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HUMAN RIGHTS AND NATURAL RESOURCES

DAVID J. HALPERIN*

INTRODUCTION

It is only a short time since the Supreme Court of the United States commented that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."¹ New doubt has been cast upon this issue from an unexpected quarter: last-minute additions to the texts of the United Nations Covenants on Human Rights. This article will review the history and apparent purposes of the new provisions in the hope that their "legislative history" will cast some light on their significance.

Article 25 of the International Covenant on Economic, Social and Cultural Rights (hereafter, "ESC")² and Article 47 of the International Covenant on Civil and Political Rights (hereafter, "C & P")³ each states that "Nothing in the [present]⁴ Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources." On the face of the Covenants, at least two anomalies are immediately apparent.⁵ First, the article in ques-

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1. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

2. General Assembly Resolution 2200 (XXI) (Annex) adopted by vote of 105 to none, A/PV. 1496, 16 December 1966, at 28.

3. General Assembly Resolution 2200 (XXI) (Annex) adopted by vote of 106 to none, A/PV. 1496, 16 December 1966, at 29.

4. This word omitted in Article 47 of C & P.

5. In addition to the problems mentioned above, it might seem surprising that the matter of natural resources is referred to at all under the heading of "Civil and Political Rights," and their relation to "Economic, Social and Cultural Rights" may seem remote to Western readers. But certain matters—self-determination, anti-colonialism, and the fear of being deprived of their natural resources—have such emotional importance to the newer states, and are so important to their creation and continued viability, that they have been treated as preconditions to the more conventional *individual* rights. Accordingly, it has long been agreed that Article 1 of each Covenant should provide that:

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

"2. *All peoples may, for their own ends, freely dispose of their natural*

tion appears in each Covenant immediately following the provisions setting forth measures of implementation, and is preceded immediately by a provision⁶ which eliminates any possibility of the measures of implementation in the Covenants being read as derogating from the powers of the United Nations and its specialized agencies with respect to human rights. In ESC Article 25, is included in the same Part IV dealing exclusively with measures of implementation; in C & P, the corresponding Article 47 is included in a separate Part V^{6a} which contains, in addition, only the article preventing any apparent conflict between the Covenant measures of implementation, and the U.N. Charter and the specialized agency constitutions. Thus, it appears in each case that a provision apparently dealing with a purely substantive question—"the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources"—is classified with measures of implementation.

The second anomaly appears in the fact that Article 1, paragraph 2 of each of the covenants provides that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

The substance of that provision has been firmly embedded in all drafts of the Covenants since the early 1950's.⁷ Since that provision seems to protect fully the right of every people to its natural resources, the

wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

"3. The States parties to the present Covenant . . . shall promote the realization of the right of self determination. . . ." (emphasis added.)

For history of these Articles 1, and documentation, see particularly Documents A/2929, at 5, 13-16, and A/3077 para. 77 and A/6342 Annex, at 2, 10.

6. Article 24 (ESC) and Article 46 (C & P) each states:

"Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialized agencies which define the respective responsibilities of the various organs of the United Nations and of the specialized agencies in regard to the matters dealt with in the present Covenant."

6a. The records do not reveal how Article 47 (C&P) was transferred from Part IV (implementation) to Part V.

7. See authorities cited in note 5, *supra*.

significance of the later provision is not immediately apparent—unless it in some manner modifies or derogates from the language in Article 1, paragraph 2.

If the latter hypothesis is correct, as seems probable, then Articles 25 (ESC) and 47 (C & P) also cast doubt upon the policy expressed in various General Assembly resolutions on natural resources. Article 1, paragraph 2 of the Covenants, standing alone, is fully consistent, for example, with the resolution on permanent sovereignty over natural resources adopted at the same session of the General Assembly as that at which the Covenants were approved.⁸ The resolution reaffirmed “the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of their national development, in conformity with the spirit and principles of the Charter of the United Nations and as recognized in General Assembly resolution 1803 (XVII)” But the resolution took into account the “important role” “that foreign capital . . . can play” in assisting developing countries in the exploitation and development of their natural resources,⁹ and also recognized the “due regard” to be given to “mutually acceptable contractual practices” in the exploitation of natural resources by foreign capital.¹⁰ The latter resolution, in turn, was consistent with General Assembly Resolution 1803 (XVII)¹¹ which declared in part that:

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. . . .

. . . .

8. Foreign investment agreements freely entered into by, or between, sovereign states shall be observed in good faith. . . .

While the concepts of economic cooperation and mutual benefit expressed in Covenant Articles 1, paragraph 2, are by no means the main thrust of Resolutions 1803 (XVII) and 2158 (XXI), these concepts are integral parts of the resolutions; indeed, each is clearly seeking to

8. Resolution 2158 (XXI), 25 November 1966.

9. *Id.*, final preambular paragraph.

10. *Id.*, operative para. 5.

11. Adopted December 19, 1962.

attract foreign developmental capital to the developing countries,¹² and would hardly discourage investment by a policy, express or implied, of non-cooperation or arbitrary confiscation.

Although the legal significance of a resolution of the General Assembly is debatable¹³ and the legal impact of an unratified treaty is even more open to question, it remains clear that when such texts have been adopted by substantially unanimous votes within the community of nations they constitute communications upon which at least some expectations may be based.¹⁴ The history of Articles 25 (ESC) and 47 (C & P) may shed light on the extent to which genuine shared expectations have arisen from their adoption.

In reading this summary, it is well to continually question whether the communications leading to the adoption of these articles, and the articles themselves, had a common meaning for the relevant participants in the decision-making process.¹⁵ While there may be no certain answer to this question,¹⁶ an approximation is necessary: it is perhaps a commonplace that language is used differently depending, for example, on the

12. And operative paragraph 7 of Resolution 2158 (XXI) expressly calls on the developed countries to make such capital available.

13. See R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963), particularly at 7.

14. Compare:

"The primary aim of a process of interpretation by an authorized and controlling community decision-maker can be formulated in the following proposition: discover the shared expectations that the parties to the relevant communication succeeded in creating in each other."

M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*, xvi (1967) [hereinafter cited as McDUGAL, LASSWELL & MILLER]. Although dealing explicitly with "agreements", the authors clearly would not interpret that word narrowly, but would apply it to "the whole flow of peoples' collaborative behavior" (*id.* at 4).

As will appear below, it is an open question whether the provisions of the Covenants on Human Rights under discussion have given rise to any *shared* expectations.

15. In this case, it would appear that the relevant participants were, at one extreme, representatives of some of the "new" or "emerging" nations, who will be identified in detail in the text; on the other extreme were, primarily, representatives of the wealthy Western nations, particularly the United States, Great Britain and France. The role of the numerous non-vocal "participants" is less clear.

16. "At any cross section in a communication sequence an observer-participant must recognize that subjective and nonsubjective events occur simultaneously. . . .

"Since the subjectivities of other people cannot be directly observed the index [describing the subjective content of an act of communication] is always hypothetical when applied to them, although it may be highly probable."

McDUGAL, LASSWELL & MILLER, *supra* note 14, at 38-39.

background of the user and the audience intended;¹⁷ but it is less obvious that words which seem to have objective clarity may have acquired, for the user or the audience, the character of political symbols,¹⁸ may be used (consciously or subconsciously) as propaganda¹⁹ which is at least as much expressive of emotions of the user as it is designed to stir the collective emotions of the audience—and whose objective meaning may have little or no relevance to the real-world expectations of the user.

MEASURES OF IMPLEMENTATION: BACKGROUND

Considering the fact that establishment of an "International Bill of Rights" was considered at the San Francisco Conference of 1945, and was treated as inherent in the U.N. Charter,^{19a} work on the covenants was inordinately slow. By 1954, the Commission on Human Rights had concluded its work on the Covenants and transmitted them to the Economic and Social Council; the substantive articles had by then reached very nearly their final form.²⁰ For the next ten years, the substantive articles were redrafted in the Third Committee of the General Assembly, and as early as May, 1964, the Secretary-General was able to report that "The Third Committee has thus far adopted the preamble and all of the general and substantive articles of the Covenants proposed by the Commission on Human Rights. . ." ²¹ and one new substantive article for each of the Covenants. Most of the revisions during that period were mere changes in wording, mostly of a relatively minor nature; the pattern proposed by the Commission on Human Rights was closely followed.²² The Secretary-General's report of July 19, 1966 is identical to that of 1964,²³ and it developed that the

17. See, e.g., *id.*, at 67-71, and authorities there cited.

18. As defined in H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 102-05 (1950). [hereinafter cited as LASSWELL & KAPLAN].

19. See H. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* ch. 2 (1958).

19a. E. SCHWELB, *HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY* 31 (1964).

20. See Document A/2929 of 1 July 1955, especially at 6, and Document E/2573, annexes I-III.

21. Document A/5705 of 20 May 1964, para. 3.

22. Compare texts appearing in Documents A/2929 and E/2573 (Annexes I-III), with texts appearing in Document A/5705 (Annex).

23. Document A/6342, para. 3. In fact, there seems to have been no Committee action in this interval; committees did not meet during the 1964-65 session of the General Assembly due to the general paralysis stemming from the dispute over voting rights versus non-payment of assessments; and in 1965, the Third Committee was occupied with other work (see n.27, *infra*).

articles adopted were considered *all* of the substantive and general articles.²⁴

In contrast to the significant, albeit slow, progress on substantive and general provisions, as of April, 1963, the Secretary-General reported that: "Since the publication of the 'Annotations,' [Document A/2929] there have been no developments in the United Nations directly connected with the measures of implementation of the draft Covenants. . . ." ²⁵

The Report of the Third Committee dated 10 December 1963²⁶ summarizes the sharp divergence of views on measures of implementation of the Covenant on Civil and Political Rights.

In 1965, the General Assembly deferred further consideration of the draft covenants for a year.²⁷ When the Third Committee turned to the Covenants on October 14, 1966, it had already been decided that there would be no general debate on implementation, and it was agreed that there would be article-by-article consideration of the proposed measures, commencing with the ESC Covenant.²⁸ Although something approaching a general debate did ensue when the delegate from the Soviet Union proposed that the Committee "correct past errors" by drafting a single set of measures of implementation which would apply to both Covenants,²⁹ and received considerable support, the proposal was abortive, and within two days the Committee was proceeding as the Chairman had suggested.³⁰

Once that point had been passed the implementation measures of ESC were adopted with relative ease, since it had long been generally agreed

24. Statement of the Chairman of the Third Committee, 14 October 1966, Provisional Summary Record, Document A/C.3/SR.1395 dated 19 October 1966. (Note: Hereafter, the Provisional Summary Records of this series of meetings of the Third Committee during the General Assembly's Twenty-First Session will be cited only as "SR. —"; dates will be the actual date of the meeting.)

25. Explanatory paper on measures of implementation, Document A/5411 of 29 April 1963.

26. Document A/5655, paras. 109-123. Note that

" . . . there was general agreement, in principle at least, regarding the system of implementation proposed for the Draft Covenant on Economic, Social and Cultural Rights."

id. para. 110.

27. Resolution 2080 (XX) of 20 December 1965. In 1965, the Third Committee was occupied with work on the International Convention on the Elimination of All Forms of Racial Discrimination.

28. Statement of the Chairman, SR.1395, 14 October 1966.

29. SR.1396, 17 October 1966 and SR.1397, 18 October 1966.

30. SR.1397, 18 October 1966 at 8 *et seq.*

that implementation of this Covenant was to consist basically of a reporting procedure,³¹ consistent with the character of the convention as one striving for development and improvement rather than laying down standards for immediate attainment.³² The principal debate was over the recipient of the report designated in what is now Article 17.³³ The texts of Articles 16 through 24 were adopted, with only minor changes from the original versions of the Commission on Human Rights, by October 26, 1966.³⁴ To this point, the discussion in the Third Committee had been harmonious.

GENESIS OF ARTICLES 25 (ESC) AND 47 (C & P)

On October 18, 1966, fourteen states³⁵ had submitted a proposed new article, provisionally numbered 25 *bis*, reading: "Nothing in this Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."³⁶ Consideration of this proposal began at the meeting of the Third Committee on October 26, 1966,³⁷ and on that date eight additional states³⁸ joined as sponsors of the proposed new article.

The basic position of the proponents was expressed by Mrs. Afnan, the representative of Iraq, who pointed out that the right to natural re-

31. See draft Articles 17-25 as prepared by the Commission on Human Rights, and commentaries thereto, Document A/2929, at 116-123; report of the Third Committee dated 10 December 1963, Document A/5655, para. 110.

32. *E.g.*, final text of ESC, Article 2, para. 1:

"Each State Party . . . undertakes to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights. . . ."

33. For a summary of the various proposals considered, see Report of the Third Committee, Document A/6546, 13 December 1966, at 9-17.

34. Compare Article 16 of the final text of ESC *with* Article 17 of the original draft, Article 17 of the final text with Article 18 of the original draft, etc.

35. Chile, Ghana, Guinea, India, Iran, Iraq, Nepal, Nigeria, Pakistan, Sudan, United Arab Republic, United Republic of Tanzania, Venezuela, and Yugoslavia.

36. Document A/C.3/L.1357, 18 October 1966, or Document A/6546 of 13 December 1966, at 28.

37. SR.1404, 26 October 1966, at 6.

38. Afghanistan, Algeria, Congo (Brazzaville), Panama, Libya, Mauritania, Mongolia, and Jordan; see Document A/C.3/L.1357/ Add. 1, 26 October 1966 or Document A/6546, p. 28. There is an unimportant confusion as to the exact number and identity of the additional sponsors: for example, the Chairman announced Iran as an additional sponsor although it was an original sponsor, while Zambia, which announced in debate its intention to be a co-sponsor, does not appear in L.1357/Add. 1, nor does Syria, although it was mentioned by Chairman as a new co-sponsor. See SR.1404, at 6, 7, and Document A/6546, at 28.

sources as mentioned in Article 1 was "accompanied by restrictions which limited its scope, whereas the amendment [that is, the proposed new article] had the advantage of recognizing that the right was absolute."³⁹ With equal frankness, Mr. Atassi of Syria said:

The obligations arising out of international economic co-operation could be differently interpreted by the countries concerned and the ultimate victory would lie with the strongest, with the result that the rich countries would become increasingly richer at the expense of the developing countries. It was necessary to establish the right of peoples to use their natural resources so that the capitalist countries might not be able to perpetuate their dominion on the pretext of international economic co-operation.⁴⁰

Similarly, Mr. Hanablia of Tunisia said that, while his delegation was not opposed to international economic cooperation, "he felt that certain obligations were no longer valid."⁴¹

The anti-imperialist rationale expressed by Syria was voiced by other delegations. For example, Mr. de Cossio of Cuba viewed opposition to the new article, particularly by the United States, as a defense of "the odious rights of capitalism" by countries which "sought to appropriate the natural resources of the developing countries;"⁴² and Mr. Tekle of Ethiopia considered the proposed article an effort of "the underdeveloped countries to seek to protect their resources against the imperialist Powers which sought to exploit them under the cloak of technical assistance or international economic co-operation."⁴³ Such "economic intervention" was seen by Mr. Amir-Mokri of Iran as the means by which "the neo-colonialists were trying to destroy the independence of the developing countries."⁴⁴ Another supporter of the new article, Mr. Goon-

39. SR.1404, at 7. The Iraqi position was repeated when Mrs. Afnan pointed out that the sponsors of the new article "had not sought to modify article 1", but added that article 1 attached restrictions to the right of peoples to their natural resources "whereas nothing in the Covenant should be construable as limiting so fundamental a right." SR.1405, 27 October 1966, at 2.

40. SR.1405, at 2-3.

41. *Id.* at 8.

42. *Id.* at 2. Note the similarity of the statements of N'Galli Marsala of the Congo (Brazzaville) that "as might have been expected, the imperialist Powers were alone in opposing the amendment" (*Id.* at 5), and that of Mrs. Soumah of Guinea that "she was not surprised that *some countries* should object to the amendment." (Emphasis added) (*id.* at 3).

43. *Id.* at 3.

44. *Id.* at 8.

eratne of Ceylon, said that the reason for the restrictions in Article 1, "which amounted in fact to substituting for a people's right to sovereignty over its natural resources the right not to be deprived of its own means of subsistence" was the membership of the United Nations at the time of its adoption, suggesting that with the changed composition of the membership Article 1 would not now have been accepted.⁴⁵

Thus, several of the early speakers in favor of the amendment (not to mention those who spoke later) made it clear that they viewed it as a means of reversing the decision embodied in Article 1, paragraph 2, by eliminating the limitations on sovereignty over natural resources contained in that article. Not all the supporters, however, took so extreme a view. For example, although Venezuela was one of the original sponsors of the additional article, in the course of debate it modified its position to the extent of saying: "One could not assert the principle of national sovereignty without taking account of the obligations arising out of international economic co-operation based on the principle of mutual interest and of international law." Mr. Rumbos of Venezuela therefore suggested modifying the proposed additional article by adding the words ". . . without prejudice to the provisions of article 1, paragraph 2, of the present Covenant."⁴⁶ This proposed change was supported by Mr. Deseta of Brazil,⁴⁷ but seems to have otherwise been generally ignored. Since the frankest proponents of the new article made it clear that their intent was to modify Article 1, paragraph 2, it is not surprising that the Venezuelan suggestion received little support!

The major, but by no means the only, opposition to the proposed new article came from the United States, France and Great Britain. In general, their argument was that the principle of sovereignty over natural resources appeared in Article 1, and that it was inappropriate to introduce a variant on that substantive provision in the portion of the Covenant dealing with measures of implementation. Mr. Paolini of France, in particular, faced squarely the Iraqi statement that the

45. *Id.* at 3. He supported the view that the new article correctly reflected the attitude of the world community by reference to "a recent General Assembly resolution," presumably Resolution 1803 (XVII), quoted in part above. Query whether the text of the resolution supports this view.

46. SR.1405, at 4.

47. *Id.*

proposed new article was a procedural device for amending Article 1 and suggested that an amendment to Article 1 could be considered when the Committee reviewed the entire text of the proposed Covenant.⁴⁸

Lady Gaitskell of the United Kingdom presented the most thorough and reasoned opposition to the additional article. After pointing out the different character of Article 24,⁴⁹ which was designed to safeguard against conflict between the new Covenants and such basic existing texts as the Charter, she suggested:

- 1.) That the proposed article created an internal contradiction within the Covenant, which would render the Covenant impossible of interpretation.
- 2.) That the adoption of an article designed to modify a previously adopted substantive article created an undesirable precedent, in that "anyone might reopen the discussion on the various substantive articles already adopted and alter them by proposing new implementation clauses."
- 3.) That it was unlikely that a majority of the General Assembly agreed that sovereignty over natural resources was not subject to obligations arising out of international law and the principles of economic cooperation and mutual benefit. Although delicately suggesting that she could not believe that the sponsors of the amendment were rejecting such obligations, she pointed out that such rejection was the effect of the proposed text.

She also pointed out that the question of sovereignty over natural resources was already under consideration by several other organs of the United Nations, and that nothing could be added by inserting a parallel provision in this Covenant.⁵⁰

It would be unduly repetitious to review all of the statements made in the course of the debate; but since the views of the various delegations are not fully reflected by the roll call votes, the positions taken in the debate are summarized in the following table:

48. SR.1404, at 7-8.

49. For the text, see *supra* note 6.

50. SR.1405, at 5-6.

Positions Expressed in Third Committee
Debate on Proposed ESC Article 25 *bis* (Now Article 25)

<u>In Favor</u>		<u>Opposed</u>
Algeria	Iraq	Argentina
Brazil	Lebanon	France
Byelorussian SSR	Malaysia	Finland
Ceylon	Mauritania	Italy
Colombia	Mali	New Zealand
Congo (Brazzaville)	Panama	Netherlands
Cuba	Philippines	Sweden
Czechoslovakia	Syria	United Kingdom
Ethiopia	Turkey	United States
Guinea	Tunisia	
Hungary	Venezuela	
India	Zambia	
Iran		

ADOPTION OF ESC ARTICLE 25

On 27 October 1966, the second session at which the proposed new article was considered, the representative of the Congo (Brazzaville) moved closure of the debate. The matter of preserving sovereignty over natural resources is of such great significance to the developing countries that it could hardly be expected that a provision dedicated to that principle would receive substantial opposition on a final vote, either from delegates of the developing countries (who, despite their own views as to legality or propriety, would be embarrassed at home by a negative vote⁵¹) or from delegates of countries with a primary concern of maintaining close and supportive relations with the developing countries. Therefore, the issue of closure of debate was crucial, since the outcome of the final vote was almost a foregone conclusion if the new article, as proposed, reach a final vote.

The motion for closure carried by a vote of 48 to 21, with 30 abstentions.⁵²

51. See H. ALKER & B. RUSSETT, *WORLD POLITICS IN THE GENERAL ASSEMBLY* 262-70 (1965), on the relation between voting behavior and the status of a regime with its constituents.

52. SR.1405, at 11-12. The roll call was:

In favour: Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Yugoslavia, Zambia, Afghanistan, Albania, Algeria, Bolivia, Brazil, Bul-

The new article was then adopted by a vote of 75 to 4, with 20 abstentions.⁵³ The strong switch of votes from the "opposed" and "abstention" columns to "in favor" supports the hypothesis that numerous States were less than enthusiastic about the new article, but felt compelled to be recorded in favor of any provision which purported to preserve or enhance sovereignty over natural resources. In addition to the statistical evidence of this tendency to conform on final vote, remarks made in explanation of votes indicate that States voted in favor of the amendment,⁵⁴ or at least abstained,⁵⁵ despite reservations about its desirability or active opposition to it.

garia, Byelorussian Soviet Socialist Republic, Cameroon, Central African Republic, Chad, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Cuba, Cyprus, Czechoslovakia, Ethiopia, Ghana, Guinea, Guyana, Hungary, Iran, Iraq, Jamaica, Jordan, Kenya, Kuwait, Libya, Mali, Mauritania, Mongolia, Morocco, Nepal, Panama, Peru, Poland, Romania, Saudi Arabia, Somalia, Sudan, Syria.

Against: United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Honduras, Iceland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Sweden, Turkey.

Abstaining: Upper Volta, Uruguay, Argentina, Ceylon, Chile, China, Costa Rica, Dahomey, Ecuador, Gabon, Greece, Guatemala, India, Indonesia, Israel, Liberia, Madagascar, Malaysia, Mexico, Niger, Nigeria, Pakistan, Philippines, Rwanda, Senegal, Sierra Leone, Spain, Thailand, Togo, Tunisia.

53. *Id.* at 12-13. The roll call was:

In favour: Hungary, India, Indonesia, Iran, Iraq, Jamaica, Jordan, Kenya, Kuwait, Liberia, Libya, Madagascar, Malaysia, Mali, Mauritania, Mexico, Mongolia, Morocco, Nepal, Nigeria, Pakistan, Panama, Peru, Philippines, Poland, Romania, Rwanda, Saudi Arabia, Senegal, Sierra Leone, Somalia, Spain, Sudan, Syria, Thailand, Togo, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Republic of Tanzania, Uruguay, Venezuela, Yugoslavia, Zambia, Afghanistan, Albania, Algeria, Bolivia, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Cameroon, Central African Republic, Ceylon, Chad, Chile, China, Colombia, Congo (Brazzaville), Congo (Democratic Republic of), Costa Rica, Cuba, Cyprus, Czechoslovakia, Dahomey, Ecuador, Ethiopia, Ghana, Guatemala, Guinea, Guyana, Honduras.

Against: New Zealand, Norway, United Kingdom of Great Britain and Northern Ireland, United States of America.

Abstaining: Iceland, Israel, Italy, Japan, Luxembourg, Netherlands, Niger, Portugal, Sweden, Upper Volta, Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Gabon, Greece.

54. See statement of Mrs. Ramaholimihaso of Madagascar, to the effect that her delegation voted in favor despite doubts about the desirability of inserting what was, in effect, an amendment to Article 1 into the articles of implementation of the Covenant. SR.1406, at 2.

55. For example, Argentina (*id.* at 2), France (*id.* at 3), and Japan, whose repre-

It also appears that an effort had been made behind the scenes to work out a version of Article 25 which would be more generally acceptable, and that this effort was frustrated by the Congo (Brazzaville) demand for closure of debate. In speaking against the closure motion, Mr. Beeby of New Zealand "asked the delegation of the Congo (Brazzaville) to withdraw his motion in order to allow the Committee time to prepare a text that would meet with unanimous approval,"⁵⁶ and the Italian delegate, Mr. Capotorti, similarly urged that an effort be made to "find a formula which all delegations could support," rather than merely "win an easy victory" with majority voting power.⁵⁷

The apparent refusal of the proponents to pursue these negotiating offers, and their insistence on the closure motion, was the source of overt frustration (if not bitterness) in the Committee. The Western nations clearly felt the issue had been railroaded through by a bare voting majority without full discussion and in violation of a spirit of compromise.⁵⁸ The intensity of feelings at this point is suggested by the remarks of Mr. Richardson of Jamaica, who, after voting in favor of both the closure motion and the principal motion, felt it necessary to say that he "hoped that the procedure adopted at the preceding meeting

sentative, Mrs. Kume, "explained that her delegation had abstained . . . because it believed that an article of a substantive nature should not be included in the articles of implementation." (*id.* at 5).

56. SR.1405, at 10.

57. *Id.* at 11.

58. E.g., Lady Gaitskell referred both to the compromise efforts and to the fact that less than half of the members of the Committee voted on the closure motion (SR.1406, at 4); Mr. Beeby of New Zealand said that:

"His delegation's [negative] vote had also been an expression of some dissatisfaction with the procedure followed. . . . He hoped that the spirit displayed at the twentieth session, when the draft International Convention on the Elimination of All Forms of Racial Discrimination had been under discussion and the *importance of compromise and consultation* had been recognized, would prevail. . . ." (emphasis added).

Id. at 5.

Perhaps most strongly, Mr. Capotorti of Italy, after stating the reasons for his vote, expressed regret at

"the manner in which closure of the debate had been imposed, despite offers of collaboration by a number of delegations, *and if a similar procedure was adopted in the future his delegation would not participate in the subsequent vote.*" *Id.* at 6 (emphasis added).

In the same vein, Mr. Grondin of Canada "regretted the manner in which debate had been closed on a question which would have gained greatly from further discussion" and suggested that "*Reliance on a majority to end an important debate was not democratic or wise* and could ultimately cause great damage to the Organization." *Id.* at 7 (emphasis added).

would not embitter future relations in the Committee”⁵⁹ The representative of Costa Rica felt called upon to object to an “undemocratic” and “deplorable” “trend in the Committee to stifle the expression of views that conflicted with the position of a certain sector of the members;”⁶⁰ Costa Rica had abstained on the motion for closure of debate, but voted in favor of the principal motion.

Discussion of the new article closed with the rather defensive remark of Mr. N’Galli Marsala of the Congo (Brazzaville) “that he had been entirely within his rights under the rules of procedure” in moving the closure of debate, coupled with his accusation that the opponents of the article “were determined to maintain the discrimination implicit in article 1, paragraph 2. . . .”⁶¹

IN THE CONVENTION ON CIVIL AND POLITICAL RIGHTS

In contrast to the heated debate over the insertion of the new article in ESC, the same provision was inserted into C & P with a minimum of discussion; the fire had all been spent! Twenty-three powers sponsored the amendment to insert the new article into C & P, which was given the tentative designation of Article 50 *bis*.⁶²

Discussion on the amendment was opened at the Third Committee meeting of 25 November 1966, and the principal action at that meeting was to defer a vote on the article until a later session, acceding to a request of the representative of Norway.⁶³ The representative of the Union of Soviet Socialist Republics had opposed the request, since he said that the Norwegian delegate “offered no valid reason for postponing action.”⁶⁴ It appears likely that Norway sought the delay either in the hope of working out a more widely acceptable version in informal talks—or, more probably, in the hope that the adoption on that day of the new resolution on permanent sovereignty over natural resources⁶⁵ might either soften the position of the proponents of the proposed

59. SR.1406, at 7.

60. *Id.* at 8.

61. *Id.* at 9.

62. Afghanistan, Algeria, Chile, Ecuador, Ghana, Guatemala, Guinea, India, Iran, Iraq, Libya, Mongolia, Nepal, Nigeria, Morocco, Pakistan, Panama, Sudan, Syria, United Arab Republic, United Republic of Tanzania, Venezuela, and Yugoslavia; see Document A/C.3/L.1381 and Add. 1 and 2, or Document A/6546 of 13 December 1966, at 138.

63. SR.1435, at 12.

64. *Id.*

65. Resolution 2158 (XXI) of 25 November 1966; partial text *supra* note 8.

article, or might carry weight as demonstrating that the question of natural resources was being fully dealt with in a specialized document.^{65a}

Whatever the Norwegian purpose may have been, it was without avail. At the next meeting of the Third Committee held on the following Monday, 28 November 1966, the proposed amendment was called as the first item of business and proceeded to a vote without further discussion. The article was adopted by a non-roll call vote of 50 to 2, with 17 abstentions.⁶⁶ (Note the relatively large number of States not taking any position whatsoever.) The explanations of votes⁶⁷ consisted largely of references to the national positions stated at length in the debate over the corresponding provision in ESC, and a desultory repetition of those reasons. It may be significant that no State which voted in favor of the amendment even bothered to explain its vote; explanations were heard only from States which either voted against or abstained.^{67a} Moreover, with the exception of Upper Volta and, arguably, Argentina, only advanced Western countries explained their votes: Norway, USA, Canada, United Kingdom, Belgium, Italy, France, and the Netherlands. These vote explanations seem to have been primarily for the purpose of reiterating that the countries concerned did not disagree with the basic principle of permanent sovereignty over natural resources, but stood by their procedural and placement objections only.

The defeat of the Western powers on this issue was so thorough that no effort was made to secure reconsideration of Articles 25 (ESC) and 47 (C & P) when the Conventions came before the General Assembly, although an (unsuccessful) attempt was made to have the Assembly reconsider another anti-colonial provision.⁶⁸ The voting in the General Assembly, therefore, fails to reflect the deep division on these articles.

65a. It should be emphasized that these comments on the Norwegian purpose are pure speculation. Egon Schwelb doubts that the Norwegian motion was related to the action taken in plenary session. Letter to the author dated February 7, 1968.

66. SR.1436, at 2.

67. *Id.* at 2-3.

67a. Since the Rules of Procedure do not permit a sponsor to explain his vote, almost half the affirmative voters were barred from explaining; but the silence of the remaining 27 affirmative voters seems significant.

68. Article 2, paragraph 3 of ESC reads:

"3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."

Among the economic rights contained in that Covenant are (Article 6) the right to work, (Article 7) the right to just and favorable conditions of work, including fair wages and safe and healthy working conditions, (Article 8) the right of unionization, and (Article 9) the right to social security. Consistent with the diversity of economic

CONCLUSION

Just as Alexis de Tocqueville found in the United States a frightening potential for a "tyranny of the majority," so the voting bloc of the emerging nations and their supporters were able to have their way, without compromise, on the text of the Covenants. But unlike a domestic majority, real power does not necessarily rest with a voting majority in the General Assembly, and the new States cannot believe that they have, by mere weight of voting power, established a legal principle which will automatically be accepted. Did the new States intend this exercise of voting strength to be an exercise of the real power to make a controlling decision on a legal norm?

A review of the record of the Third Committee leaves the impression that there were actually two debates: the one conducted by proponents of Article 25 (ESC), and the one in which the opponents participated. It is as though the two were not communicating with each other on more than a superficial level. The Western delegates were speaking the language of logic and law. But the developing nations seem to have been using the language of political symbols, and particularly "sentiment symbols."⁶⁹ The idea of *absolute* sovereignty over natural resources, unlimited and unencumbered, seems to go beyond the specific practices of the past; indeed, it seems to go beyond natural resources; it appears to be a propaganda symbol which represents the entire package of anti-colonialist sentiment, the new nations' assertion of independence and defiance of the richer nations—both those which exploited in the past and those which may patronize in the future.

To some extent, the Western representatives seem to have understood this emotive content of the debate; at least their repeated expression of acceptance of the principle of sovereignty over natural resources seems an acknowledgment of it. But their legalistic arguments were essentially irrelevant to the position of the proponents. Some of the less extreme proponents of the new article also seem to have tried

systems among the States who might wish to ratify, there is no guarantee of the right of private property. (Compare European Convention for the Protection of Human Rights and Fundamental Freedoms, first protocol, Article 1, 213 U.N.T.S. 262 (1955).)

Lebanon moved the adoption *as a whole* of each of the texts proposed by the Third Committee in its final report, Document A/6546 of 13 December 1966. The United States moved to amend (Verbatim Record of the General Assembly, A/PV.1496 of 16 December 1966, at 16-17) so as to require a separate vote on Article 2, paragraph 3 of ESC; the U.S. amendment was defeated 67 to 16, with 23 abstentions (*id.* at 23-25).

69. LASSWELL & KAPLAN, *supra* note 18, at 19-20.

to understand the Western position, but their suggestions were, similarly, irrelevant to the legalistic approach of the West.⁷⁰

The net effect is that much of what each side said fell outside the "attention frame"⁷¹ of the other: "They live, we are likely to say, in different worlds. More accurately, they live in the same world, but they think and feel in different ones."⁷²

If this analysis of the debate is accurate, then it becomes still more difficult to determine the legal significance of the new articles, even assuming widespread ratification of the Covenants: the proponents sought to modify Article 1, paragraph 2, but to what extent? Did they intend the modification to be legally significant, or only symbolic? Did those who failed to speak, but who voted affirmatively, conceive of their votes as supporting a new legal norm; or were their votes merely constrained concessions to a political symbol?

The general attitude of the "new" Asian and African nations has been characterized as acceptance of present international law, "*except where it is still found to support past colonial rights* or is clearly inequitable by the present standards of civilization."⁷³ Debate in the Third Committee, whatever else may be uncertain, clearly reflected the fear (whether or not justified) that hidden in international law and in the principles of economic cooperation and mutual benefit are traps whereby creditor-States would deprive the developing, debtor-States of their natural resources.⁷⁴ The remedy attempted, declaring sovereignty over resources to be above law and above the practical requirement of co-operation, seems extreme: the practice of the newer States themselves has been characterized as involving efforts to remove old burdens,

70. E.g., Malaysia, which remarked that since the opponents agreed that "the text was based on a principle already embodied in article 2, paragraph 1," the positions were not far apart, and "he hoped that the opponents would find a formula which would enable them to cast an affirmative vote" (SR.1405, at 6); Mali, which "saw no reason why a principle already set forth in article 1, paragraph 2, should not be stated in a separate article" (*id.* at 7); and Iran, which reaffirmed its own respect for obligations arising from economic co-operation while asserting the "sacred" right to natural resources (*id.* at 8).

71. LASSWELL & KAPLAN, *supra* note 18, at 26.

72. W. LIPPMAN, PUBLIC OPINION 20-21 (1922).

73. Anand, *Role of the "New" Asian-African Countries in the Present International Legal Order*, 56 A.J.I.L. 383, 388 (1962) (emphasis added).

74. For a summary of evidence to the effect that the fear is real, based upon the past experience of small States in weak bargaining positions, see, e.g., Anand, *Attitudes of the Asian-African States Toward Certain Problems of International Law*, 15 Int. & Comp. L.Q. 55, 61-62 (1966).

while they have both given assurances for and honored their post-independence agreements.⁷⁵ And it has been pointed out that in most Twentieth Century cases of extensive expropriations, there have been reasonably effective *de facto* negotiated settlements, resulting in partial compensation.⁷⁶

It has also been suggested that Western insistence on an unvarying obligation to pay "full" compensation for expropriated foreign-owned assets is "... little more than a preference assumed for bargaining purposes—an element of legal mythology to which spokesmen pay ritualistic tribute and which has little meaning in effective policy."⁷⁷ It would not be unreasonable to believe that the developing countries' claim to a sovereignty over natural resources which is unencumbered by the needs of economic cooperation or the demands of law is a similar ritualistic claim: one which may express a starting point for bargaining, rather than a final position.

So viewed, the provision inserted in the Covenants on Human Rights is consistent with States' general practice of declining to have disputes adjudicated—a practice said to be based largely on the fact that "it seems more advantageous to leave the matter unsettled" than run the risk of losing a case which is legally doubtful.⁷⁸ And while documents such as the General Assembly resolutions on sovereignty over natural resources may be viewed as part of an attempt to modify international law so as to wipe out the vestiges of colonialism,⁷⁹ it seems likely that the maximum effect the new States can hope for in the present case is a very slight increase in the level of uncertainty—which may be precisely what is desired.

75. Anand, *Role of the "New" Asian-African Countries*, *supra* note 73, at 402-03.

76. Dawson & Weston, "Prompt, Adequate and Effective"; *A Universal Standard of Compensation?*, 30 Fordham L. Rev. 727, 740-49 (1962).

77. *Id.* at 757.

78. Anand, *Role of "New" Asian-African Countries*, *supra* note 73, at 404-05.

79. Anand, *Attitude of the Asian-African States*, *supra* note 74, at 73.