in principle between civil and political rights on the one hand and economic, social and cultural rights on the other led the General Assembly to decide for the drafting of two separate Covenants. Cf. A/RES/543 (VI) of 5 February 1952. Also Doc. A/2929 (1955), in: GAOR 10th Sess., Annexes, Agenda Item 28, Part II, Ch.II, para. 9.

21 ICESCR see note 16.

22 Article 2 para. 1 of the ICESCR provides: "Each State Party to the present Covenant *undertakes to take steps* individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively the full realization of the rights* recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". (emphasis added). However, the Committee on Economic, Social and Cultural Rights stated in its General Comment No. 3 (1990) that the ICESCR creates certain obligations of immediate effect namely the duty "to take steps" and the prohibition of discrimination and the so-called "minimum core rights", Report of the Committee on Economic, Social and Cultural Rights, 5th Sess., Doc. E/1991/23, Doc. E/C.12/1990/8, page 23.

23 Article 2 para. 1 ICCPR reads: "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 Cove-

The difference in wording and in nature of the rights recognized in the two Covenants gives ground for the conclusion that the ICCPR creates immediate obligations.[24] A further argument can be gained from article 2 para. 3 ICCPR requiring domestic remedies in case of Covenant rights violations.[25] It is questionable whether one could speak of violations of the rights if they did not create stringent legal obligations. There would also be no need for the provision on derogations in article 4 ICCPR if the States parties were only required to enhance the realization of the Covenant rights according to their particular abilities. In that case states could base derogations on the grounds of their lacking ability to implement the Covenant rights in times of public emergency without the need for a derogation clause such as article 4 para. 1.[26] Finally, if certain rights cannot even be derogated from in times of public emergency (article 4 para. 2), non-compliance with them in times of peace cannot be justified on the ground of lack of available resources.[27]

On the other hand, pursuant to article 2 para. 2 of the ICCPR, each State party "undertakes to take the necessary steps" to give effect to the rights.[28] Article 40 para. 1 of the ICCPR obliges States parties to report

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nant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

24 C. Tomuschat, "Die Bundesrepublik Deutschland und die Menschenrechtspakte der Vereinten Nationen", *Zeitschrift für die Vereinten Nationen* 26 (1978), 1 et seq., (4); T. Buergenthal, "To Respect and to Ensure State Obligations and Permissible Derogations", in: Henkin, see note 12, 72 et seq., (77). Tomuschat points out, e.g. that the right to life, the prohibition of torture and slavery, servitude and forced labor create obligations by which states can abide without any transitory period. C. Tomuschat, "National Implementation of International Standards on Human Rights", *Canadian Human Rights Yearbook* 1984-1985, 31 et seq., (40-41).

25 C. Tomuschat, "Equality and Non-Discrimination under the Covenant on Civil and Political Rights", in: I. von Münch (ed.), *Festschrift für H.-J. Schlochauer: Staatsrecht, Völkerrecht, Europarecht*, 1981, 691 et seq., (694).

26 Different from the ICCPR, the ICESCR does not include a derogation clause. But this does not mean that derogations from the ICCPR rights are lawful without any limitation. P. Alston/ G. Quinn, "The Nature and Scope of States parties' Obligations under the International Covenant on Economic, Social and Cultural Rights", *HRQ* 9 (1987), 156 et seq.

27 It is interesting to note that the non-derogable rights in article 4 para. 2 are not only the very basic ones but, at the same time, the ones which can be enforced immediately through forbearance.

28 Article 2 para. 2 reads, see note 6.

on the measures giving effect to the Covenant rights and "on the *progress made* in the enjoyment of those rights" (emphasis added). Terms like "to undertake the necessary steps" and "progress made" seem to imply a progressive implementation. Therefore, some commentators have argued that the Covenant is based on the idea of progressive implementation.[29] However, the majority of commentators have pointed out that the term "progress made" refers not to the measures undertaken but to the results of these measures and that the duty to report within one year therefore leads to an immediate obligation.[30]

In the following, the seeming contradiction between article 2 para. 1 on the one hand and arts 2 para. 2 and 40 on the other hand will be analyzed by referring to the drafting history of these provisions and by elaborating the interpretation given to these provisions by the Human Rights Committee.

1. The Drafting of arts 2 para. 2 and 40 para. 1

According to the original draft of article 2 para. 2 before the Commission on Human Rights which was in charge of drafting the ICCPR, States parties undertake to take the necessary steps within "reasonable time". The advocates of this provision stressed the importance of the phrase "reasonable time" and intended to provide with it for a progressive implementation.[31] They argued that the Covenant was so comprehensive that no state could claim its legislation to be in complete har-

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29 F. Jhabvala, "The Practice of the Covenant's Human Rights Committee", *HRQ* 6 (1984), 81 et seq., (96, 100-101). Robertson argued that the Covenant is based on the idea of progressive implementation. A. H. Robertson, "The U.N. Covenant on Civil and Political Rights and the European Convention on Human Rights", *BYIL* 21 (1968/69), 21 et seq., (26). He changed his view later pleading for an immediate implementation. A.H. Robertson, "The Implementation System: International Measures", in: Henkin, see note 12, 332 et seq., (500, note 48).

30 E. Schwelb, "The Nature of obligations of the States parties to the International Covenant on Civil and Political Rights", in: R. Cassin, *Amicorum Discipulorumque Liber*, 1969, 301 et seq., (308); C. Tomuschat, "Die Bundesrepublik Deutschland und die Menschenrechtspakte der Vereinten Nationen", see note 24, 4; J.P. Humphrey, Letter to the Editor, *HRQ* 6 (1984), 539 et seq., (539), Nowak, see note 13, 557.

31 Doc. E/CN.4/SR.329, page 8.

mony with all its provisions.[32] Since time was needed for a complete implementation, the reporting system should prevent excessive delays in the implementation. This system would help the exchange of information between the States parties and make them more conscious of their obligations undertaken under the Covenant.[33] Other drafters objected arguing that the expression of immediate obligations in article 2 para. 1 would be taken back implicitly with the provision of para. 2.[34] According to a general principle of international law, the States parties were obliged to adopt the necessary domestic legislation before or upon ratification.[35] The reporting system was also rejected on the basis that it would detract from the immediate obligation undertaken by States parties to the Covenant.[36]

Eventually, a compromise was agreed upon in the final draft of the Commission.[37] The idea of a previous implementation of the Covenant was given up. On the other hand the words "reasonable time" providing for a progressive implementation of the Covenant were deleted. A progressive implementation was only provided for the equality of spouses (article 23 para. 4).[38] The reporting system was incorporated as a procedure for the implementation of the Covenant because the system of inter-state communications was considered to be insufficient.[39] The article on the reporting system did not yet include the phrase "and on the progress made in the enjoyment of those rights" as today's article 40 para. 1.[40]

The members of the Third Committee of the General Assembly finalizing the drafting process agreed that the notion of progressiveness should not be incorporated into the ICCPR. They held that the enjoyment of civil and political rights — different from the enjoyment of

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32 Ibid., 5.

33 Doc. A/2929, in: GAOR (X), Annexes, Agenda item 28, Part II, Ch. VII, para. 163.

34 Doc. E/CN.4/SR.329, pages 8,11.

35 Doc. E/CN.4/SR.138, 6, para. 16; Doc. E/CN.4/SR.329, pages 7,9,15.

36 Doc. A/2929, in: GAOR (X), Annexes, Agenda item 28, Part II, Ch. VII, para. 162.

37 ESCOR XVIII Sess., Suppl. 7, Annex I, B, 62-72.

38 Cf. article 49 II of the Commission's draft.

39 Humphrey, see note 30, 539.

40 For the text of the provision, Draft Covenant on Civil and Political Rights, article 49, in: Report of the 10th Sess. of the Commission on Human Rights, ESCOR (XVIII) Suppl. No. 7, Annex I, 71.

economic, social and cultural rights — could not be delayed. Therefore, the Covenant was supposed to create almost immediate obligations.[41] Still at issue was whether article 2 para. 2 and the reporting system should be retained. Some members of the Third Committee disagreeing with these provisions argued that they would introduce the notion of progressive implementation.[42] The majority, however, endorsed article 2 para. 2.[43] With this provision they intended to take into account the fact that the legal order of many Member States was not in complete harmony with the Covenant[44] and that effective steps were needed to ensure the Covenant rights.[45] Due to the comprehensive scope of the Covenant a certain degree of delay in the implementation was to be expected.[46] Article 2 para. 2 was meant to express that a reasonable time limit, but not unlimited flexibility, was at the States parties' disposal for the implementation of the Covenant.[47] Certain minimum guarantees needed to be complied with upon ratification otherwise the complaint system would make no sense.[48] It was commonly agreed that the Covenant would not allow a prolonged period of time for its implementation

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41 Doc. A/C.3/SR.1181, in: GAOR (XVII), Agenda item 43, 237 para. 23; Doc. A/C.3/SR.1257, in: GAOR (XVIII), Agenda item 48, 238, para. 12; Doc. A/C.3/SR.1427, in: GAOR (XXI), Agenda item 62, para. 2. Cf. Schachter, see note 12, 323-324. Only the representatives of China, the Ukraine and Iraq took a different view. Cf. Doc. A/C.3/SR.1258, in: GAOR (XVIII), Agenda item 48, 244, para. 31; Doc. A/C.3/SR.1183 of 14 November 1962, in: GAOR (XVII), Agenda item 43, 245, para. 9, Doc. A/C.3/SR.1427, in: GAOR (XXI), Agenda item 62, para. 3.

42 Doc. A/C.3/SR.1181, in: GAOR (XVII), Agenda item 43, paras 2, 4; Doc. A/C.3/SR.1257, in: GAOR (XVIII) Agenda item 48, paras 2, 7.

43 Doc. A/C.3/SR.1181, in: GAOR (XVII), Agenda item 43, para. 3; Doc. A/C.3/SR. 1182, in: GAOR (XVII), Agenda item 43, para. 35.

44 Doc. A/C.3/SR.1258, in: GAOR (XVIII), Agenda item 48, para. 6.

45 Doc. A/C.3/SR. 1182, in: GAOR (XVII), Agenda item 43, para. 7.

46 Doc. A/C.3/SR.1181, in: GAOR (XVII), Agenda item 43, paras 23, 35; Doc.A/C.3/SR.1257, in: GAOR (XVIII), Agenda item 48, 237, para. 12; Doc. A/C.3/SR.1427, in: GAOR (XXI), Agenda item 62, para. 3.

47 Doc. A/C.3/SR.1181, in: GAOR (XVII), Agenda item 43, para. 35; Doc.A/C.3/ SR.1182, in: GAOR (XVII), Agenda item 43, 243, para. 35; Doc. A/C.3/SR.1183, in: GAOR (XVII), Agenda item 43, 247, para. 19; Doc. A/C.3/SR.1257, in: GAOR (XVIII) Agenda item 48, para. 12; Doc. A/C.3/SR.1258, in: GAOR (XVIII), Agenda item 48, 241, para. 6; Doc. A/C.3/SR.1426, in: GAOR (XXI), Agenda item 62, para. 33.

48 Doc. A/C.3/SR.1426, in: GAOR (XXI), Agenda item 62, para. 33; Doc. A/C.3/SR.1427, in: GAOR (XXI), Agenda item 62, para. 2.

but would, in principle, create immediate obligations for the States parties.[49]

The reporting system was also incorporated into the Covenant. Criticism on an early draft of article 40 para. 1 before the Committee led to substantive changes.[50] Instead of submitting reports on "the progress made in giving effect to the rights" as initially proposed, States parties are now obliged to report on "the progress made in the enjoyment of those rights."[51] After the clarification that the term "progress made" did not refer to the measures to be adopted but to the result of these measures, the members of the Third Committee voted unanimously (with two abstentions) in favor of article 40 para. 1.[52] The reporting system was intended to prevent inappropriate delays in the implementation of the Covenant.[53] At the same time it was incorporated to make States parties adopt further measures necessary to ensure the rights of the Covenant in law and practice.[54] The one year period until the first report was considered necessary for the implementation of the Covenant.[55]

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49 Also Schachter, see note 12, 323-324.

50 For this criticism, see Doc. A/C.3/SR.1181, in: GAOR (XVII), Agenda item 43, para. 4; Doc. A/C.3/SR.1257, in: GAOR (XVIII), Agenda item 48, para. 7; Doc. A/C.3/SR.1426, in: GAOR (XXI), Agenda item 62, para. 32; Doc. A/C.3/SR.1427, in: GAOR (XXI), Agenda item 62, paras 2, 8. For the change of the draft, see Doc. A/C.3/SR.1427, in: GAOR (XXI), Agenda item 62, para. 36.

51 The initial draft of article 40 para. 1 read: "The States parties to this Covenant undertake to submit reports on the measures they have adopted and the *progress made in giving effect to the rights* recognized herein (emphasis added)". Doc. A/C.3/L.1379/Rev.1, para. 1; Doc. A/6546, para. 86.

52 Doc. A/C.3/SR.1427, in: GAOR (XXI), C.3, Agenda item 62, paras 35-37, 45-46. Article 16 of the ICESCR, in contrast, refers to the progress made in achieving the observance of the rights recognized.

53 Doc. A/C.3/SR.1181, in: GAOR (XVII), Agenda item 43, page 237, paras 23-24; Doc. A/C.3/SR.1257, in: GAOR (XVIII), Agenda item 48, paras 12, 21.

54 Doc. A/C.3/SR.1427, in: GAOR (XXI), C.3, Agenda item 62, para. 22.

55 Ibid, para. 27.

2. Pronouncement of the Human Rights Committee on Immediate Implementation

Under the individual complaint system, the Human Rights Committee has made it clear that the Covenant creates in principle immediate and unconditional obligations.[56] In numerous cases the Committee has held that a State party had *violated* the Covenant.[57] Without the assumption of legal obligations the Committee could not have found such violations.[58] In *Broeks v. The Netherlands*, the Dutch Government asserted that if the Committee should decide that article 26 entails obligations with regard to legislation in the economic, social and cultural field, such obligation could only be the one of progressively taken measures to eliminate discrimination to the maximum of the state's available resources.[59] But the Committee rejected this interpretation observing that what was at issue was not "whether or not social security should be progressively established ... but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective protection against discrimination."[60] With this statement the Committee clarified that article 26 does not create a progressive but an immediate obligation for States parties which is violated in case of discrimination. Using the terms "violate" and "guarantee" the Committee emphasized the stringent and immediate legal obligation undertaken by States parties under article 26. An "effective protection" against discrimination requires immediate compliance. Otherwise the Committee could not have found a violation of article 26 in *Broeks v. The Netherlands.*[61] Consequently, in *E. and A.K. v. Hungary*, the Committee

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56 Tomuschat, see note 25, 691 et seq., (694); Humphrey, see note 30, 540.

57 From its early days the Human Rights Committee has done so. Cf. Selected Decisions under the Optional Protocol, Vol. 1, CCPR/C/OP/1 (1985) and Vol. 2, CCPR/C/OP/2 (1990).

58 C. Tomuschat, "Der Ausschuß für Menschenrechte, Recht und Praxis", *Zeitschrift für die Vereinten Nationen* 29 (1981), 141 et seq., (145).

59 Comm. No. 172/1984 (1987), in: Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. 2, Doc. CCPR/C/OP/2, pages 196, 199-200, para. 8.3.

60 Ibid., 201, para. 12.5.

61 Ibid., 201, para. 15.

pointed out that "the State party's obligations under the Covenant *apply as of the date of its entry into force.*"[62] (emphasis added)

Under the reporting system the Committee has urged States parties to take immediate steps to prevent and combat human rights violations in various Concluding Observations.[63] Such demands are based on the assumption that the Covenant creates immediate obligations. Without such legal obligations laid down in the ICCPR the Committee could not urge States parties to take *immediate* steps to prevent human rights violations. If a State party is temporarily unable to render its own law and practices compatible with a Covenant right, the Committee points to the option to enter a temporary reservation.[64] The Committee has applied the duty to take immediate steps to almost all rights provided for in the Covenant, for example the right to life,[65] the right to be free from torture,[66] the right to liberty and security of person,[67] the right to

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62 Comm. No. 520/1992 (1994), Doc. GAOR 49 Sess., Suppl. No. 40, 336.

63 In its Comments on Brazil of 1996 the Committee urged "the Government of Brazil to take immediate and effective steps to prevent and combat human rights violations by members of the security forces". Doc. CCPR/C/79/Add.66, para. 19. Such pronouncement refute the assertion of Alston and Quinn that the standards in fact applied "with the implicit but certainly unstated endorsement of the Human Rights Committee, is one of progressive achievement." Alston/ Quinn, see note 26, 173.

64 General Comment No. 24/52 on Reservations (1994), in: HRI/GEN/1/Rev.2, 42, para. 20.

65 In its Comments on Brazil the Committee in 1996 urged immediate steps to prevent summary and arbitrary executions, see note 63, para. 19.

66 In its Comments on Brazil the Committee urged immediate steps to prevent acts of torture and excessive use of force. Ibid., 19. Also Concluding Observations on Japan of 1998, Doc. CPR/C/79/Add.102, para. 22; Concluding Observations on the Libyan Arab Jamahiriya of 1998, Doc. CCPR/C/79/Add.101, para. 11.

67 In its Comments on Brazil the Committee in 1996 urged immediate steps to prevent arbitrary detention and for immediate steps to ensure that convicted persons are released without delay on completion of their sentence. See note 63, paras 19, 21. In its Comments on Peru of 1996 the Committee urged the State party to take immediate measures with a view to releasing innocent prisoners and to providing them with compensation, Doc. CCPR/C/79/Add.67, para. 21, also Comments on Bosnia and Herzegovina of 1992, Doc. CCPR/C/79/Add.14, para. 7; Concluding Observations on Japan of 1998, see note 66, para. 22.

a fair and speedy trial,[68] the right of detainees to be treated with humanity,[69] the rights of individuals belonging to ethnic minorities,[70] the right to freedom of opinion, expression and information,[71] the rights to freedom of association and assembly,[72] and to political rights.[73]

As already indicated it is not only the duty not to violate the rights enshrined in the ICCPR, but also to take steps to implement these rights effectively. Accordingly, the Committee has stressed unconditionally obligations of States parties to adopt measures that will ensure

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68 In its Comments on Peru of 1996 the Committee urged that public trials be reinstated immediately, see note 67, para. 25. The Committee also recommended immediate measures to reduce the backlog of persons in detention awaiting trial in the Dominican Republic, Doc. CCPR/C/79/Add.18, para. 10. Also Concluding Observations on Japan of 1998, see note 66, para. 22.

69 In its Comments on Estonia of 1995 the Committee urged "immediate steps to ensure that all persons deprived of their liberty are treated with humanity and with respect for the inherent dignity of the human person in conformity with arts 7 and 10 of the Covenant, Doc. CCPR/C/79/Add.59, para. 33 (1995). In its Comments on the United Kingdom and Northern Ireland of 1995 (Hong Kong) the Committee urged the Government "to take immediate steps to ensure that living conditions in Vietnamese Refugee detention centers be improved," Doc. CCPR/C/79/Add.57, para. 24 (1995).

70 In its Comments on Brazil of 1996 the Committee not only recommended "immediate steps to guarantee the rights of individuals belonging to racial minorities and indigenous communities, especially with regard to their access to quality health services and education", but also recommended "that in the light of article 27 of the Covenant, all necessary measures should be taken to ensure that the process of demarcation of indigenous lands be speedily and justly settled.", see note 63, para. 32.

71 Concluding Observations on the Libyan Arab Jamahiriya of 1998, see note 66, para. 11.

72 In its Comments on the United Kingdom and Northern Ireland (Hong Kong) of 1995 the Committee recommended that "immediate steps be taken to ensure that the electoral system be put in conformity with article 21, 22 and 25 of the Covenant", see note 69, para. 25.

73 In its Comments on Nigeria of 1996 the Committee recommended immediate steps to restore democracy in Nigeria, Doc. CCPR/C/79/Add.64, para. 26. In its Comments on the United Kingdom and Northern Ireland (Hong Kong) of 1995 the Committee recommended, see above. The Committee in its Comments on Burundi of 1994 believed it essential to take urgent measures to reorganize public institutions and to permit all citizens to have access to public service in Burundi, Doc. CCPR/C/79/Add.41, para. 14.

compliance with provisions of the ICCPR.[74] This has also become apparent in various pronouncements of the Committee in connection with States reports. The Committee has urged States parties "to ensure that the provisions of the Covenant are fully implemented" in accordance with their obligations under article 2.[75] This unconditional demand would not have been made if the Committee did not think that full implementation was immediately required by the ICCPR.

3. Assessment of the Covenant's Progressive Element

As already indicated the provisions of article 2 para. 2 and 40 ICCPR contain a progressive element.[76] Article 2 para. 2 was intended to express that real steps are needed to put the Covenant rights into effect.[77] In addition, the Covenant enshrines a set of abstract legal principles which require elaboration according to the prevailing living conditions. Taking into account that article 2 calls for an effective protection of human rights, the implementation of the Covenant can never be static.[78] Constantly changing living conditions create new dangers for the enjoyment of the rights recognized in the Covenant.[79] These changes may be due to technical innovations or new developments in society. For example, increasing migration throughout the world creates new problems which need to be addressed in order to protect human rights effectively.[80] Traditionally the freedom of information was primarily concerned with print media. Nowadays, due to technological development,

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74 In its Comments on Brazil of 1996 the Committee stated that "the State party is under an obligation to adopt measures that will ensure compliance with article 10." See note 63, para. 25.

75 Comments on Brazil of 1996, ibid., para. 16.

76 Nowak, see note 13, 556.

77 Doc. A/C.3/SR.1182, in: GAOR (XVII), Agenda item 43, para. 7.

78 Robertson commented that "it would be foolish to pretend that no further progress can be made in the enjoyment of human rights in any country, even after it has ratified the Covenant." A.H. Robertson, "The Implementation System: International Measures", in: Henkin, see note 12, 332 et seq., (500, note 48).

79 A. Seibert-Fohr, "The Role of the Reporting System in Respect of the Development of Human Rights Treaties' Application", in: E. Klein (ed.), *The Monitoring System of Human Rights Treaty Obligations*, 1998, 111 et seq., (118-119).

80 Ibid., 119.

new means of information (for example the Internet) bring along new forums and challenges for human rights. Changes in the implementation of human rights may also be due to new convictions in society. It is beyond doubt that the implementation and realisation of gender-equality has changed throughout the last decades due to new concepts of gender-equality. Accordingly, the Covenant needs a continuing adjustment of the measures of protection according to the prevailing living conditions. This has been acknowledged by the Human Rights Committee. In its Comments on Brazil the Committee acknowledged the Government's "commitment to ensuring that national legislation is in full conformity with the provisions of the Covenant" and trusted "that it will continue to give high priority to the adoption and implementation of amendments to existing laws ... in order to ensure compliance with the State party's international human rights obligations."[81]

The need for continuing efforts of implementation is particularly valid for the affirmative obligations under the Covenant. The Human Rights Committee has repeatedly stressed that specific acts are needed in order to ensure the enjoyment of rights enshrined in the Covenant.[82] The recognition of such positive rights necessarily involves a dynamic element in the implementation of the Covenant.[83] The continuous obligation of implementation is reflected in the state reporting system. Article 40 para. 1 emphasizes that a single act of implementation is not sufficient. It provides for an initial report within one year of the entry into force of the Covenant for the States parties and for subsequent reports "whenever the Committee so requests". Pursuant to its Guidelines the Human Rights Committee requests periodic reports from States parties to the Covenant.[84] The continuing reporting duty was intended to induce States parties to adopt further measures to guarantee the effective enjoyment of the rights in law and practice.[85] The Human Rights Committee generally welcomes "information on any significant

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81 Doc. CCPR/C/79/Add.66, para. 17.

82 General Comment No. 3/13 on article 2 (1981), in: HRI/GEN/1/Rev.1, page 4. See also General Comment No. 6/16 on article 6 (1982), ibid., page 7; Buergenthal, see note 24, 77.

83 M. Nowak, "Inhalt, Bedeutung und Durchsetzungsmechanismen der beiden UNO-Menschenrechtspakte", in: W. Kälin/ G. Malinverni/ M. Nowak, *Die Schweiz und die UNO-Menschenrechtspakte*, 1991, 3 et seq., (9); Nowak, see note 13, 556-557.

84 For the latest Guidelines regarding the form and contents of periodic reports from States parties, see Doc. CCPR/C/20/Rev.2.

85 Doc. A/C.3/SR.1427, in: GAOR (XXI), C.3, Agenda item 62, para. 22.

new development in regard to the rights referred to in the Covenant" in the reporting system.[86] In the periodic reports, the Committee expects modifications of laws and practices affecting the Covenant rights.[87] In accordance with article 40 para. 1 it attaches importance to the description of the progress made in the enjoyment of the rights recognized in the Covenant since the last report.[88] Equally States parties are required to indicate the difficulties affecting the implementation of the Covenant.[89]

With the assertion of this progressive element the immediate obligations of States parties arising out of the Covenant is not called into question.

III. Relationship between the ICCPR and Domestic Law

The relationship between the Covenant and domestic law of the States parties to the Covenant is crucial when it comes to the question how the Covenant is to be implemented. Three questions are to be distinguished: whether an individual may directly invoke the Covenant provisions before a domestic court, whether the State party is required to incorporate the Covenant into its domestic legal system or whether it is obliged to make it self-executing.[90] What rank does the Covenant need to be accorded within the domestic legal system?

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86 Guidelines regarding the form and contents of initial reports from States parties to the Committee, Doc. CCPR/C/5/Rev.2, para. 7.

87 In its Guidelines regarding the form and contents of periodic reports from States parties it asks that periodic reports describe such modifications. See note 84, para. 6 c.

88 Ibid., para. 6 (f).

89 But the mere fact that difficulties may arise in the implementation of the Covenant does not mean that it only requires progressive implementation. But see Jhabvala, see note 29, 96.

90 The term directly applicable is used in this article if a norm of international law can be applied by domestic courts, be it on the basis of domestic law or on the basis of international law, the latter being rather an exception as will be seen below. The term is to be distinguished from the domestic law concept of self-executing treaties though they may at times overlap. Whether a norm of international law is self-executing is merely a question of domestic law. See T. Buergenthal, "Self-Executing and Non-self Executing Treaties in National and International Law", *RdC* 235 (1992), 309 et seq., (317, 319 et seq.); B. Graefrath, "How Different Countries Implement International

Even if there is an international obligation to make a treaty directly applicable,[91] this does not mean that it can be invoked as a source of law in domestic law because according to the traditional concept it does not automatically transform the treaty into domestic law *eo ipso*.[92] The PCIJ held in 1928 in its Advisory Opinion on the Jurisdiction of the Courts of Danzig that international treaties "cannot, as such, create direct rights and obligations for private individuals."[93] According to this concept, an international treaty provision can only be applied by domestic courts if it acquires the status of domestic law and if it is considered to be self-executing pursuant to the domestic law of the respective State party.

In practice the methods of implementation vary broadly, not only depending on whether a State party is a monist or dualist country.[94] Whether this practice is in accordance with the exigencies under the Covenant will be analyzed below.

1. ICCPR as Directly Applicable Treaty?

The traditional view that international law itself does not create any rights or obligations directly enforceable in domestic courts has been somewhat put aside in the context of European Community law.[95]

Standards on Human Rights", *Canadian Human Rights Yearbook* 1984-1985, 3 et seq., (9).

91 For the exigencies for an obligation to make a treaty directly applicable, see under III. 2.

92 Buergenthal, see note 90, 320-321.

93 PCIJ Ser. B No. 15 (1928), 3 et seq., (17-18). For a detailed analysis of the Court's holding, see Buergenthal, see note 90, 322-325.

94 For a detailed account of the different ways of legislative and judicial implementation, see C. A. Cohn, "The Early Harvest: Domestic Legal Changes Related to the Human Rights Committee and the Covenant on Civil and Political Rights", *HRQ* 13 (1991), 295 et seq.

95 The Court of Justice of the European Community in the *Van Gend en Loos* Case concluded that a provision of the Community treaty (article 12) was directly applicable Community law in all EC Member States and therefore created rights enforceable by individuals in the national courts. The Court held that Community law does "not only impose obligations but is also intended to confer rights [upon nationals] which become part of their legal heritage." *CML Reports* 2 (1963), 129-130.

The wording of article 2 of the Covenant seems to exclude any direct applicability. Article 2 para. 1 provides that "[e]ach 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...". While para. 1 could be read to provide for directly applicable rights, para. 2 seems to contradict this assumption. It requires necessary steps of implementation in accordance with the States parties' constitutional processes to give effect to the Covenant rights. It could be concluded that measures of implementation are necessary before the Covenant becomes applicable on the domestic plane. Taking into account the States parties' constitutional processes, article 2 para. 2 seems to make room for the practice of dualist countries in which international treaties are not *per se* a source of law, thereby excluding an automatic direct applicability.

On the other hand, arguably in reference to the reasoning of the Court of Justice of the European Community in the *Van Gend en Loos* Case, the Covenant also created a "new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."[96] It is beyond dispute that the universal protection of civil and political rights by a legally binding treaty such as the Covenant created a new legal order of international law and that by ratifying this instrument the States parties limited their sovereignty over a matter which, on such large scale, was previously considered a sole matter of domestic affairs.[97] With the entry into force of the Covenant, the individual became a focus of international concern and obligations. Taking into account the individual complaint system under the Optional Protocol to the Covenant,[98] it is hard to perceive the individual as being merely an object of this order, rather than a subject entitled to its own rights.

While this argument might provide a point of departure for the future interpretation of the Covenant, one has to bear in mind, however, that the concept pronounced by the Court of Justice of the European Community is still considered to be an exception in international law, which seems to be reserved for a supranational organization such as the

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96 Ibid.

97 For a description of the evolution of modern international human rights law, see T. Buergenthal, "The Evolution of International Human Rights", in: H. Gros Espiell, *Amicorum Liber*, Vol. I, 1997, 123 et seq.

98 See note 4.

European Community with its own comprehensive powers. This particularity might have been the point of departure of the European Court when it based the new concept on the "new legal order of international law"[99] and it would exclude the applicability of the concept under the regime of the Covenant which does not provide for such supranational powers.

The Court may also have meant that such a "new legal order of international law" can only be assumed when the drafting State parties intended to create a special régime designed to ensure that individuals can invoke the treaty provisions in domestic courts.[100] In that case one needs to look into its drafting history. As mentioned before, the drafters of the Covenant adopted article 2 para. 2 to underscore that the Covenant is not self-operative, but requires legislation to give it domestic effect.[101] There was a dispute in the drafting committee as to whether the Covenant could become applicable as part of domestic law at all. The United States proposed a provision according to which "[t]he provisions of this Covenant shall not themselves become effective as domestic law".[102] Other drafters did not object to a direct application of the Covenant.[103] Therefore, the United States proposal was rejected by the drafting committee.[104] The decision not to exclude explicitly domestic effects can be taken as an indication that a direct application was at least deemed to be possible. However, one cannot conclude that the drafters wanted to make the Covenant directly applicable as a matter of international law. State representatives wanted to clarify with the adoption of article 2 para. 2 that the Covenant rights could not be claimed in domestic courts without any incorporating domestic mechanism.[105] They tried to exclude any form of automatic transformation of the Covenant

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99 An indication of this interpretation can be found in the Court's holding in *Costa v. Ente Nazionale Energia Elettrica*, "By contrast with ordinary international treaties, the E.E.C. Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply." *CML Rev.* 2 (1964-1965), 197-198.

100 Buergenthal, see note 90, 328.

101 Doc. E/CN.4/AC.1/SR.33, page 4; Doc. E/CN.4/AC.1/SR.43, page 2.

102 Doc. E/CN.4/224.

103 Doc. E/CN.4/SR.125, pages 7-9.

104 Ibid. 17-19.

105 Doc. A/C.3/SR.1258, in: GAOR (XVIII), Agenda item 48, 245, para. 40; Doc. A/C.3/SR.1182, in: GAOR (XVII), Agenda item 43, 239, paras 4, 7; Doc. A/C.3/ SR.1258, in: GAOR (XVIII), Agenda item 48, 242, para. 16.

into domestic law without consideration of the domestic constitutional processes to transform international treaties. By obliging States parties in article 2 para. 2 to take steps "in accordance with its constitutional processes" to give effect to the Covenant rights, the drafters demonstrated that they did not want to interfere with the varying domestic implementation mechanisms. The drafters who rejected the United States proposal left the question whether the Covenant can be applicable as part of domestic law to the States parties. A direct application by courts of States parties was deemed to be possible. However, a direct application as a matter of international law, that is by virtue of the Covenant itself, was not intended. To sum it up, the drafting history rather contradicts the assumption that the Covenant was drafted to be directly applicable *eo ipso*.

2. Duty to Make the ICCPR Directly Applicable?

Even if the Covenant does not create any rights or obligations directly enforceable in domestic courts, does it mandate to ensure that the treaty provisions as such will be applicable on the domestic plane? To phrase it differently, does the Covenant mandate its incorporation into domestic law so that its provisions are accorded the force of domestic law? Or is it enough to merely adapt municipal law to the provisions of the Covenant?

The point of departure should be the above cited Advisory Opinion of the PCIJ on the Jurisdiction of the Courts of Danzig. There the Court held that the question whether the international treaty at issue created an international obligation to confer directly enforceable rights on individuals had to be determined according to the *object of the treaty*.[106] The Court found that the States parties had intended to create a "special legal régime" which required immediate resort to the provisions of the agreement. Whether it is the object of the Covenant to confer directly enforceable rights on individuals will be analyzed below.

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106 See note 93.

a. Textual Interpretation of article 2

There is no explicit obligation to confer on the Covenant the status of domestic law. While a duty to make the Covenant directly applicable could be based on the undertaking of States parties to respect and ensure the Covenant rights to the individual pursuant to article 2 para. 1, article 2 para. 2 provides that the States parties to the Covenant undertake "to adopt such legislative or other measures as may be necessary to give effect" to the Covenant rights.

For the Covenant's interpretation it is useful to look at the interpretation given to similar provisions in other human rights instruments. Article 2 para. 2 of the ICCPR has its counterpart in article 2 of the American Convention on Human Rights.[107]

The Inter-American Court of Human Rights has not so far clearly answered the question of direct applicability.[108] In an advisory opinion request by Costa Rica the Court was asked whether article 14 of the Convention is guaranteed to all persons under its jurisdiction by virtue of the obligation assumed by the country. The Court held that there is an internationally enforceable right to reply and that the State party is required to adopt appropriate legislation or other measures giving effect to that right if not already ensured.[109] But the court did not explicitly address the issue of direct applicability.[110]

The European Convention for the Protection of Human Rights and Fundamental Freedoms does not refer to measures of implementation such as article 2 para. 2 of the ICCPR. Pursuant to article 1 of the European Convention the States parties "shall secure to everyone within their jurisdiction the rights and freedoms" of the Convention.

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[107] Where the exercise of any of the rights or freedoms referred to in article 1 is not already ensured by legislative or other provisions, the States parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those right or freedoms.

[108] For a detailed analysis of the Court's jurisprudence on this matter, see Buergenthal, see note 90, 338-340.

[109] Enforceability of the Right to Reply or Correction (arts 14 paras 1 and 2, American Convention on Human Rights), Advisory Opinion OC-7/86, Inter-Am. Ct. H.R., Ser. A, Judgments and Opinions, No. 7, 1986, paras 14, 35.

[110] Buergenthal, see note 90, 339-340. But see, J. de Aréchaga, "Self-Executing Provisions in International Law", in: K. Hailbronner et al. (eds), *Staat und Völkerrechtsordnung: Festschrift für Karl Doehring*, 1989, 409 et seq.

The argument can be made that this article provides for a duty to make the Convention directly applicable.[111] If the States parties "shall secure" the conventional rights pursuant to article 1 it seems to be a fair assumption that the rights need to be made directly applicable, especially because the Convention does not refer to "legislative or other measures" as a step towards implementation as does the Covenant. With directly applicable rights the conventional rights would be secured to all people within a State party's jurisdiction. Article 13 with its guarantee for an effective national remedy in case of a violation of the Convention has also been interpreted as requiring a direct application of the European Convention on the domestic plane.[112] Article 13 of the Convention which is similar to article 2 para. 3 of the ICCPR provides for an effective remedy in case its rights, as set out in the Convention, are violated.

Another argument for a duty to make the European Convention directly applicable is the way the respective rights have been formulated. Its provisions are precise enough to be directly applied by courts. But this theory was rejected by the European Court of Human Rights in the *Swedish Engine Drivers Union* Case which left it to the States parties how to implement the Convention. The Court declared that "neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any provisions of the Convention".[113]

However, in *Ireland v. United Kingdom*, the Court has acknowledged that the conventional rights were intended to be "directly secured to anyone within the jurisdiction of the Contracting States" and that "[t]hat intention finds a particular faithful reflection in those instances where the Convention has been incorporated into domestic law..."[114] Despite this seeming preference of a national application of the Convention's provisions, the Court stated that "[t]he absence of a law expressly prohibiting this or that violation does not suffice to establish a breach [of the Convention] since such a prohibition does not represent

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111 T. Buergenthal, "The Effect of the European Convention on Human Rights on the Internal Law of Member States", *ICLQ*, Suppl. No. 11 (1965), 79 et seq., (80-83). See also A. Z. Drzemczewski, *European Human Rights Convention in Domestic Law*, 1983, 34 et seq.; but see Opsahl, see note 19, 160.

112 H. Golsong, *Das Rechtsschutzsystem der EMRK*, 1958, 8.

113 20 Eur. Ct. H.R. Ser. A, 1976, 1 et seq., (18).

114 25 Eur. Ct. H.R. Ser. A, 1978, 5, (91).

the sole method of securing the enjoyment of the rights and freedoms guaranteed."[115] The leeway given to the States parties in the implementation of the European Convention therefore continues to be fairly broad.

It could be argued that if direct applicability has not been acknowledged to be required by the European Convention, the wording of which seems to be more open to this theory, it can hardly be deduced from the Covenant which explicitly refers to legislative *or* other measures of implementation. On the other hand, the Covenant is a different human rights instrument with an autonomous meaning. It may very well be that the Covenant has to be interpreted differently.

Article 2 para. 2 calling for legislative or other measures seems to leave the States parties with a considerable amount of latitude in the domestic implementation.[116] This has allowed some commentators to assert that article 2 leaves open the status of the Covenant in domestic law.[117] Article 2 para. 2 mandates measures to give effect to the rights "[w]here not already provided for by existing legislative or other measures." Therefore, it could be argued that if domestic law already provides for the effective enjoyment of the rights recognized by the Covenant no additional measures are necessary.

Inspite of this, the Covenant may mandate legislative and other measures in article 2 para. 2 as additional tools of implementation to elaborate the meaning of the Covenant rights side by side with the Covenant's direct application. The wording of article 2 para. 2 does not necessarily exclude a duty to make the Covenant directly applicable[118] which could be based on the duty to respect and to ensure the Covenant rights pursuant to article 2 para. 1 or on the purpose of article 2 in

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115 Ibid., 61 Eur. Ct. H.R. Ser. A, 1981, 42.

116 F. Jhabvala, "Domestic implementation of the Covenant on Civil and Political Rights", *NILR* 32 (1985), 461 et seq., (463, 466). See also Cassese who points out that one cannot infer from article 2 para. 2 any argument in favour or against the way the Covenant should be implemented by each state. A. Cassese, "Modern Constitutions and International Law", *RdC* 185 (1985), 331 et seq., (458, note 113) See also Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 39.

117 Schachter, see note 12, 312.

118 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 42.

general.[119] In fact, the provisions of the Covenant requiring States parties not to interfere with individual rights are drafted in such a way that they can be applied by courts.[120] However, some of the Covenant's rights may not be detailed enough to provide the courts with the necessary legal standards for judicial application while implementing domestic legislation would.[121]

b. Drafting History of article 2 para. 2

In order to further elaborate the meaning of article 2, it is useful to go back once again to its drafting history and the intentions expressed during the drafting. As already pointed out, the Commission on Human Rights and the Third Committee wanted to underscore with the adoption of article 2 para. 2 that the Covenant was not self-operative but required measures to give it domestic effect. They undoubtedly held specific steps of implementation to be necessary to give effect to the Covenant rights. Knowing the differences between monist and dualist states, the drafters did not want to interfere with the different concepts of transformation prevalent in the States parties to the Covenant.[122] Even if some drafters wanted to clarify with article 2 para. 2 that the Covenant rights could not be claimed before domestic courts *per se* without any domestic incorporating measure,[123] this does not rule out an obligation of the States parties to incorporate the Covenant into domestic law in accordance with their constitutional processes, be it through legislative act or by automatic incorporation. As already demonstrated, by rejecting the proposal according to which the provisions of the Covenant should not themselves become effective as domestic law,[124] a direct application of the Covenant was at least not ruled out. This rejection has been interpreted as an expression of the drafters' intention to avoid any provision which might affect the domestic con-

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119 See under III. 2. c.

120 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 58.

121 For a solution of this problem, see under V., text accompanying note 371.

122 Graefrath, see note 90, 6.

123 Doc. A/C.3/SR.1258, in: GAOR (XVIII), Agenda item 48, 245, para. 40; Doc. A/C.3/SR.1182, in: GAOR (XVII), Agenda item 43, 239, para. 4, 7; Doc. A/C.3/SR.1258, in: GAOR (XVIII), Agenda item 48, 242, para. 16.

124 See text accompanying note 104.

stitutional processes to transform international treaties.[125] Therefore, at least the way of transformation needs to be for the States parties to choose.

While the drafting history does not evidence the intention of the drafters to require States parties to make the Covenant directly applicable on the domestic plane, the option of direct application was not explicitly ruled out. The major objectives of the drafters, namely to give room for different constitutional processes to transform international treaties and to require additional steps of implementation, can be reconciled with an obligation to make the Covenant directly applicable in domestic law.

c. Purpose and Context of article 2

The overriding purpose of article 2 and of the entire Covenant is the most effective protection of its human rights.[126] The effective enjoyment and protection of the rights enshrined in the Covenant is the ultimate yardstick to which the implementation measures need to measure up.

It has been argued that the ICCPR as a universal instrument seeking the protection of human rights in countries with different legal and political structures requires that the States parties are free to chose how to implement the treaty obligations into their domestic systems so that their diversity is not abolished.[127] However, there is a tension between the goal to make room for different constitutional processes and the goal to ensure the effective enjoyment of the Covenant rights so that neither of these maxims can claim absolute validity. Even if the Cove-

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[125] Nowak, see note 13, 54. Other commentators have interpreted the drafters' intention to leave the question whether to incorporate the Covenant into domestic law to national law. Schachter, see note 12, 314.

[126] Pursuant to article 2 para. 2 the States parties undertake "to give effect". Article 40 sets up a state reporting system to "give *effect* to the rights recognized" and speaks about the "*enjoyment* of those rights". Furthermore, article 2 para. 3 of the Covenant obliges States parties "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy".

[127] Graefrath, a former member of the Human Rights Committee, based this assertion on article 1 of the Covenant which provides for the right to self-determination. B. Graefrath, *Menschenrechte und internationale Kooperation, 10 Jahre Praxis des Internationalen Menschenrechtskomitees*, 1988, 62; Graefrath, see note 90, 6 seq.

nant needs to be made applicable by domestic courts to make the Covenant rights more effective, this can be done by making allowance for different methods of transformation of international treaties.

There seems to develop a preference for the Covenant's direct application in order to ensure the most effective protection of the Covenant rights. Tomuschat, a former member of the Human Rights Committee, while acknowledging that the Covenant does not contain a clause mandating a certain form of incorporation points out that an incorporation of the Covenant in form of a domestic statute "is the simplest way to ensuring that everyone is able to invoke any right" of the Covenant.[128] He elaborated that the Covenant was apt for incorporation and for enforceability as such with direct effect because it provides for individual rights immediately exercisable, not merely state obligations to create such rights.[129] He went so far to assert that an incorporation of the Covenant provides a higher degree of legal stability and reliability than keeping it outside the national legal order.[130] Similarly, according to Jhabvala, an incorporation, while not formally required would probably be preferable wherever possible.[131]

The argument could be made that the emphasis on the effective enjoyment of the Covenant rights together with the need for an effective remedy requires States parties to make the Covenant directly applicable on the domestic plane. Article 2 para. 3 clarifies that the Covenant creates rights, which can be enforced directly through domestic remedies.[132] Arguably the ultimate yardstick needs to be the Covenant itself and therefore a direct applicability is required to ensure an *effective* remedy.

On the contrary, it has been argued that it is enough if the individual can invoke national law reflecting the Covenant rights and thereby indirectly the Covenant.[133] If a national system takes international obligations as self-evident, or if courts in dualist countries consider the Covenant as an interpretative guidance, the effect may be similar to the one

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128 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 39 seq.

129 Ibid., 40.

130 Ibid., 51.

131 Jhabvala, see note 116, 463, 483.

132 Nowak, see note 13, page XXII, para. 14.

133 This is the position of the United Kingdom, see Summary Record of the 1433rd Mtg. Consideration of the United Kingdom's fourth periodic report, Doc. CCPR/C/SR.1433, para. 15.

of monist countries where the Covenant can be applied directly.[134] Therefore, if a direct application of the Covenant is not mandated, article 2 para. 2 at least requires that national authorities interpret domestic law in such a way as to make the Covenant applicable at the national level in order to give effect to the Covenant.[135]

However, it has been held that domestic remedies do not seem to be effective as required by article 2 para. 3 if the remedy organ is not authorized to apply the international provision directly at the national level.[136] If a statute transforms the provisions of the Covenant into domestic law without any formal reference to the Covenant itself the courts are not required to interpret the provisions by reference to the jurisprudence of the Human Rights Committee.[137] This opens the way for discrepancies between the interpretation of implementing domestic law and of the Covenant itself.[138] Furthermore, if a national legal system does not provide for a right recognized in the Covenant, it is not possible to fill such a gap without the Covenant's incorporation into domestic law because there is no point of reference for an indirect application of the Covenant.[139] A direct application of the Covenant could be the ultimate safeguard in a case of incomplete or lacking measures of implementation. Another advantage of the Covenant's direct application is its prevalence over older legislation, which is incompatible with the Covenant.[140]

It has been argued that making the Covenant part of domestic law is the more effective method of implementation of human rights standards in cases where the provisions are not self-executing under domestic law

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134 Buergenthal, see note 90, 319.

135 Cassese, see note 116, 458.

136 Opsahl, see note 19, 176; J. J. Paust, "Avoiding "fraudulent" executive policy: Analysis of non-self-execution of the Covenant on Civil and Political Rights", *DePaul Law Review* 42 (1993), 1257 et seq., (1259).

137 A similar situation arose in the former colonies of the United Kingdom which incorporated into their constitutions many of the rights proclaimed in the European Convention on Human Rights without any explicit reference to this international instrument. T. Buergenthal, "Modern Constitutions and Human Rights Treaties", *Colum. J. Transnat'l L.* 36 (1997), 211 et seq., (220).

138 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 49 seq.

139 Ibid., 50.

140 Ibid., 51.

or if they require affirmative action.[141] However, if there is a duty to make the Covenant directly applicable by domestic courts States parties are required to make it self-executing or to incorporate it in a way that it can be applied directly on the domestic plane. Since state authorities rather apply rules which form part of the domestic legal order than refer to international instruments which are not formally incorporated, this may be the more effective method of implementation. Once incorporated into domestic law the Covenant rights compete with domestic law even if no further implementing legislation is enacted. It is beyond doubt that a direct application of the treaty cannot be the sole measure of implementation, especially where positive steps are required as in arts 2 para. 3, 9 para. 5, 14 para. 6, 23 and 24.[142] But while incorporation would not make additional measures of implementation unnecessary, it would certainly strengthen the implementation of the Covenant mandated by article 2 para. 2 as a supplementary measure.

Coming back to the theory of the PCIJ in its Advisory Opinion on the Jurisdiction of the Courts of Danzig, one can conclude that the object of the ICCPR is "to create a special legal régime" governing the relations between individuals and States parties which requires immediate resort to its provisions.[143] It can be argued that, pursuant to the specific nature of the Covenant as a human rights instrument and its purpose to make the Covenant rights effective, a direct applicability is required. This interpretation is based rather on the general purpose than on an explicit intent of the drafters or an explicit textual obligation. Admittedly, it is true that in traditional international law the duty to make a treaty directly applicable on the domestic plane is the exception rather than the rule. However, this rule does not seem to be adequate in the area of human rights where international treaties deal with the relationship of the States parties to individuals and therefore necessarily target domestic issues. Since human rights treaties reach into domestic areas the traditional strict distinction between national and international law cannot be as strict as in other areas of international law focusing on the relationship between states. The conventional ways of implementation of international treaties do not seem to be adequate for the Covenant

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141 Graefrath, see note 90, 11.

142 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 44.

143 This was the reason why the Court held the *Beamtenabkommen* in this case to be directly applicable. See note 93.

because of this blurred line between domestic and international law.[144] Correspondingly, a trend towards alignment of domestic and international law can be observed in practice.[145]

d. Interpretation by the Human Rights Committee

In its early statements the Human Rights Committee pointed out that the choice of how to implement the Covenant is largely left to the States parties. In its General Comment on "Implementation at the national level" from 1981 the Committee noted that "article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article."[146] As to specific rights, the Committee in its General Comment on article 17 in 1988 acknowledged that "it is for each State to determine [the measures to be adopted to protect minors] in the light of the protection needs of children in its territory and within its jurisdiction."[147] Pursuant to the General Comment on non-discrimination of 1989 "[i]t is for the States parties to determine appropriate measures to implement the relevant provisions" on non-discrimination.[148] In 1998 in *A. and S.N. v. Norway*, the Committee rejected the author's assertion that since the Covenant had not been incorporated into the Norwegian legal system, a complaint before Norwegian courts was *a priori* not an effective remedy.[149] Mr. Ganji, a member of the Committee, said during the consideration of an early

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144 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 31.

145 For cases of reception of human rights treaties and international jurisprudence, see T. Buergenthal, "International Tribunals and National Courts: The Internationalization of Domestic Adjudication", in: U. Beyerlin et al. (eds), *Recht zwischen Umbruch und Bewahrung*. Festschrift R. Bernhardt, 1995, 687 et seq., (687-703). Also Buergenthal, see note 137, 216-220.

146 General Comment No. 3/13, see note 82, para. 1; HRC Report, in: GAOR, Suppl. No. 40, Doc. A/33/40, para. 117: "The method used to integrate the provisions of the Covenant in domestic law is a matter of each State party to decide in accordance with its legal system and practice".

147 General Comment No. 17/35 on article 24 (1989), in: HRI/GEN/1/Rev.1, 24, para. 3.

148 General Comment No. 18/37 on Non-discrimination, in: HRI/GEN/1/Rev.1, 26, para. 4.

149 Comm. No. 224/1987 (1988), para. 6.2, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/43/40, para. 246. See also Schachter, see note 12, 315.

Danish report that "[t]he incorporation of treaty provisions into domestic law became necessary only when such provisions were not in keeping with a pre-existing legal situation.[150] However, the Committee has never seen an obstacle in article 2 for States parties, inferring directly enforceable obligations from the Covenant.[151]

In more recent pronouncements, the Human Rights Committee has also left the States parties with a certain leeway in the implementation of the Covenant. In 1993 in *Araujo-Jongen v. The Netherlands*, it noted that there are various methods applied by States parties to incorporate the Covenant.[152] Hence, the Committee did not require a single method of incorporation. It further held that the question of whether a provision of the Covenant acquires direct effect in a State party is a "matter of domestic law" outside the competence of the Committee.[153] The dualist approach according to which the status of the Covenant in domestic law is determined by national law therefore persists.

In 1994 the Committee in *Roberts v. Barbados* accepted that the Covenant itself was not made part of domestic law as long as the provisions of the Covenant were made effective. It declared that "while the Covenant is not part of the domestic law of Barbados .., the State party has nevertheless accepted the legal obligation to make the provisions of the Covenant effective".[154] In several instances the Committee left the States parties with the choice between making the Covenant itself part of domestic law or giving effect to the rights of the Covenant in a more indirect way, that is by giving due consideration to the Covenant in the elaboration and interpretation of domestic law. This became apparent in the Committee's Comments on Sri Lanka in 1995 where it did not require a direct application but recommended that "due consideration be given to the provisions of the Covenant" during the reform of the Constitution.[155] Accordingly, in its Comments on Hungary in 1993 the Committee recommended that the State Party should fully incorporate

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150 Summary Record of the 54th Mtg., Consideration of the report of Denmark, Doc. CCPR/C/SR.54, para. 47.

151 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 42.

152 Comm. No. 418/1990 (1993), HRC Report, in: GAOR, Suppl. No. 40, Doc. A/49/40, Vol. II, 114, (118).

153 Ibid., see also *APL v. The Netherlands*, Comm. No. 478/1991 (1993), para. 6.5.

154 Comm. No. 504/1992 (1992), Doc. CCPR/C/51/D/504/1992, para. 6.3.

155 Comments on Sri Lanka, Doc. CCPR/C/79/Add.56, para. E.

the Covenant into domestic law or give direct effect to it.[156] In its Comments on Ireland in 1993, noting that the Covenant cannot be directly invoked in Irish courts, the Committee demanded that "the need to comply with the international obligations should be taken fully into account by the judiciary".[157] The Committee thereby made the judiciary also responsible for the implementation of the Covenant.

However, during these years the leeway accorded to the States parties by the Human Rights Committee had already diminished. If a state decided not to make the Covenant directly applicable, the measures of implementation were clearly defined by the Committee: the Committee criticized legal systems for not containing *all* the rights set forth in the Covenant[158] and recommended the incorporation of the provisions of the Covenant into domestic law.[159] This makes clear that article 2 at least requires that all rights set forth in the Covenant need to be part of the domestic legal system.

According to the Committee it is not enough to rely on unwritten rights. Codification of the Covenant rights is required. In its Concluding Observations on the United Kingdom of Great Britain and Northern Ireland of 1995 the Committee expressed its concern that "implementation of the Covenant is impeded" by the non-incorporation of the Covenant into domestic law and the absence of a constitutional Bill of Rights.[160] It emphasized the need for incorporation *or* a bill of rights "under which legislative or executive encroachment on Covenant rights could be reviewed by the courts" giving the States parties the choice between the two measures.[161] This was a harsh criticism of the British legal tradition of unwritten fundamental rights and showed a clear preference for codification. Concluding its consideration of the second periodic report of Ireland the Committee in 2000 urged that country to

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156 Comments on Hungary, Doc. CCPR/C/79/Add.22, para. E.1.

157 Comments on Ireland, Doc. CCPR/C/79/Add.21, para. 18.

158 Comments on Sri Lanka, see note 155, para. D; Comments on Ireland, see above.

159 Comments on Iceland, Doc. CCPR/C/79/Add.26, para. 11 (1993). An indirect incorporation was sought hereby.

160 Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, Doc. CCPR/C/79/Add. 55, para. 9, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/50/40, paras 408-435. Meanwhile the United Kingdom enacted the Human Rights Act of 1998 with regard to the European Convention on Human Rights.

161 Ibid. para. 20.

incorporate the Covenant into its domestic legislation. Similarly, in its Comments on Iceland's second periodic report in 1993 the Committee expressed its concern that there were no written fundamental human rights in the Icelandic Constitution but only "reliance on unspecified unwritten fundamental rules" which did not "adequately meet the requirements of Article 2 (2)". It went on to point out: "No matter how effective the Icelandic constitutional tradition of relying on unwritten fundamental rules and principles may be, codification of the rules governing the protection of human rights is an important element of protection".[162]

This statement is rather striking. It is doubtful why codification should be an important element of protection when reliance on unwritten rules would be also effective. After all, the effective protection of civil and political rights is the ultimate purpose of article 2. If it is not the effectiveness which requires codification, what is it that demands codification? It seems hard to justify such an interpretation if the obligation of codification can neither be deduced from the wording of article 2 para. 2 nor from its purpose. The reason for this statement seems to be a general suspicion among the members of the Committee that unwritten rules do not provide as much protection as codified ones.[163]

Some members of the Committee early were in favor of making the Covenant part of domestic law and its direct application by domestic courts, at least where it is not incorporated into domestic legislation. During an early consideration of the legal situation in the United Kingdom some members of the Committee thought it was advisable to confer upon the Covenant the legal force of statutory law.[164] They argued that despite the principle of freedom of states as to how to discharge their international obligation, the States parties were obliged under article 2 para. 1 to respect all rights of the Covenant. Because of the fragmentary character of the case law in the United Kingdom, there was a high probability that the substance of the Covenant was not entirely

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162 See note 159, para. 6.

163 However, in its latest Concluding Observations on the British Crown dependencies of Jersey, Guernsey and the Isle of Man the Committee merely urged the State party "to ensure that all Covenant rights are given effect in domestic law", Doc. CCPR/C/79/Add.119, para. 8.

164 Summary Record of the 69th Mtg., Consideration of the periodic report of the U.K., Doc. CCPR/C/SR.69, para. 83.

protected by British domestic law.[165] Therefore it should be possible to invoke the provisions of the Covenant before domestic tribunals and administrative agencies.

As early as 1978, during the consideration of the Swedish report, Tomuschat stressed that in a country which had chosen to bring domestic legislation into line with the Covenant without formally incorporating it into domestic law and without making the Covenant part of its domestic law, an individual should have the right directly to invoke its provisions before the courts.[166] He argued that the rights accorded by the Government to the individual could not depend upon the method of implementation in various countries.[167] Later he elaborated that individuals are not limited to claim that national law enacted to implement the Covenant be correctly applied. The legal entitlement under article 2 para. 3 related directly to the Covenant and therefore the right to a remedy included the right of access to the text of the Covenant.[168] He further recommended that the courts of states which have chosen to incorporate the Covenant in its domestic legal order should not hesitate to consider the Covenant rights as self-executing provisions.[169] In sum, the arguments by the Committee members for a direct application are based on article 2 paras 1 and 3, as well as on more general considerations of equality and effective protection. Direct application is deemed to be a safeguard.

The preference by some of its members of an obligation to make the Covenant directly applicable has gradually gained ground in the Human Right Committee in recent years. In its Concluding Observations on Nepal in 1994 the Human Rights Committee stated "the need to clearly define the place of the Covenant within the Nepalese legal system to ensure that domestic law[s] are applied in conformity with the

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165 As already pointed out, this argument later led the Committee to require the codification of the Covenant rights in the United Kingdom. See text accompanying notes 160-161.

166 HRC Report, in: GAOR, Suppl. No. 40, Doc. A/33/40, para. 70.

167 Summary Record of the 52th Mtg., Consideration of the periodic report of Sweden, Doc. CCPR/C/SR.52, para. 38.

168 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 59. However, he recognized that the question whether a provision possesses a sufficient degree of precision to be directly applied by domestic courts is to be determined by each domestic system according to its own criteria. Ibid., 44.

169 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 42.

provisions of the Covenant."[170] The principle of direct applicability of the Covenant and the possibility of invoking it directly before the courts was welcomed by the Committee in the case of the Libyan Arab Jamahiriya.[171] Regularly the Committee asks States parties to indicate cases in which the provisions of the Covenant were *directly* invoked before state organs, including the courts[172] and it expresses its concern that the Covenant rights cannot be invoked directly before domestic courts.[173] Recently, in its Concluding Observations on Mongolia, the Committee recommended that the public should be informed that the Covenant may be relied on in the courts in order to obtain remedies.[174]

While up to 1993 the Committee only asked that the Covenant itself be given direct effect *or* for incorporation of the rights into domestic law so that the Covenant can be applied indirectly,[175] it now requires the Covenant's direct application whether it is incorporated or becomes part of domestic law upon ratification. This became clear in the following pronouncements: in its Comments on Nepal the Committee stressed the "need the provisions of the Covenant to be fully incorporated into domestic law *and* made enforceable by domestic courts" (emphasis added).[176] In its 1996 Concluding Observations on Gabon the Committee expressed its regrets that the Gabonese Constitution did not make a specific reference to the Covenant[177] and recommended "that the Covenant be incorporated in the domestic legal order *and that its provisions be made directly applicable* before the courts" (emphasis added).[178] Recently, in its Concluding Observations on Guyana of 2000 the Committee was concerned that "not all Covenant rights have been

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170 Concluding Observations on Nepal, Doc. CCPR/C/79/Add.42, para. 6.

171 Concluding Observations on the Libyan Arab Jamahiriya of 1998, see note 66, para. 4.

172 Summary Record of the 1426th Mtg. Consideration of the 4th periodic report of the Russian Federation, Doc. CCPR/C/SR.1426, para. 14 I. (b); Comments on Latvia, Doc. CCPR/C/79/Add.53, para. E., Comments on Estonia, see note 69, para. 24.

173 Concluding Observations on Zimbabwe, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/53/40, Vol. I, H., para. 211; Concluding Observations on Israel, ibid. L., para. 305.

174 Concluding Observations on Mongolia, Doc. CCPR/C/79/Add.120, para. 7.

175 Comments on Hungary, see note 156, para. E.1.

176 See note 170, para. 12.

177 Concluding Observations on Gabon, Doc. CCPR/C/79/Add.71, para. 8.

178 Ibid., para. 18.

included in the current Constitution and therefore cannot be directly enforced".[179] It recommended that Mongolia should explain to the public that the Covenant may be relied on in domestic courts in order to obtain remedies.[180] With regard to article 9 para. 4 of the Covenant, the Committee in *A v. Australia* held that domestic courts charged with the review of the lawfullness of detention must have the power to order release if the detention is incompatible with the Covenant itself.[181] Pursuant to article 9 para. 4, anyone deprived of his liberty shall be entitled to take proceedings before a court, in order that the court may decide on the "lawfulness of his detention". The Committee interpreted "lawfulness" not only as compliance with domestic law but also as compliance with the provisions of the Covenant. Accordingly, domestic courts need to be able to apply the Covenant directly even if it has not been incorporated into domestic law in order to determine the lawfulness of the detention.

States parties that traditionally do not incorporate international treaties have attracted criticisms from the Committee, as already seen in the case of the United Kingdom and Ireland. In 1996 the Committee went so far to recommend to Denmark to "take appropriate measures to ensure the *direct application* of the provisions of the Covenant into domestic law" (emphasis added).[182] If international treaties are not considered to be self-executing by a State party, as in the case of India, the Committee recommends "that steps be taken to incorporate fully the provisions of the Covenant in domestic law, so that individuals may invoke them *directly* before the courts" (emphasis added).[183]

In its Concluding Observations on Israel in 1998 the Committee noted "with regret that, although some rights provided for in the Covenant are legally protected and promoted through the Basic Laws, municipal laws, and the jurisprudence of the courts, the Covenant has not been incorporated in Israeli law and cannot be *directly* invoked in the courts.[184] In its Concluding Observations on the United Republic of Tanzania in 1998 the Committee even went so far as to say: "While the Committee is encouraged to hear that the courts are beginning to refer

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179 Doc. CCPR/C/79/Add.121, para. 6.

180 Concluding Observations on Mongolia, see note 174.

181 Comm. No. 560/1993 (1997), Doc. CCPR/C/59/D/560/1993, para. 9.5.

182 Concluding Observations on Denmark, Doc. CCPR/C/79/Add.68, para. 17.

183 Concluding Observations on India, Doc. CCPR/C/79/Add.81, para. 13.

184 See note 173, para. 305.

to the Covenant in judgments, it recommends that the Covenant be given *formal recognition and applicability* in domestic law (art. 2)" (emphasis added).[185] This shows that it is no longer enough if domestic law protects the rights recognized by the Covenant so that the Covenant has its counterpart in domestic law which can be invoked in domestic courts. States parties need to ensure that the Covenant itself can be applied directly by domestic courts. The Covenant needs its own formal place in the domestic legal system so that the Covenant provisions themselves become enforceable by domestic courts.

To sum up, there has been a development in the practice of the Human Rights Committee. While originally the choice of the method of implementation was left to the States parties, the Human Rights Committee in recent years has increasingly elaborated the standards for implementation. Earlier, the Covenant did not need to be part of the domestic legal system. Since 1993 the Committee started to require incorporation *or* direct application of the Covenant. The following years brought a period of transition. The requirements for incorporation were expanded. States parties were asked to codify all Covenant rights domestically. The intention of the Committee was to ensure that individuals are able to have encroachments on Covenant rights reviewed by the courts, either on the ground of incorporation or a bill of rights containing the rights outlined by the Covenant.[186] Gradually the Committee started requesting not only the incorporation of the Covenant rights but also the direct application of the Covenant provisions themselves. Today States parties are left with the choice between considering the Covenant self-executing or incorporating it into domestic law so that the Covenant can be directly invoked in the courts.

The reason for this development in the interpretation of article 2 by the Human Rights Committee from free choice of implementing measures to more stringent requirements for incorporation is a new focus on the effectiveness of the implementation and on the effective domestic remedies to challenge violations of the Covenant. By requiring that all rights set forth in the Covenant be contained in the States parties' legal systems the Committee wants to make sure that individuals are not prevented from invoking the rights conferred under the Covenant be-

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[185] Concluding Observations on the United Republic of Tanzania, Doc. CCPR/C/Add.97, in: HRC Report, GAOR, Suppl. No. 40, Doc. A/53/40, Vol. 1, P, para. 394.

[186] Concluding Observations on the United Kingdom of Great Britain and Northern Ireland, see note 160, paras 408-435.

fore national courts.[187] The requirement that the Covenant rights need to be directly enforceable by domestic courts is meant as a safeguard for the effective enjoyment of all Covenant rights by the individual. Generally speaking this instrumentalizes the national enforcement systems as mechanisms for the enforcement of international human rights.

There is a general mistrust by the members of the Committee as to the effectiveness of an indirect application of the Covenant. For example Mrs. Medina Quiroga pointed out during the consideration of the fourth periodic report of the United Kingdom that British courts only very rarely referred to the Covenant.[188] Buergenthal pointed to the disadvantages of the British system, according to which the Covenant and the European Convention did not create a formal cause of action.[189] As Prado Vallejo, another member of the Committee, during the consideration of Ireland's initial report put it, the Covenant can be applied much more easily if the provisions of the Covenant can be invoked before national courts.[190] According to his colleague, Eckhardt Klein, being able to influence the application of the law if invoked before the

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187 As pointed out earlier, the Human Rights Committee criticized the Sri Lanka legal system for not containing all the rights set forth in the Covenant because it prevented individuals from invoking the rights conferred under the Covenant before national courts. Comments on Sri Lanka, see note 155 para. D. Also Concluding Observations on Zimbabwe, see note 173, para. 211.

188 Summary Record of the 1432th Mtg., Consideration of the 4th periodic report of the United Kingdom and Northern Ireland, Doc. CCPR/C/SR.1432, para. 82. However, the British representative during the consideration of this report pointed to statistics indicating that courts in some states which had incorporated the Covenant referred to the Covenant even less frequently. Summary Record of the 1433rd Mtg., see note 133, para. 15.

189 Summary Record of the 1432rd Mtg., see above, para. 90. More recently, the United Kingdom enacted the Human Rights Act of 1998 enabling British citizens to petition British courts for protection under the European Convention on Human Rights.

190 Summary Record of the 1239th Mtg., Consideration of Ireland's initial report, Doc. CCPR/C/SR.1239, para. 95. His colleague Herndl even went so far as to maintain that if an international instrument is not incorporated into domestic legislation the administrative authorities and courts cannot apply it. Cf. Summary Record of the 1235th Mtg., Doc. CCPR/C/SR.1235, para. 46.

courts was not the same as having to be applied as domestic law.[191] Therefore, by asking the States parties to take measures so that the Covenant itself can be invoked and applied in the domestic courts, the Committee wants to ensure that there are effective domestic remedies to challenge violations of the Covenant. This reflects an interpretation that, as outlined above, is based rather on the purpose than on an explicit obligation of article 2 or a definite intent of its drafters. The obligation to respect and ensure the Covenant rights pursuant to article 2 para. 1 and the right to an effective remedy pursuant to article 2 para. 3 play a vital role in this concept. It goes without saying that the Committee still requires further steps of implementation beyond the incorporation of the Covenant. But if the legislature fails to enact implementing legislation, individuals shall not be prevented from invoking the Covenant rights in court.

While a number of States parties traditionally have refused to make the Covenant part of their domestic law, more and more States parties now comply with the recently elaborated requirements for implementation. Examples of States parties where the Covenant can be invoked directly before the courts are France,[192] Finland,[193] the Czech Republic[194] and the Libyan Arab Jamahiriya.[195] With regard to the European Convention, the United Kingdom enacted the Human Rights Act under which British citizens are able to petition British courts for protection under the European Convention. The Act gives effect to rights and freedoms guaranteed under the Convention and requires all courts to take Convention rights into account. A similar step might be taken in future with regard to the ICCPR.

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191 Summary Record of the 1534th Mtg., Consideration of the periodic report of Denmark, Doc. CCPR/C/SR.1534, para. 52.

192 Article 55 of the French Constitution of 4 June 1958. International treaties take precedence over French domestic law, see Concluding Observations on France of 1996, Doc. CCPR/C/79/Add.80. See also *Faurisson v. France*, Comm. No. 550/1993 (1996), Doc. CCPR/C/58/D/550/1993.

193 Finland has incorporated the Covenant into domestic law, see Finland's observations in *Sara et al. v. Finland*, Comm. No. 431/1990 (1994), Doc. CCPR/ C/50/D/431/1990, para. 4.7.

194 Article 10 of the Czech Constitution, article 36 of the Charter of Fundamental Rights and Freedoms, see *Josef Frank Adam v. The Czech Republic*, Comm. No. 586/1994 (1996), Doc. CCPR/C/57/D/586/1994, para.8.9. Also *Malik v. Czech Republic*, Comm. No. 669/1995 (1998), Doc.CCPR/ C/64/D/669/1995. For further examples, cf. Nowak, see note 13, 54.

195 See note 66.

3. Domestic Normative Rank of the Covenant

Another question raised is which normative rank the Covenant rights require within the domestic legal order, that is, the place in the hierarchy of sources of law of the State party. Accordingly, the Human Rights Committee in *Tae Hoon Park v. Republic of Korea* found "it incompatible with the Covenant that the State party has given priority to the application of its national law over its obligations under the Covenant."[196] Recently, the Committee expressed its concern about "the increasing trend [in Zimbabwe] to enact parliamentary legislation and constitutional amendments to frustrate decisions of the Supreme Court that uphold rights protected under the Covenant and overturn certain laws incompatible with it."[197] According to the Committee the Covenant requires its "effective precedence over any inconsistent legislative act".[198] Such approach is mandated by the overarching principle of the Vienna Convention on the Law of Treaties, namely that treaty based obligations must be complied with in good faith.

In order to ensure conformity between national law and international obligations of States parties, the Committee frequently instructs States parties to review draft legislation and existing legislation to ensure their compatibility with the Covenant[199] and welcomes domestic recognition of the Covenant's supremacy over domestic law.[200] As the Committee in its General Comment No. 24 pointed out, "[d]omestic laws may need to be altered properly to reflect the requirements of the Covenant".[201] The status of the Covenant in the domestic legal system needs to be clearly defined to ensure that domestic laws are applied in accordance with the provisions of the Covenant.[202] Domestic law must

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196 Comm. No. 628/1995 (1998), Doc. CCPR/C/64/D/628/1995, para. 10.4.

197 Concluding Observations on Zimbabwe, see note 173, para. 211.

198 Comments on Estonia, see note 69, para. D. 10.

199 Comments on Ireland, see note 157, paras 9, 18; Comments on Estonia, see note 69, para. 24; Concluding Observations on Zimbabwe, see note 173, para. 213; Concluding Observations on Mongolia, see note 174, para. 7.

200 Concluding Observations on Belarus, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/53/40, Vol. 1, E., para. 142; Concluding Observation on Costa Rica, Doc. CCPR/C/79/Add.107, para. 3; Concluding Observation on Slovakia, Doc. CCPR/C/79/Add.79, para. 4.

201 General Comment No. 24/52, see note 64, para. 12.

202 Concluding Observations on Nepal, see note 170, para. 6. Also Concluding Observations on the Libyan Arab Jamahiriya, see note 66, para. 6; Con-

be interpreted and applied in accordance with the obligation under the Covenant.[203] Therefore, States parties are asked whether courts may declare invalid legal norms which are inconsistent with the Covenant. Most States parties have undertaken a wide range of reforms, from constitutional amendments, new codes, to the repeal of single provisions to ensure the compatibility of domestic law with the Covenant.[204] Some states have developed specific mechanisms to check new legislation for its compatibility with the Covenant.[205]

Not only legislation but even the Constitution needs to be in accordance with the Covenant. The Human Rights Committee has repeatedly expressed its concern over the lack of clarity concerning the resolution of conflicts between the Covenant and the Constitution of a State party.[206] One might argue that in case of a conflict between the Covenant and the Constitution of a State party the consent to be bound by the Covenant is invalid, as a violation manifest and concerning a rule of the state's internal law which is of fundamental importance pursuant to article 46 para. 2 of the Vienna Convention.[207] The Human Rights Committee, however, requires a rank that is higher than the Constitution. In its Concluding Observations on Morocco the Committee noted that "steps remain to be taken to harmonize the Constitution with the Covenant".[208] In 1998 the Committee in its Concluding Observations on Jamaica expressed its appreciation "that in the envisaged review of the Jamaican Constitution, any provision in contradiction with the Covenant ... would be eliminated".[209]

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cluding Observations on Lithuania, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/53/40, Vol.1, F., para. 166.

203 Comments on Ireland, see note 157, para. 9.

204 For a detailed account of legislative reforms in States parties to the Covenant, see Cohn, see note 94, 304 seq.

205 For examples, see ibid., 314 seq. For the obligation to establish monitoring and control mechanisms, see under IV. 2. d.

206 Comments on Iceland, see note 159, para. 7; Concluding Observations on Slovenia, Doc. CCPR/C/79/Add.40, para. 8.

207 It is questionable whether such a conflict is "manifest" and "objectively evident to any state conducting itself in the matter in accordance with normal practice and in good faith." Cf. Convention, article 46 para. 2.

208 Concluding Observations on Morocco, Doc. CCPR/C/79/Add.44, para. B 4.

209 Concluding Observations on Jamaica, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/53/40, Vol.1, B., para. 72.

The reasons for requiring the compatibility of the Constitution with the Covenant were given by the Committee in its Concluding Observations on Armenia in 1998. The Committee explained its "grave concern" about the incompatibility of several provisions of the Constitution with the Covenant with the fact that "[t]he inconsistency of domestic law with provisions of the Covenant not only engenders legal insecurity, but is likely to lead to violations of rights protected under the Covenant."[210] This statement indicates that the Covenant not merely creates obligations of result but also obligations of conduct. It is not enough to refrain from violations of the rights. The States parties need to make sure that their legal order is set up in such a way that it unlikely leads to violations.

This has an impact on the question how and at which level of domestic law the Covenant needs to be incorporated. Whereas Tomuschat and Graefrath, both early members of the Committee, in 1984 and 1988 held that a state may introduce the Covenant at different levels within the hierarchy of its legal sources,[211] the Committee meanwhile has gone much further. States parties have the choice between either fully incorporating the Covenant into domestic law with a rank superior to that of domestic legislation or giving it the status of domestic law, so that in case of conflict between a provision of the Covenant and domestic law the former prevails.[212] If the Covenant is not made self-executing the Committee now envisages an incorporation of the Covenant rights into the Constitution. In its Comments on Iceland of 1993 the Committee recommended "amending the national Constitution in order to reflect adequately the provision of the International Covenant on Civil and Political Rights."[213] The Committee criticized Nigeria in 1996 for not

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210 Concluding Observations on Armenia, Doc. CCPR/C/79/Add.100, para. 7.

211 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 42. Graefrath, see note 127, 56.

212 Comments on Ireland, see note 157, para. 18; cf. Comments on Latvia, see note 172, paras D, E; Comments on Hungary, see note 156, paras D.6 and E 1; Comments on Ireland, see note 157, para. 10; Concluding Observations on Malta, Doc. CCPR/C/79/Add.29, para. 4(1994), HRC Report, in: GAOR, Suppl. No. 40, Doc. A/49/40, paras 117-131. For examples of higher normative status of international treaties in countries, see Buergenthal, see note 137, 215 seq.

213 See note 159, paras 6, 12; Comments on Sri Lanka, see note 155, para. E; Comments on Norway, Doc. CCPR/C/79/Add.27, para. 8; Comments on Cameroon, Doc. CCPR/C/79/Add.33, para. E. 17; Comments on Latvia,

legally protecting the rights guaranteed under the Covenant in Nigeria because the applicable Constitution did not include basic rights.[214] It expressed its appreciation for giving the Covenant a status equal to that of the Constitution in its Concluding Observations on Colombia in 1997.[215]

If a State party does not consider the Covenant to be automatically part of its legal order, one option to meet this new standards is to incorporate the Covenant, by virtue of a reference to the Covenant, into the Constitution so that it becomes part of the internal legal order which cannot be changed by domestic legislation so that its provisions may be directly invoked before the courts. For example, article 15 of the Russian Constitution now establishes that international treaties including the Covenant are part of the Russian legal system and that the Covenant can be invoked directly in Russian courts.[216] Article 10 para. 2 of the Spanish Constitution provides that the norms relative to basic human rights recognized by the Constitution, shall be interpreted in conformity with the Universal Declaration of Human Rights and international treaties and agreements on those matters ratified by Spain.[217] Hereby the Covenant was incorporated for the purpose of interpretation of the Constitution. In its Concluding Observations on Spain in 1996 the Committee noted as a positive aspect that many decisions of Spanish courts refer to the Covenant as a legal basis in accordance with this constitutional provision.[218] The Committee welcomed the method of reference in its Concluding Observations on the former Yugoslav Republic of Macedonia[219] and expressed its regrets that the opportunity was not taken to include a reference to the Covenant into the 1994

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see note 172, para. D; Concluding Observations on Jamaica, see note 209, para. 72.

214 Concluding Observations on Nigeria, Doc. CCPR/C/79/Add.65, para. 14.

215 Concluding Observations on Colombia, Doc. CCPR/C/79/Add.75, para. 7.

216 See the explanations of the Russian representative during the consideration of Russia's 4th periodic report, see note 172, para. 24. Cf. also Concluding Observations on the Russian Federation, Doc. CCPR/C/79/Add.54, para. 7.

217 Constitution of Spain (1978), cf. Buergenthal, see note 137, 217.

218 Concluding Observations on Spain, Doc. CCPR/C/79/Add.61, para. 9.

219 Concluding Observations on the former Yugoslav Republic of Macedonia, Report of the Human Rights Committee, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/53/40, Vol. I, O., para. 372.

Constitution of Gabon.[220] To accord to the Covenant a constitutional status by reference to its provisions in national constitutions is a frequent phenomenon that has developed recently.[221]

Another option is to incorporate the provisions of the Covenant into the Constitution by spelling out these rights and making sure that the Covenant can be directly invoked in court. Often the Covenant language is used as a model for domestic legislation. The use of Covenant terminology in domestic legislation promotes its direct application on the domestic plane.[222] This was done in the Finnish Constitution of 1995 with the later approval of the Committee.[223] Similarly, Iceland adopted Constitutional Act No. 97/1995 amending the human rights provisions of the Constitution.[224] In its Concluding Observation on Slovakia, the Committee welcomed the inclusion of an extensive and elaborate catalogue of fundamental rights in the Slovak Constitution and the application of provisions of the Covenant by the Constitutional Court.[225]

4. Article 2 and the Reservations, Understandings and Declarations of the United States

The United States entered a number of reservations, understandings and declarations to the Covenant.[226] A particular problem as to the direct application of the Covenant by domestic courts is posed by the declaration of the United States "[t]hat the provisions of Articles 1 through 27 of the Covenant are not self-executing".[227] While international treaties which the United States is a party to have the status of U.S. law pursuant to article VI of the Constitution, their applicability in United

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220 Concluding Observations on Gabon, see note 177, para. 8.

221 For a detailed survey Buergenthal, see note 137, 217 seq.

222 Cohn, see note 94, 302.

223 Concluding Observations on Finland, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/53/40, Vol. I, J., para. 253.

224 Concluding Observations on Iceland, Doc. CCPR/C/79/Add.98.

225 Concluding Observations on Slovakia, see note 200, para. 4.

226 Senate Comment on Foreign Relations, Report on the ICCPR, S. Exec. Rep. No. 23, 102d Cong., 2d Sess. 6-20 (1992), in: *ILM* 31 (1992), 645 et seq., (651-657).

227 Text of Resolution and Ratification, III (1). For the text of the declaration, see ibid., 18, 23, in: *ILM* 31 (1992,), 657 et seq., (659).

States courts depends on whether their provisions are considered to be self-executing. Because of the non-self-executing declaration the Covenant does not, by itself, create individual rights enforceable in U.S. courts.[228] In the absence of appropriate implementing legislation, the Covenant does not give rise to a cause of action.[229] The declaration has been subject to objections.[230] It was argued that the declaration was in contradiction to the object and purpose of the Covenant and violated it.[231] In contrast thereto the declaration was described as not affecting international obligations of the United States under the Covenant because it was entirely an issue of domestic law and merely concerned the modalities of domestic implementation.[232]

As already pointed out, the Committee does not criticize states that do not consider the Covenant to be self-executing as long as they take steps to incorporate the provisions of the Covenant into domestic law so that individuals may invoke them directly before the courts.[233] There is no *per se* obligation to consider a treaty self-executing. Even if there is an obligation to make the Covenant directly applicable, this can be achieved through incorporating legislation without the need to consider the treaty self-executing. Therefore, a non-self-executing declaration in itself does not constitute a violation of the Covenant, but combined with other factors it may run counter to the obligations under article 2.

The problem lies in the combination of the non-self-executing declaration with the apparent intention of the reservations to make sure

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228 D. P. Stewart, "U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations", *HRLJ* 14 (1993), 77 et seq., (79). For an interesting interpretation of reservations, understandings and declarations as permitting state judges to apply the Covenant directly on the basis of the "federalism understanding" the U.S. Senate attached to the instrument of ratification, see Buergenthal, see note 137, 221-222.

229 See Senate Comment, see note 226, 19 (1992).

230 For the U.S. constitutional issues raised by the reservations, understandings and declarations, see Buergenthal, see note 137, 221; L. Henkin, "U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker", *AJIL* 89 (1995), 341 et seq.; Lawyers Committee for Human Rights, "Statements on U.S. ratification of the CCPR", *HRLJ* 14 (1993), 125.

231 Paust found the declaration to be in violation of the Covenant's arts 2, 4, 5, 9, 14, 50 and its Preamble. Cf. Paust, see note 136, 1259.

232 Stewart, see note 228, 79 and 83.

233 See e.g., Concluding Observations on India, see note 183, para. 13.

that the Covenant does not require any changes in United States law or practice.[234] An example is the reservation to article 7 "[t]hat the United States considers itself bound by Article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." With regard to arts 10 and 14 of the Covenant a reservation states "[t]hat the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system." The proviso which was not included in the instrument of ratification provides: "Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." Though the reservations have been entered to particular provisions of the Covenant, the totality of the reservations, understandings and declarations gives the impression that the *status quo* under U.S. law shall be preserved and that no additional legislation is therefore required.[235] In fact, the spokesman of the former Bush administration declared that implementing legislation was not necessary, because, as a result of the reservations such legislation was unnecessary.[236]

The U.S. reservations limiting the obligation undertaken to the *status quo* have been criticized as violating the rule that a party may not invoke its domestic law to justify non-compliance with a treaty and posing serious questions of good faith[237] and to be contrary to the object and purpose of the Covenant.[238] The Covenant is not intended to describe a *status quo* but to set standards to which the States parties need to measure up. To limit the obligations undertaken by a State party in general to existing legal standards so that no changes are neces-

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234 This interpretation of the reservations is shared by Henkin. Henkin, see note 230, 342.

235 T. Buergenthal, *International Human Rights in a Nutshell*, 2nd edition, 1995, 297.

236 See Senate Comment, see note 226, 657; Henkin, see note 230, 348.

237 Schachter, see note 12, 322; F. C. Newman/ D. Weissbrodt, *International Human Rights*, 1990, 590.

238 Henkin, see note 230, 343.

sary contradicts article 2 para. 2 which envisages steps to be taken, that is domestic changes.[239] A reservation to article 2 is not permissible.[240]

That a state may not perpetuate its domestic standards was acknowledged by the Human Rights Committee in its General Comment relating to reservations where it pointed out that "[d]omestic laws may need to be altered properly to reflect the requirements of the Covenant".[241] The Committee criticized that "[r]eservations often reveal a tendency of States not to want to change a particular law"[242] and went on:

> "So that reservations do not lead to a perpetual non-attainment of international human rights standards, reservations should not systematically reduce the obligations undertaken only to those presently existing in less demanding standards of domestic law. Nor should interpretative declarations or reservations seek to remove an autonomous meaning to Covenant obligations, by pronouncing them to be identical, or to be accepted only insofar as they are identical, with existing provisions of domestic law."[243]

This General Comment which seems to address implicitly a number of problems of the United States reservations, understandings and declarations in a critical way was criticized by the United States, France and the United Kingdom.[244] The United States questioned whether the Committee is vested with the legal authority to make determinations

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239 According to Schachter the U.S. reservations intent to deprive the requirement to adopt measures wherever necessary to give effect to the Covenant for the United States because it reduces U.S. obligations to the level of existing law. Schachter, see note 12, 322. For the continuous obligation of implementation, see II. 3.

240 General Comment No. 24/52, see note 64, para. 9.

241 Ibid. para. 12.

242 Ibid.

243 Ibid. para. 19.

244 Observations by the United States of America on General Comment No. 24/52 relating to Reservations, (1994-1995), HRC Report, in: GAOR, Suppl. No. 40, Doc. A/50/40, Vol. 1, 131, in: *HRLJ* 16 (1995), 422 et seq., (423); Observations by France on General Comment No. 24/52 relating to Reservations, (1995-1996), HRC Report, in: GAOR, Suppl. No. 40, Doc. A/51/40; Observations by the United Kingdom on General Comment No. 24/52 relating to Reservations, (1994-1995), HRC Report, in: GAOR, Suppl. No. 40, Doc. A/50/40, Vol.1, 135, in: *HRLJ* 16 (1995), 424 et seq.

concerning the permissibility of specific reservations.[245] The Human Rights Committee in its General Comment No. 24 maintained that "[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant ... because ... it is an inappropriate task for States Parties in relation to human rights treaties, and ... because it is a task that the Committee cannot avoid in the performance of its functions."[246] According to the Committee "[b]ecause of the special character of a human rights treaty, the compatibility of a reservation with the object and purpose of the Covenant must be established objectively... and the Committee is particularly well placed to perform this task..."[247]

Pursuant to article 20 para. 4 and article 21 of the Vienna Convention on the Law of Treaties the acceptability of a reservation is left to the individual appraisal of each State party to a treaty. According to the United States, divesting States parties of any role in determining the extent of their treaty obligations was contrary to the Covenant scheme and the Vienna Convention on the Law of Treaties. As pointed out by the United Kingdom in its observations on General Comment No. 24, another Contracting State always has the right formally to object to a reservation according to the Vienna regime.[248] In the case of reservations potentially incompatible with the object and purpose of a treaty as a whole, the availability of binding third-party procedures could be of great importance.[249]

It has been argued by legal scholars that when a human rights treaty creates a control body, such a body should be entitled to determine the legality of reservations in order to discharge its functions.[250] This has

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245 Observations by the United States of America on General Comment No. 24/52 relating to Reservations, see above, 422.

246 General Comment No. 24/52, see note 64, para. 18.

247 Ibid.

248 Observations by the United Kingdom on General Comment No. 24/52, see note 244, 425, para. 9.

249 Ibid. 425, para. 10.

250 M. Rama-Montaldo, "Human Rights Conventions and Reservations to Treaties", in: H. Gros Espiell, *Amicorum Liber*, Vol. II, 1997, 1261 et seq., (1272); Nguyen Quoc Dinh et al., *Droit International Public*, 5th edition, 1994, 181. See also W.A. Schabas, "Is the United States still a party?", *Brook. J. Int'l L.* 21 (1995/96), 277 et seq., (315); H. Gros Espiell, "La Convention américaine et la Convention européenne des droits de l'homme", *RdC* 218 (1989), 167 et seq., (382 et seq.).

been recognized by the European Court of Human Rights.[251] With regard to the Human Rights Committee it has been argued that in the course of an inter-state complaint, the Committee charged with adjudicating such complaints must take a position on the question whether a reservation is valid if a petitioner State party invokes the invalidity of a reservation.[252] However, while the United Kingdom accepted that the Committee must be able to take a view of the status and effect of a reservation where this is required in order to carry out its substantive functions under the Covenant, it denied any general power conferred on the Committee by the Covenant to determine whether a reservation is compatible with the object and purpose of the Covenant.[253] Such a determination could not be binding on the States parties unless a legal obligation to accept such determinations had been entered previously.[254] The United Kingdom preferred determinations on the validity of reservations on the basis of decisions judicially arrived after full legal argument.

The question has also been dealt with by the ILC since 1993 when it included the law and practice relating to reservations in its agenda and appointed Mr. Pellet as Special Rapporteur. After deliberations on his Second Report, the Commission, in its Preliminary Conclusions on reservations to normative multilateral treaties including human rights of 1997, recognized that when the respective treaties are silent on the matter, monitoring bodies are competent to "comment upon and express recommendations" with regard to the admissibility of reservations "in order to carry out the functions assigned to them".[255] However, the legal force of the treaty bodies' findings "cannot exceed that resulting from the powers given to them for the performance of their general monitoring role".[256]

Apart from the question whether the Committee has the power to determine the admissibility of reservations, the United States in its Observations on General Comment No. 24 acknowledged that it is "nei-

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251 *Belilos v. Switzerland*, 132 Eur. Ct. H.R. Ser. A, 1, (18).

252 Schabas, see note 250, 316; General Comment No. 24/52, see note 64, para. 18.

253 Observations by the United Kingdom on General Comment No. 24/52, see note 244, 425, para. 11.

254 Ibid., 425, para. 12.

255 ILC Report 1997 Chapter 5, in: GAOR 52nd Sess., Suppl. No. 10, Doc. A/52/10, 126 seq., para. 5.

256 Ibid., para. 8.

ther appropriate nor lawful" to generally subordinate the Covenant to the "full unspecified range of national law".[257] Though, the United States does not seem to consider its reservations to be that broad.

The proviso excluding legislation required by the Covenant which is prohibited by the U.S. Constitution is not in accordance with the status the Covenant requires in domestic law according to the Committee.[258] As elaborated above, the Committee asks states to harmonize the Constitution with the Covenant. Therefore, in case of a conflict between the Covenant and the Constitution — for example if the Covenant requires legislation prohibited by the Constitution — it is not the Constitution but the Covenant that needs to prevail under these international standards.[259] One could argue that because of the proviso, only obligations which are in accordance with the U.S. Constitution were undertaken by the United States. However, the Senate explicitly declared it not to be a reservation but a proviso and advised the President not to include it in the instrument of ratification. Even if the proviso had to be considered to be a reservation because of its effects on the Covenant's application to the United States,[260] it would be doubtful whether under the above cited standards of the Committee such a broad reservation was compatible with the object and purpose of the Covenant and therefore valid pursuant to article 19 para. 3 of the Vienna Convention on the Law of Treaties.

What is equally troubling is that the concept underlying the reservations, understandings and declarations seems to be that the national legal order needs only to be in accordance with the Covenant and that if this is the case no additional steps are required. The Government explicitly deemed implementing legislation to be unnecessary in the United States.[261] This is contrary to article 2 para. 2 which according to

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257 Observations by the United States of America on General Comment No. 24/52, see note 244, 423.

258 The question whether the proviso is in accordance with the Covenant has to be distinguished from its validity under U.S. domestic law according to which the U.S. may not enter into international obligations not in accordance with the Constitution.

259 As to the question whether the consent to the Covenant is valid as to obligations violating the Constitution, see text accompanying notes 207-209.

260 According to the General Comment on Reservations the declaration of a statement by a State party is irrelevant if it purports to modify the legal effects of a treaty. General Comment No. 24/52, see note 64, para. 3. Also Vienna Convention on the Law of Treaties, article 2 para. 1 lit.(d).

261 See note 236.

the Human Rights Committee requires in any case, even if the domestic legal order of a State party does not contradict the Covenant, implementing legislation to elaborate the meaning of the Covenant rights.[262] As outlined above, it is the understanding of the Committee that the Covenant creates obligations of conduct apart from duties of forbearance.

To render the Covenant non-self-executing and to exclude any further legislation of incorporation is not in accordance with the new standards of the Human Rights Committee according to which individuals need to be able to invoke the Covenant directly in domestic courts.[263] The aforementioned argument that the non-self-executing declaration merely is concerned with domestic issues is not accurate. It is true that the question whether an international treaty provision is self-executing is a question of domestic law. However, if the Covenant obligates States parties to make the Covenant directly applicable by domestic courts as stated by the Human Rights Committee in recent years, a state which neither considers the Covenant to be self-executing nor incorporates it in a way that its provisions can be invoked in domestic courts violates its obligations under international law. As seen in the above analysis of the Committee's pronouncements in the state reporting system, it is not enough to declare that the rights set forth in the Covenant are guaranteed in domestic law and can be protected by the judiciary on that basis, as asserted by the United States in its observations on General Comment No. 24.[264] If a State Party chooses to make the Covenant part of its national law but denies it self-executing effects, it needs to adopt legislation which can provide the basis for invalidation of legislative acts because of their violation of the Covenant.[265] This is why the Committee requires clarity as to which of these provisions are self-executing within domestic law and which require specific legislation if a State party has made the Covenant part of its domestic legal system.[266] Ac-

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262 See under IV.1.

263 For the assertion that the reservations, understandings and declarations violate article 2 para. 3, see Henkin, see note 230, 341, note 31.

264 Observations by the United States of America on General Comment No. 24/52, see note 244, 423. This argument has also been made by Stewart, see note 228, 79.

265 For the way this needs to be done, see under III. 3.

266 Concluding Observations on Cyprus, Doc. CCPR/C/79/Add.39, para. 4 (1994), HRC Report, in: GAOR Suppl. No. 40, Doc. A/49/40, paras 312-333; Concluding Observations on Cyprus, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/53/40, Vol. I, G., para. 193.

cording to the Committee's understanding, all branches of government are charged with the implementation of the Covenant.[267] Therefore, the purported intention of the declaration to make clear that the legislative and executive branch will oversee domestic implementation of the Covenant, rather than the judicial branch,[268] is in contradiction of the concept developed under article 2.

To sum up, the totality of the reservations, understandings and declarations seems to deprive the individual of any effect from the Covenant by limiting its obligations to the *status quo* of U.S. law, negating the need for implementing legislation and denying individuals a cause of action under the Covenant. As Henkin concluded, they leave the Covenant "without any life in United States law".[269] This can hardly be deemed to be in accordance with the requirements under article 2. The reservations, understandings and declarations, therefore, have been subject to objections by other States parties to the Covenant.[270]

The Human Rights Committee in its General Comment on reservations criticized such action by States parties in general. It pointed out:

> "Of particular concern are widely formulated reservations which essentially render ineffective all Covenant rights which would require any change in national law to ensure compliance with Covenant obligations. No real international rights or obligations have thus been accepted. And when there is an absence of provisions to ensure that Covenant rights may be sued on in domestic courts, and further, a failure to allow individual complaints to be brought to the Committee under the first Optional Protocol, all the essential elements of the Covenant guarantees have been removed."[271]

This General Comment which seems to address implicitly a number of problems of the reservations of the United States, understandings and declarations in a critical way was, as already mentioned, criticized by the United States with the argument that the choice of the "most appropriate means of implementation is ... left to the internal law and

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267 See text accompanying note 157.

268 Stewart, see note 228, 9.

269 Henkin, see note 230, 349.

270 For objections against reservations designed to keep the *status quo* under U.S. law, see, e.g., the objections of Finland, 1993, of the Netherlands, 1993. Some states interpret these reservations as not affecting the obligations assumed by States parties on the basis of article 2. See Objections of Italy, 1993 and of Germany 1993.

271 General Comment No. 24/52, see note 64, para. 12.

process of each State party."[272] The United Kingdom did not accept the assertion of the Committee that no real international obligations were undertaken if reservations excluded the acceptance of obligations requiring changes in national law. In such cases States parties at least accepted the Committee's supervision of those Covenant rights guaranteed by their national law.[273]

So far the Human Rights Committee has not criticized the declaration of the United States concerning the alleged non-selfexecuting character of the Covenant. In 1995, a year after the adoption of General Comment No. 24, it held in its Comments on the initial report of the United States that "[w]hether or not courts of the United States eventually declare the Covenant to be non-self-executing, information about its provisions should be provided to the judiciary".[274] It noted positively that "American courts are not prevented from seeking guidance from the Covenant in interpreting American law".[275] The Committee thereby clarified that the decision whether the Covenant is self-executing is for the domestic courts to decide. However, the question whether the declaration in association with the other reservations and the proviso violates article 2 was not addressed. Nor did the Committee formally rely on General Comment No. 24. In view of its pronouncements on the direct application of the Covenant outlined above, it is questionable whether the Committee will in future not raise the issue of the declaration concerning the non-selfexecuting character of the Covenant. Merely seeking guidance from the Covenant in interpreting American law is no longer sufficient.

There seems to be a development as to the willingness of the U.S. government to implement the Covenant. According to a more recent Executive Order of the Clinton administration it will be the "policy and practice [of the United States] ... to fully respect and implement its obligations under the human rights treaties to which it is a party" including the Covenant.[276] It sets up coordinating bodies for the imple-

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[272] Observations by the United States of America on General Comment No. 24/52, see note 244, 423.

[273] Observations by the United Kingdom on General Comment No. 24/52, see note 244, para.8.

[274] Comments on the initial report of the United States of America, Doc. CCPR/C/79/Add. 50, para. 15.

[275] Ibid., para. 11.

[276] Executive Order on Implementation of Human Rights Treaties of 10 December 1998.

mentation in the different departments and agencies and initiates the development of mechanisms to review legislation for conformity with human rights obligations. Though not reversing the reservations, understandings and declarations or the proviso it indicates a general willingness of the U.S. government to implement the Covenant and to promote conformity of domestic legislation and executive action with the Covenant. The defective rule of the judiciary in the implementation of the Covenant due to the non-self-executing declaration and the non-incorporation of the Covenant, however, is not altered.

IV. Specific Measures of Implementation

To ensure all aspects of the Covenant rights and their effective enjoyment, it is not enough to make it directly applicable and to bring domestic law into line with the Covenant.[277] The constitutional provisions incorporating the Covenant need to be implemented.[278] The precise content of the Covenant rights needs to be elaborated. This becomes particularly apparent in broadly formulated provisions such as article 23 para. 1 pursuant to which families are entitled to the protection by the state. It is not enough not to violate (*respect*) the Covenant rights, they need to be *secured.* As the Human Rights Committee in its General Comment on article 2 of 1981 emphasized, "the obligation under the Covenant is not confined to the respect of human rights, but ... States parties have also undertaken to ensure the enjoyment of these rights".[279] It therefore asked for "specific activities by the States parties".[280] Pursuant to arts 23 para. 4 and 24 para. 1, States parties shall make provision for the necessary protection of any children. These provisions request specific steps of protection by the States parties in order to give meaning to these rather broad fundamental rights in law and practice. The Committee asks for specific activities not only in regard of rather broad articles, such as article 3 on gender equality, but in regard of all rights set forth in the Covenant.[281] The Covenant in article 2 para. 2 explicitly requires "legislative or other measures as may be

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277 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 44.

278 Comments on Estonia, see note 69, para. D. 10.

279 General Comment No. 3/13, see note 82, para. 1.

280 General Comment No. 3/13, see above.

281 Ibid.

necessary to give effect to the rights recognized in the present Covenant".

1. Legislative Measures

Some provisions of the Covenant explicitly require protection by law. Pursuant to article 6 para. 1 the right to life "shall be protected by law". Article 17 para. 2 lays down "the right to the protection of the law" against interferences with one's privacy, family, home or correspondence and against unlawful attacks on one's honor and reputation. The Human Rights Committee explained that "legislation must specify in detail the precise circumstances in which such interferences may be permitted."[282] This is not limited to the articles explicitly requiring protection by law. The Committee regularly asks States parties for legal measures designed to protect each of the Covenant rights.[283]

Other provisions demand legislative prohibitions. Article 8 para. 1, for example, provides that "slavery and slave-trade in all their forms shall be prohibited". Pursuant to article 26 "the law shall prohibit any discrimination". Article 20 requires the penal prohibition of any propaganda for war and of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The need for a law prohibiting such actions and providing for appropriate sanctions in case of violation has been stressed by the Human Rights Committee in its General Comment on article 20.[284] Sanctions in penal legislation are considered necessary in order to discourage violations. Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination in article 4 lit.(a) and (b) mandates States parties to penalize all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, acts of violence or incitement to such acts, assistance to racist activities, and participation in organizations promoting and inciting racial discrimination. In its Comments on the Dominican Republic of 1993, the Human Rights Committee held that "[m]uch more severe sanctions are needed to ef-

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282 General Comment No. 16/32 on article 17 (1988), in: HRI/GEN/1/Rev.1, page 22, para. 8.

283 General Comment No. 9/16 on article 10 (1982), in: HRI/GEN/1/Rev.1, page 9, para. 1.

284 General Comment No. 11/19 on article 20 (1983), in: HRI/GEN/1/Rev.1, page 12, paras 1, 2.

fectively discourage torture and other abuses by prison and law enforcement officials."[285] In its Comments on Guinea, the Committee demanded that appropriate penalties should be imposed on perpetrators of violations.[286] The Committee also asked for preventive disciplinary and punitive measures to prevent the excessive use of force.[287]

Apart from the general requirement of protection by law and legislative prohibitions, the Covenant itself spells out some specific legal steps to be taken to ensure respective rights. Article 9 para. 5, for example, requires that victims of unlawful arrest or detention "shall have an enforceable right to compensation". Similarly, article 14 para. 6 provides for compensation "according to law" in certain cases of miscarriage of justice. This provision prompted the Human Rights Committee to call for corresponding legislation.[288] Pursuant to article 14 para. 5 "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal *according to law*" (emphasis added).

The Human Rights Committee has extended the obligation to elaborate rights in domestic law in some cases where the Covenant itself does not explicitly call for legislative measures. In its General Comment on article 23 the Committee asked the States parties to prescribe the conditions for the free consent of intending spouses by law.[289] It also asked for an elaboration of the right to take part in the conduct of public affairs in law and in the constitution of States parties: in its General Comment on article 25 the Committee stated that " [t]he allocation of powers and means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other law",[290] that the right to vote and to be elected pursuant to article 25 lit.(b) should be

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285 Comments on the Dominican Republic, see note 68, para. 10.

286 Comments on Guinea, Doc. CCPR/C/79/Add.20, para. E. 6.

287 Comments on Argentina, Doc. CCPR/C/79/Add.46, para. 18.

288 General Comment No. 13/21 on article 14 (1984), in: HRI/GEN/1/Rev.1, page 17, para.18.

289 General Comment No. 19/39 on article 23 (1990), in: HRI/GEN/1/Rev.1, page 29, para. 4.

290 General Comment No. 25/57 on article 25 (1996), Doc. CCPR/C/21/Rev.1/Add. 7, para. 5.

guaranteed by law[291] and that abusive interferences with registration or voting should be prohibited by penal law.[292]

Not only the rights but also restrictions of the rights need to be spelled out in a norm. Pursuant to arts 12 para. 3, 18 para. 3 and 19 para. 3 restrictions on the freedom of movement, the freedom of religion and belief as well as on the freedom of expression and information must be prescribed "by law".

The Covenant apparently attaches much importance to the law and trusts that law – though not exclusively – provide for an effective protection of the rights recognized. It has been argued that the Covenant in its article 25 shows a preference for law as a product of a democratic process.[293] However, this view might be influenced by the preference of civil law countries for parliamentary acts. The reason for the emphasis on law is the importance attributed to the rule of law and the fact that it provides stability reducing the risk of arbitrariness. This became apparent in the General Comment on article 17 where the Human Rights Committee emphasized that for the protection against unlawful and *arbitrary* interferences with one's privacy "it is precisely in State legislation above all that provision must be made". Law provides for strict control and unambiguously limits the circumstances of restrictions.[294] Therefore, most rights and restrictions need to be elaborated by a law. Which specific norms are necessary for the implementation depends on the respective rights.[295]

It is important to note that the leeway given to states in the elaboration of the rights is broad enough so that the legislative steps can be adjusted to the specific features of the respective domestic systems.[296]

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291 Ibid., para. 9.

292 Ibid., para. 11.

293 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 42.

294 General Comment No. 6/16, see note 82, page 6, para.3.

295 Since the purpose of this article is to elaborate the common denominators for the implementation of all Covenant rights this is not the place to deal with the specific requirements. The requirements for the particular rights have been elaborated in a number of publications. See, e.g., Nowak, see note 13; D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, 1994.

296 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 42.

In general States parties have the choice between a general-abstract parliamentary act or a similar unwritten norm of common law.[297] A certain degree of political discretion is also certainly necessary for the implementation of the Covenant in order to allow for diversity.[298]

To make sure that the provisions of the Covenant become effective, the Human Rights Committee does not only ask for legislative measures with regard to the text of the Covenant. The Committee also requires that States parties adopt "appropriate measures to give legal effect to the *views* of the Committee as to the interpretation and application of the Covenant in particular cases arising under the Optional Protocol" (emphasis added).[299] Thereby the Committee seeks to ensure the compatibility of the Covenant's domestic application with its own interpretation.

2. Other Measures of Implementation

In its General Comment on article 2 of 1981 the Human Rights Committee had already stressed that legislative enactment often is not sufficient *per se*.[300] As mentioned earlier, specific activities are necessary enabling individuals to enjoy their rights as provided for in para. 1.[301] Repeatedly the Committee has called for steps to ensure that the Covenant rights are established by law *and* guaranteed in practice.[302] Accordingly, in the reporting system the Committee does not only inquire about the implementation measures undertaken by States parties to the Covenant but also about actual practices.[303] All three branches of government — the legislature, the judiciary and the administration — are

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297 For the meaning of the term "law" in the Covenant, see Nowak, see note 13, 208-209.

298 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 44.

299 *Thompson v. Panama*, Comm. No. 438/1990 (1994), Doc. CCPR/C/52/D/438/1990, para. 5.3; *Roberts v. Barbados*, Comm. No. 504/1992 (1994), Doc. CCPR/C/51/D/504/1992, para. 6.3.

300 General Comment No. 3/13, see note 82, page 4, para. 1. See also General Comment No. 4/13 on article 3 (1981), in: HRI/GEN/1/Rev.1, 4, para. 2.

301 Ibid.

302 General Comment No. 13/21 on article 14 (1984), in: HRI/GEN/1/Rev.1, page 17, para. 3. General Comment 18/37, see note 148.

303 General Comment No. 4/13, see note 300, page 4, para. 2.

charged with the implementation of the Covenant. Therefore, the Committee asks for administrative, judicial and other measures apart from legislative steps in order to prevent and punish violations of Covenant rights.[304] The active prevention of violations plays a vital role in this regard.[305] Often practical steps are required.[306] The range of possible measures is as far-reaching as the Covenant's area of application. The Covenant rights play a role in virtually every area of life.

a. Law Enforcement

It is not enough to incorporate the Covenant and to elaborate its provisions in domestic law. The legal steps undertaken to give effect to the Covenant rights need also to be enforced. Apart from judicial measures, administrative enforcement measures are necessary. For example, to combat threats to life as provided for by article 6, strict police measures may be required.[307]

b. Institutional Safeguards

States parties need to develop institutions which remove impediments to the realization of the Covenant rights.[308] One example is an independent judicial system as required by arts 9 and 14.[309] Pursuant to article 13 a competent authority needs to be set up to review cases of expulsion in order to protect aliens against arbitrary expulsions. According to the Committee's General Comment on article 1 political processes which allow the exercise of the right to self-determination are necessary.[310] Article 25 lit.(b) requires that periodic elections are held. In recent years the Human Rights Committee has put an emphasis on the

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304 General Comment No. 20/44 on article 7 (1992), in: HRI/GEN/1/Rev.1, page 31, para. 8; General Comment No. 18/37, see note 148, 27, para. 9.

305 In its General Comment No. 6/16 the Committee obligated States parties to prevent deprivation of life and disappearances. See note 82, 6, paras 3,4.

306 General Comment No. 9/16, see note 283, page 10, para. 3.

307 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 53.

308 Schachter, see note 12, 319.

309 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 44; Graefrath, see note 127, 66.

310 General Comment No. 12/21 on article 1 (1984), in: HRI/GEN/1/Rev. 1, page 13, para. 4.

development of democratic institutions. In its Concluding Observations on Morocco of 1994, for example, it pointed out that "steps remain to be taken to ... develop democratic institutions and human rights machinery for better implementation of the Covenant".[311] In 1996 it recommended immediate steps to restore democracy in Nigeria.[312]

States parties also need to guarantee the existence and freedom of institutions set up by private individuals enabling them to fully enjoy their rights recognized by the Covenant. In its General Comment on article 25 the Committee held that to ensure the full enjoyment of the political rights protected by this article, a free press is necessary.[313] That the prevention of control over the media is equally important for the freedom of expression was stressed in the General Comment on article 19.[314]

c. Procedural Safeguards

Since there is a focus on the prevention of violations, state procedures that individuals are subject to need to be shaped in a way that violations are avoided. Article 9 sets up in detail the procedure as to how persons arrested or detained shall be treated and article 14 spells out procedural guarantees in civil and criminal trials. Detainees are treated with humanity pursuant to article 10. The Human Rights Committee has elaborated procedural obligations to ensure the openness of procedures where the individual is at particular risk of violations of his rights. For example, to protect the rights of detainees pursuant to article 10 there should be readily accessible registers and records about the persons responsible for detention, about the time and place of interrogations and about persons present.[315] These records should be made available for purposes of judicial or administrative proceedings. Such measures are intended to be safeguards for the legality of proceedings dealing with individuals in order to discourage violations.

Another procedural safeguard elaborated by the Committee is the requirement that the use of statements or confessions obtained through

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311 Concluding Observations on Morocco, see note 208, para. B 4.

312 Comment on Nigeria, Doc. CCPR/C/79/Add.65, para. 26.

313 General Comment No. 25/57, see note 290, para. 25.

314 General Comment No. 10/19 on article 19 (1983), in: HRI/GEN/1/Rev.1, page 11, para. 2.

315 General Comment No. 20/44, see note 304, para. 11.

torture in judicial proceedings should be prohibited as inadmissible.[316] State officials thereby shall be discouraged in the first place from resorting to measures not in accordance with the Covenant.

d. Monitoring and Control Mechanisms

In order to prevent violations and to ensure effective protection of the Covenant rights the Committee requires domestic control mechanisms.[317] Any kind of barrier to the effective enjoyment of the Covenant rights needs to be examined.[318] For example, in its Concluding Observations on Bosnia and Herzegovina of 1992 the Human Rights Committee recommended the systematical monitoring of measures to ensure that "ethnic cleansing" does not take place.[319] In its General Comment on article 25 the Committee recommended an independent electoral authority to supervise the electoral process so that it is conducted in accordance with the Covenant.[320] It stressed repeatedly that the supervision of state officials is crucial to prevent violations.[321] Especially in areas where the state exercises control over individuals — as for example over detainees — constant control and supervision of state officials are necessary.[322]

In case of an alleged violation States parties need to allow complaints, conduct a prompt investigation and provide for adequate compensation in the event of a violation.[323] This was stressed by the Human

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316 Ibid., 32, para. 12.

317 General Comment No. 7/16 on article 7 (1982), in: HRI/GEN/1/Rev.1, page 7, para. 1. This Comment was replaced in 1992 by General Comment No. 20/44, see note 304.

318 Schachter, see note 12, 311, 320.

319 Comments on Bosnia and Herzegovina of 1992, see note 67.

320 General Comment No. 25/57, see note 290, para. 20.

321 General Comment No. 20/44, see note 304, page 32, para. 11; General Comment No. 21/44 on article 10 (1992), in: HRI/GEN/1/Rev.1, 34, para. 6.

322 General Comment No. 20/44, see note 304, 32, para. 11; Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 54.

323 General Comment No. 21/44, see note 321, 34, para. 7. For an analysis of article 2 para. 3 with its requirement of an effective remedy, see Nowak, see note 13, 57 et seq.; Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 55 seq.; McGoldrick, see note 295, 279-280, 285-287.

Rights Committee in its General Comment on article 7 asking for investigations in case of complaints of maltreatment prohibited by article 7.[324] With regard to the right to vote, the Committee elaborated that there should be access to judicial review or an other equivalent process to ensure the compliance of the electoral process with article 25.[325] To a large extent states fulfill their obligation of implementation by establishing such remedies because individuals are better qualified to decide when their rights have been violated.[326]

In order to ensure systematic implementation and conformity of domestic law with the Covenant the Committee considers it helpful for States parties to appoint bodies or institutions to review domestic law and measures.[327] The effective application of national legislation concerning the rights laid down in the Covenant also needs to be monitored.[328] For example, in its Comments on Estonia the Committee expressed its concern that the "Covenant's effective precedence over any inconsistent legislative act" was affected by a lack of implementation of constitutional articles implementing the Covenant[329] and recommended measures "to ensure that all domestic provisions inconsistent with the Covenant be repealed".[330]

Courts play a vital role in the supervision of the compatibility of domestic laws with the Covenant. During the consideration of the Gabonese report in 1997 the state delegation was asked whether the Constitutional Court or the Supreme Court could examine the laws enacted by Parliament and, if necessary declare them incompatible with the Covenant.[331] In its Comments on Latvia of 1995 the Committee expressed its concern over the absence of a body, such as a Constitutional Court, charged with determining the conformity of domestic laws with

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324 General Comment No. 20/44, see note 304, 32, para. 14.

325 General Comment No. 25/57, see note 290, para.20.

326 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 54.

327 General Comment No. 4/13, see note 300, page 5, para. 4. The absence of such an institutional mechanism was criticized by the Committee in its Concluding Observations on Zimbabwe, see note 173, para. 211.

328 General Comment No. 21/44, see note 321, 34, para. 6.

329 Comments on Estonia, see note 69, para. D. 10.

330 Ibid., para. 24.

331 T. Buergenthal in: Summary Record of the 1541st Mtg., Consideration of the initial report of Gabon, Doc. CCPR/C/SR.1541.

the provisions of the Covenant.[332] It is not clear whether the Committee thereby declared itself in favor of *in abstracto* review even without personal injury. Such remedies against parliamentary acts exist only in a number of countries.[333] At least if someone is adversely affected by an alleged violation based on legislation, a court needs to be charged with the determination of the domestic law's conformity with the provisions of the Covenant pursuant to article 2 para. 3.

The Committee is in favor of an action which may be brought to the constitutional court of a State party. This became apparent not only in the just cited Comments on Latvia but also in the Concluding Observations on Armenia. In the latter the Committee was concerned that only representatives of the executive and legislative branches could have recourse to the Constitutional Court and recommended an amendment to the Constitution so as to enable individuals to bring questions concerning human rights guaranteed in the Constitution which are also protected in the Covenant to the Constitutional Court.[334]

In recent pronouncements the Committee favored the additional institution of an Ombudsman with powers to initiate investigations *suo motu* as an effective independent mechanism for monitoring the implementation of the Covenant and for ensuring the integration of the Covenant rights in law and practice.[335] As an alternative the Committee recommends the establishment of a National Commission on Human Rights to study the conflicts between domestic law and the Covenant, to make recommendations with a view to amending legislation and to monitor the effective implementation of the Covenant.[336]

e. Contextual Measures

There is a wide range of measures to establish a benign context in order to enable individuals to exercise their rights. This applies especially to provisions of the Covenant obligating States parties to take positive

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332 Comments on Latvia, see note 172, para. D.

333 One example is Germany where a constitutional procedure for the review of statutes challenged as violating the Constitution exists.

334 Concluding Observations on Armenia, see note 210, para. 9.

335 Concluding Observations on Zimbabwe, see note 173, paras 212-213.

336 This proposal was made, for example, by Buergenthal during the consideration of Gabon's initial report, Summary Record of the 1543st Mtg., Doc. CCPR/C/SR.1543; Concluding Observations on Gabon, see note 177, para. 18.

steps of protection. According to the Human Rights Committee, to fulfill the obligation to protect children pursuant to article 24 "every possible measure should be taken to foster the development of [children's] personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant".[337] To promote the rehabilitation of prisoners pursuant to article 10 para. 3, measures such as teaching, education, re-education, vocational guidance and training, as well as work programs for prisoners may be necessary.[338] Another example is the obligation to ensure gender equality pursuant to article 3. The Committee in its General Comment No. 4 held that the articles dealing with the prevention of discrimination require "not only measures of protection but also affirmative action designed to ensure the positive enjoyment of rights."[339] Positive measures are also necessary to protect the right to life[340] and to facilitate the realization of and respect for the right of peoples to self-determination.[341]

Apart from social and cultural measures, even certain economic conditions need to be established in order to enable individuals to exercise their civil and political rights. In its General Comment on article 24 the Committee pointed out that measures to protect children, "although intended primarily to ensure that children fully enjoy the other rights enunciated in the Covenant, may also be economic, social and cultural."[342] Accordingly, in its General Comment on article 25 it recommended that positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty and impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively.[343] To reduce infant mortality and increase life expectancy in accordance with the right to life the Committee considered it to be desirable for States parties to adopt measures to eliminate malnutrition and epidemics.[344] Graefrath, a previous member of the Committee from the former German Democratic Republic, even went so far to demand generally from States parties to the ICCPR to raise the level of education, to eliminate educational

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337 General Comment No. 17/35, see note 147, 24, para.3.

338 General Comment No. 21/44, see note 321, 34, para. 11.

339 General Comment No. 4/13, see note 300, 4, para. 2.

340 General Comment No. 6/16, see note 82, 7, para. 5.

341 General Comment No. 12/21, see note 310, 13 , para.6.

342 General Comment No. 17/35, see note 147, 24, para.3.

343 General Comment No. 25/57, see note 290, 12.

344 General Comment No. 6/16, see note 82, 7, para. 5.

privileges, to overcome illiteracy and to satisfy basic needs of the people.[345] The Committee has not gone that far, though its pronouncements clearly demonstrate that there is, as acknowledged by the preamble of the Covenant, an interdependence between civil and political rights on the one side and economic, social and cultural rights on the other side.

f. Information and Education

The Human Rights Committee has always put an emphasis on measures of information for individuals and State authorities.[346] The Committee regularly asks for the translation of the Covenant into all languages spoken in a State party, its wide publication and its inclusion in school curricula to ensure that the provisions are widely known to members of the legal profession, the judiciary, law enforcement officials and to the general public.[347] In order to effectively exercise their rights, individuals need to know what their rights under the Covenant are.[348] Detained persons, for example, should be given access to information on their rights.[349] Electors should be fully informed of the guarantees of article 25 lit.(b); information and materials about voting should be available in minority languages.[350] Even the State reports to the Committee on the domestic implementation of the Covenant should be published so that individuals know what the legal provisions giving effect to the Covenant rights are.[351]

In order to prevent violations by individuals educational measures are recommended to change practices detrimental to the enjoyment of civil rights. As to the effective application of article 2 and 3 regarding non-discrimination, for example, the Committee stated that there is a need for the "adoption of administrative and educational measures designed to eliminate traditional practices and customs detrimental to the

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345 Graefrath, see note 90, 17. This was the position of the socialist countries.

346 General Comment No. 3/13, see note 82, 4, para. 2.

347 Ibid.; Concluding Observations on Nepal, see note 170, para. 12; Comments on Spain, where the Committee recommended information campaigns, see note 218, para. 16.

348 General Comment No. 3/13, see note 82, 4, para. 2.

349 General Comment No. 21/44, see note 321, 34, para. 7.

350 General Comment No. 25/57, see note 290, paras 20 and 12.

351 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 60.

well-being and status of women and vulnerable groups of the ... society."[352] In comparison, a working group of the former Sub-Commission on the Prevention of Discrimination and Protection of Minorities specified educational measures to implement the International Convention on the Elimination of All Forms of Racial Discrimination.[353] The working group recommends classes to develop awareness of human rights at schools, colleges and universities, instruction of teachers, lectures, political parties, trade unions and NGOs, access to education at all levels to persons belonging to minorities and the promotion of knowledge of history, language and culture of the society and its ethnic groups. An action-oriented national plan for education and the use of different channels of culture and information are also deemed necessary.[354]

As to specific rights, the Human Rights Committee recommends media campaigns against xenophobia[355] and obligates States parties to disseminate to the population relevant information concerning the ban on torture.[356]

Information and training is also an important feature in the prevention of human rights violations by State officials. The Committee, therefore, recommends detailed information of the judicial and administrative authorities on the Covenant and the Optional Protocol "in order to ensure their effective application".[357] In its Comments on Brazil in 1996, for example, it asked for education and sensitization of law enforcement officials about human rights through campaigns, programs and the systematic incorporation of human rights education in all training activities.[358] Specific instruction and training of State officials is

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352 Concluding Observations on Nepal, see note 170, para. 13; Concluding Observations on Morocco, see note 208, para. B 4; Concluding Observations on Mauritius, Doc. CCPR/C/79/Add.60, para. 23.

353 Joint working paper on article 7 of the International Convention on the Elimination of All Forms of Racial Discrimination, prepared by J. Bengoa/ I. Garvalov/ M. Mehedi/ S. Sadiq Ali, Doc. E/CN.4/Sub.2/1998/4, para. 164 seq.

354 Ibid., paras 164-178.

355 Comments on Sweden, Doc. CCPR/C/79/Add.58, para. 23.

356 General Comment No. 20/44, see note 304, 31, para. 10.

357 Concluding Observations on Cyprus, Doc. CCPR/C/79/Add.39, para. 5, HRC Report, in: GAOR, Suppl. No. 40, Doc. A/49/40, paras 312-333.

358 Comments on Brazil, see note 63, para. 19. As to the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, cf. Committee on the Elimination of Racial Discrimination,

required in areas where individuals are particularly vulnerable because of State custody, for example with regard to the prohibition of torture, cruel, inhuman or degrading treatment or punishment[359] and with regard to the protection of the rights of detainees under article 10.[360] To ensure consistency between the Covenant and its implementation, states should establish mechanisms designed to follow the developments at the international level and to bring them regularly to the attention of the national authorities.[361]

V. Conclusion

Though article 2 para. 2 outlining the necessary implementation of the Covenant seems to be rather vague on first sight, it has found an extensive elaboration in the work of the Human Rights Committee. The implementation envisaged by the ICCPR in article 2 para. 2 is an immediate and very comprehensive one. The Covenant incorporates the concept of immediate obligations. As the drafting history of the Covenant shows, the idea of progressive implementation was — with the exception of article 23 para. 4 — rejected for the Covenant. The drafters wanted to create almost immediate obligations. Arts 2 para. 2 and 40 were not intended to put this into question. This has been acknowledged by the Human Rights Committee in various pronouncements under the individual complaint procedure and under the state reporting system stressing the immediacy of obligations undertaken by States parties under the Covenant.

This observation does not mean that the obligations created under the Covenant are static and that development is excluded. The obligation to undertake steps to give effect to the Covenant rights under article 2 para. 2 and the reporting system evidence that the rights require steady realization. There is no contradiction between these provisions and article 2 para. 1 because they form part of an overall concept of an immediate obligation which cannot be defined in terms of radical and

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General Recommendation XII on the Training of Law Enforcement Officials in the Protection of Human Rights, Doc. CERD/C/365; Joint working paper, see note 353, para. 168.

359 General Comment No. 20/44, see note 304, 32, para. 10.

360 General Comment No. 21/44, see note 321, 34, para. 7.

361 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 37, 39.

absolute immediacy. The progressive element entailed herein reflects the peculiarity of any human rights system which can never be static.

While the Committee always has considered the obligation to implement the Covenant to be an immediate one, there has been a remarkable development in the conception of article 2 by the Human Rights Committee with regard to the necessary measures to implement the Covenant. The leeway given to States parties regarding the choice of implementation measures has been reduced gradually. This is particularly true for measures defining the relationship between the Covenant and domestic law. Even if, according to the Committee, the Covenant does not *per se* create any rights or obligations directly enforceable in domestic courts, States parties are now obliged to give formal recognition and applicability to its provisions in domestic law.[362] The differentiation between monist and dualist states prevails so far and the question whether the ICCPR is self-executing is for the States parties to decide. However, the Committee has substantially limited the choice of measures of implementation by requiring that the Covenant acquires the status of domestic law upon its domestic legislative approval and ratification or that it is incorporated into the Constitution with a status superior to that of domestic legislation. The difference between these two methods of implementation is only a gradual one allowing dualist and monist states to reconcile the implementation with their constitutional processes as provided for in article 2 para. 2. In any case, the Covenant has to be made directly applicable by domestic courts according to the Committee. In the case of incorporation, the enacted legislation needs to provide for the rights to become immediately binding as part of domestic law. Therefore, the assertion that the Covenant creates only obligations of result is no longer true under this interpretation of article 2 by the Committee.

Apart from the obligation to make the Covenant directly applicable, the Committee has elaborated a whole series of obligations of conduct concerning the status of the Covenant in domestic law, i.e. the obligation to codify the Covenant rights, to accord to it a status superior to domestic legislation, to ensure the conformity of domestic law including the Constitution with it and to incorporate it into the Constitution. Specific measures to prevent and punish violations of the Covenant as elaborated by the Committee in the reporting system (i.e. law enforcement, institutional and procedural safeguards, monitoring and control

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362 Concluding Observations on the United Republic of Tanzania, see note 185, para. 394.

mechanisms, contextual measures, information and education) are additional examples of obligations of conduct. The development in the conception of article 2 by the Committee has resulted in a process of reforms in the implementation measures undertaken by States parties to the Covenant including constitutional reforms.

There is little left of the seeming choice provided for in article 2 para. 2 between "legislative *or* other measures" regarding the incorporation of the rights recognized in the Covenant.[363] Both types of measures seem to be required to give effect to the Covenant rights. While there clearly needs to be a legislative act to transform the Covenant into domestic law, be it in the form of legislative approval of the Covenant or in the form of its incorporation, other steps are required to spell out the meaning of the respective Covenant provisions. Though the Covenant and the Committee attach great importance to the protection of the Covenant rights through law to elaborate their meaning, the Covenant rights also need to be guaranteed in practice. As noted earlier, constant efforts are necessary to fulfill this requirement. The Human Rights Committee has elaborated a very comprehensive list of "other measures" pursuant to article 2 para. 2, from law enforcement, institutional and procedural safeguards, monitoring and control mechanisms, contextual measures to information and education. It puts a great emphasis on the obligation of states to prevent human rights violations and to provide active protection to individuals in the implementation process. States parties need to build institutions which remove impediments to the realization of the rights recognized by the Covenant, develop procedural safeguards and set a benign context for the enjoyment of the Covenant rights. The implementation measures envisaged by the Committee are far-reaching.

The legislature, the executive, and the judiciary are all assigned an important role in the implementation of the Covenant rights. While the legislature is responsible for the proper transformation of the rights into domestic law, the executive is called upon to enforce the law and the judiciary needs to be involved in the enforcement of the Covenant by its direct application as an additional safeguard. All branches may be involved in the elaboration of the Covenant rights. It is interesting to note that the importance of the Covenant's legislative and judicial implementation was already stressed during the drafting of the Covenant. Therefore a proposal was introduced according to which the States par-

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[363] Schachter earlier argued that article 2 para. 2 leaves open whether legislative or other measures are necessary, Schachter, see note 12, 312.

ties should report "on legislative, judicial or other action taken" to give effect to the Covenant's rights.[364]

While article 2 para. 2 provides for implementing measures "in accordance with its constitutional processes" the Human Rights Committee seems to put increasing emphasis on the effectiveness of the implementation, mandating steps which might even not be in accordance with the State party's constitutional processes. The reason lies in article 2 para. 2 itself which obligates the States *to give effect* to the rights recognized in the Covenant. However, there is still considerable leeway for the States parties in the elaboration of the content of the rights. Despite an emphasis on legislative measures, the Committee allows for legislative, administrative, judicial or other measures often leaving the choice to the States parties as long as the implementation is effective.[365] Legislative measures can be adjusted to the specific features of the particular domestic legal systems. This is due to the wording of article 2 para. 2 which speaks about "necessary steps" and "in accordance with ... constitutional processes" and it corresponds to the intention of the drafters. Particularly with regard to "other measures" there is an extensive range of possible steps to put the rights into practice.

In sum, the Committee has developed a progressive interpretation of the obligation of States parties to implement the ICCPR. The shift from free choice to detailed requirements on how to implement the Covenant is due to the special character of human rights treaties. While free choice of implementing measures represents the traditional rule under international law, this concept does not seem to be adequate for the effective protection of human rights under the experience of the Committee.

The new interpretation of article 2 by the Human Rights Committee will have an impact on the implementation of the Covenant in the United States. Because of the recent development in the Committee's

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364 Report of the Third Committee, in: GAOR 21st Sess., Annexes, Agenda Item No. 62, 37, para. 372 and 38, paras 376-377. However, the amendment was criticized as restrictive and later withdrawn. Ibid., paras 377 and 384; Jhabvala, see note 29, 101.

365 General Comment No. 18/37, see note 148, 26, para. 5; General Comment No. 19/39, see note 289, 29, para. 3; General Comment No. 23/50 on article 27 (1994), in: HRI/GEN/1/Rev.1, 40, para. 6.1. Sometimes the Committee asks for legislative and other measures, cf. General Comment No. 20/44, see note 304, 30, para. 2; General Comment 18/37, see note 148, 27, para. 9; General Comment No. 25/57, see note 290, para. 1.

pronouncements, the United States reservations, understandings and declarations face a couple of problems. The idea underlying the reservations, understandings and declarations that neither domestic legal changes nor implementing legislation are necessary is incompatible with the standards developed by the Committee. Contrary to the U.S. understanding, the Covenant needs to be made directly applicable and the judicial branch needs to be involved in the implementation of the Covenant. The status accorded to the Covenant in U.S. domestic law will need to be modified.[366] These problems have not yet been explicitly addressed by the Committee but they are likely to be addressed in future considerations of U.S. periodic reports.

With its interpretation of article 2 the Committee has gone further than the European Court of Human Rights which — despite a seeming preference for the incorporation of the European Convention into domestic law — leaves the States parties with a fairly broad leeway in the implementation of the Convention. The Committee's new standards for incorporation may eventually have an impact on other human rights systems in future. The European and Inter-American institutions charged with the interpretation of their respective conventions may follow the example of the Committee in the interpretation of provisions on implementation similar to article 2 of the Covenant.

In the more distant future, the Human Rights Committee may even use the concept developed by the Court of Justice of the European Community and consider the Covenant to be directly applicable even without its transformation into domestic law by States parties. Admittedly, this would be a huge step leaving the traditional distinction between international and domestic law behind. However, there is a trend of convergence of the two areas of law anyway[367] and as pointed out several times before, the protection of human rights requires new methods of implementation. Taking into account that human rights treaties are living instruments which led the European Court of Human Rights to adopt a dynamic method of interpretation which is informed by the purpose (*telos*) of the Convention rather than by its drafting

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366 While international treaties enjoy the same normative rank as federal statutes according to the U.S. Constitution, the Committee requires a higher status. It regularly asks for an incorporation into the Constitution. See text accompanying notes 212-215.

367 Buergenthal, see note 145.

history,[368] it could be argued in future that the ultimate goal of an effective protection of human rights necessitates a direct application of the Covenant in domestic courts (irrespective of national systems regarding incorporation) side by side with an active implementation of the Covenant into the domestic structure. Such a direct application seems to be desirable in order to avoid situations where the Covenant is not considered to be self-executing and at the same time cannot be directly applied because the legislature prevents the implementation of the Covenant all together by simple non-action.

It has to be kept in mind that article 2 para. 2 obliges States parties to take the necessary steps to adopt measures necessary to give effect to the Covenant rights. It is beyond question that even if one considers the Covenant to be directly applicable more steps are necessary to guarantee full compliance.[369] In particular, when it comes to the obligation to "secure" the rights and to actively accord protection to the individual, the legislature is called upon. But this does not necessarily exclude any directly applicable effect of the Covenant as a safeguard in case of failure to implement.[370] The Covenant rights are drafted in such a way that they can be applied by courts, at least with regard to the very core of the rights with their duty of forbearance.[371] It could be argued that the measures of implementation are an addition to the Covenant's direct application and that the latter is the ultimate safeguard when measures

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368 *Tyrer v. United Kingdom* (1978), 26 Eur. Ct. H.R. Ser. A, 15-16, para. 31. Also *Dudgeon v. United Kingdom* (1981), Vol. 45, 23-24, para. 60. However, in *Feldbrugge* and *Deumeland* the Court stressed that a dynamic interpretation is not available to read completely new concepts into the Convention. *Feldbrugge v. The Netherlands* (1987), Vol. 124, 1; *Deumeland v. Germany* (1986), Vol. 100, 1. Also ICJ Advisory Opinion on Namibia which also takes into account changes. Even the Court of Justice of the European Community's holding that Community law was intended to confer rights upon individuals was based rather on the purpose (objective intent) of the treaty than on the drafter's intent.

369 It has been argued that article 2 para. 2, with the undertaking to take steps excludes a direct effect of the Covenant *per se* on domestic law. Cf. Robertson, "The U.N. Covenant on Civil and Political Rights and the European Convention on Human Rights", see note 29, 25.

370 The arguments made for a duty to make the Covenant directly applicable can equally be raised for its direct application without domestic transformation.

371 Tomuschat, "National Implementation of International Standards on Human Rights", see note 24, 44, 58.

of implementation are not sufficient to guarantee the Covenant rights on the domestic plane. In this case individuals could directly refer to the Covenant rights in domestic courts even if the State party has not complied with its obligation of implementation under article 2 para. 2.