*Human Rights Panel*

# A Post-Cold War Human Rights Agenda

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The international human rights movement was still in its infancy when the Cold War broke out, and it has lived almost all of its years under the heavy shadow of that war. In those circumstances, and in less than half a century, international human rights have enjoyed an astounding success: the human rights idea is established beyond challenge; the world has accepted an excellent bill of human rights. But resistance built into the international political system, and aggravated by the Cold War and other ideological tensions, has left some defects in human rights standards and appalling deficiencies in the means for implementing them. In this post-Cold War era, the international community should fill normative lacunae and repair normative defects. Above all it must move boldly towards an effective monitoring and enforcement system and take big steps in cultivating a human rights "culture." Important progress in these respects will require commitment and energetic leadership by the United States.

## I. "INTERNATIONAL" HUMAN RIGHTS

I begin by considering the term "international human rights." Notwithstanding their international thrust and flavor, international human rights are, at bottom, national rights. For the jurisprudentially conservative, international law does not create or even recognize rights for the individual; international law creates obligations only between states to respect rights of their inhabitants — individuals are merely third-party beneficiaries of inter-state obligations. Even for the daring international lawyer, human rights remain national rights, rights to be enjoyed in the state's domestic legal order.[1]

The international human rights movement was designed to establish human rights and make them more secure in national society. It sought to obtain the general agreement of states on minimum human rights standards and to persuade as many states as possible to adopt them. We do not have an International Declaration of Human Rights, but rather a *Universal* Declaration of Human Rights.[2] The Universal Declaration was intended to evoke and

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1. *See* Louis Henkin, *International Human Rights as "Rights,"* 1 CARDOZO L. REV. 425 (1979), *reprinted in* LOUIS HENKIN, THE AGE OF RIGHTS 31 (1990).

2. G.A. Res. 217A, U.N. Doc. A/810 (1948).

signal agreement by all states on the idea of human rights and on the standards to be incorporated into national constitutions and legal systems.[3] The international bill of rights — the Declaration and the two International Covenants[4] — calls on states to *recognize*, to *respect*, and to *ensure* human rights in their national polities and their constitutional jurisprudence.

## II. IMPROVING THE STANDARDS

The national character of international human rights helps us understand what happened during the Cold War and what is likely to happen now. It was a miracle that the political system was able to develop the international bill of rights during the Cold War. In fact, the end of the Cold War has not produced any call for major revisions of the human rights standards.[5] Although the covenants and conventions are a remarkable achievement, they are not without fault. Thanks to the Cold War, there were obvious omissions and purposeful ambiguities, and the inadequacies in enforcement are infamous.

I note a few omissions. First, the international documents claim no source and hang on no theory. They refer to peace and justice and invoke human dignity, but they do not indicate how these support human rights or which rights they lead to. That omission doubtless resulted from the gulf between the natural rights tradition of the West and Communist ideology's rejection of that tradition. In the international instruments, all states were asked to recognize the idea of human rights and accept the agreed catalog, if only on faith, or from political pragmatic considerations. After the Cold War, some agreement on the theory or sources of human rights may help persuade any who are still reluctant to recognize them, and may provide guidance for filling out the content of the idea. Such agreement, however, may remain impossible to achieve, and attempts to achieve it may be dangerous. We might continue to do as well without a theory.

Second, startlingly absent from the catalog of rights is the right to individual autonomy. The international instruments recognize particular liberties but not "liberty" — autonomy and freedom of choice — and the particular liberties guaranteed do not include individual autonomy in important "private matters." Individual autonomy is not explicitly protected by the U.S. Constitution either, but the Supreme Court supplied that omission. *Lochner*[6] has long been rejected, but "liberty," we now know, also means autonomy;

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3. *Id.* pmbl.

4. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

5. The Convention on the Rights of the Child was concluded during the "transition" to the changed world order. *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/RES/44/25 (1989).

6. Lochner v. New York, 198 U.S. 45 (1905).

it includes privacy (as in *Roe v. Wade*[7]) and protects against arbitrary encroachment upon freedom of choice in all matters.[8]

International human rights law should also protect economic liberty. Economic and social rights are very much part of the international human rights catalogue, and the Universal Declaration recognizes the right to property, but neither the Universal Declaration nor the International Covenant on Economic, Social and Cultural Rights guarantees economic liberty. The omission of economic liberty, of freedom of enterprise, during the Cold War was perhaps inevitable. With the end of Communism and the general move to privatization and the market economy, it may be time to add economic freedom to welfare rights.

Some rights that are in the international catalog need clarification to remove ambiguities that had papered over ideological differences. For example, both the United States and the Soviet Union supported the right to work,[9] but to the United States it meant freedom to choose one's work, whereas to the Soviet Union it meant society's obligation to guarantee employment. Such ambiguities ought to be resolved, perhaps by a protocol, but at least by an agreed interpretation of the instruments.

"Democracy" is another concept burdened by ambiguities of the Cold War. The Covenant on Civil and Political Rights guarantees the right "to take part in the conduct of public affairs, directly or through freely chosen representatives" and "to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."[10] The right to vote — to representative government — is one right among many, and during the Cold War each side claimed that its political system (and only its system) satisfied the Covenant provisions. Even repressive regimes claimed to be "democratic:" universal suffrage was said to be satisfied by occasional "yes" or "no" referenda, by one party systems, and by other political arrangements whose claim to being authentically democratic were ludicrous. The future requires some agreement on the essential elements of representative democracy and on the relation of democracy to individual rights. Even after the Cold War, however, most states are not democratic and even small steps toward agreement will not be easy.

## III. INDUCING COMPLIANCE

The notorious weakness of the international human rights movement is its lack of effective inducements to ensure compliance with agreed human rights norms. It may not be surprising that states have been unwilling to be moni-

7. 410 U.S. 113 (1973).
8. Nebbia v. New York, 291 U.S. 502 (1934).
9. International Covenant on Economic, Social and Cultural Rights, *supra* note 4, art. 6.
10. International Covenant on Civil and Political Rights, *supra* note 4, art. 25.

tored; what may be surprising is that states are also reluctant to monitor and attend to human rights conditions in other states. The "enforcement machinery" for international human rights is primitive.

Unfortunately, the Cold War prevented even the establishment of a U.N. High Commissioner for Human Rights. Those who are skeptical about the effectiveness of international law may doubt the utility of such an office. I believe that such a Commissioner would be highly important in inducing compliance: he or she would help "mobilize shame." That is, after all, what international human rights law has always been about. International law generally has never been enforced by police officers. Even the law in the United States depends not on the police as much as on a "culture" of compliance, on the fact that people generally abide by legal standards. In international life, we must develop a culture of human rights compliance. The Cold War frustrated the growth of such a culture, but now, international institutions can contribute to that culture. Now, the states of the former Soviet Union are more willing to submit to monitoring and have supported the idea of a High Commissioner. The United States, I am pleased to note, pressed the idea. In December 1993, the General Assembly voted to establish the office of High Commissioner. Now the office must be filled by a person of stature and initiative, who must be given the authority and the resources he or she will need.

## IV. AN AGENDA FOR THE UNITED STATES

If an international culture of human rights is to grow, the United States will have to help nurture it. We have not been wholly dedicated to that task. During the Cold War we often subordinated our concern for human rights to our "war effort." We no longer have any need (or excuse) for that.

Our contribution to such a human rights culture must come in several forms. First, the United States must improve its own commitment and cooperation. It should assume and honor international obligations to *recognize*, to *respect*, and to *ensure* human rights — *all* human rights. In 1948, the United States recognized all the rights set forth in the Universal Declaration; but in 1992, for example, government officials said that they would not support U.S. ratification of the International Covenant on Economic, Social and Cultural Rights because the rights recognized there are not rights. Also, in 1992, the U.S. finally ratified the U.N. Covenant on Civil and Political Rights, but it did so subject to important reservations. Many will find it difficult to understand how the United States can recognize rights and yet adopt reservations refusing to honor them. The most ignoble reservation, I believe, is our reservation to Article 6(5) of the Covenant whereby, as critics have said, we reserve the right to execute children.[11]

11. The International Covenant on Civil and Political Rights forbids the imposition of capital punishment for a crime committed by someone under 18 years of age. *Id.* art. 6(5). Another reservation,

The United States must also help assure that other states comply with their international human rights obligations. We should support effective international monitoring through stronger institutions, including the U.N. High Commissioner, but also through the Security Council when gross human rights violations threaten international peace and security. We should also assume some national responsibility for human rights abuses elsewhere. Some twenty years ago, the U.S. Congress prohibited foreign aid and the sale of arms to countries guilty of consistent patterns of gross violations of internationally recognized human rights,[12] but the implementation of such laws has been a less than noble chapter. Congress left major loopholes; the executive branch subverted even what Congress required. In several instances, Congress knowingly permitted the executive branch to flout the law. Members of Congress, for instance, were aware of gross violations by our friends in Central America. When the executive branch turned a blind eye, however, members of Congress did not speak up, apparently afraid that they might be held responsible for "losing" Guatemala, or Nicaragua, or El Salvador. If we are to give meaning to such laws, we must see to it that they are faithfully executed.[13]

Finally, we should look to our laws and institutions. The United States still suffers from its early "isolationism," and, as a result, we have been building up, instead of breaking down, legal obstacles to our full and effective participation in human rights agreements and institutions. We are reluctant to join in making human rights law by treaty, but Congress does not adopt laws to meet international standards. We have a constitutional system that permits — perhaps requires — automatic incorporation of treaties into our law, but we have developed devices to keep treaties from becoming part of our law automatically, and then we seem to resist congressional implementation of such treaties.

Recently, for example, we have heard opposition to "making law" by treaty; law, it is argued, should be made by Congress, not by the executive branch through its power to negotiate treaties. Such arguments are anti-historical. Treaties have made law and have been the law of the land since before we were a democracy. And, under our Constitution, a treaty is to be the law of the land once it is consented to by the Senate and "made" by the President. Now there is a deplorable tendency to declare human rights agreements "non-self-executing." For the Senate or the President to declare non-self-executing a treaty which by its character could be self-executing, is "anti-constitutional" (some might say unconstitutional). There is no reason why most human rights agreements cannot be self-executing. Nevertheless, if a treaty is unwisely declared non-self-executing, the United States is obligated to implement it

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to Article 20 requiring a state to prohibit war propaganda and forms of "hate speech," may have been required by the U.S. Constitution.

12. *See, e.g.*, Foreign Assistance Act of 1973, Pub. L. No. 93-189, 87 Stat. 714 (1973) (codified as amended in scattered sections of 22 U.S.C.).

13. *See* U.S. CONST. art. II, § 3.

promptly. The Senate gave consent to ratification of the U.N. Convention Against Torture[14] in 1990, but declared that the United States should not ratify it until Congress enacts legislation.[15] As of this date, Congress has not done so. Similarly, there has been no apparent move to implement the Covenant on Civil and Political Rights since its ratification in 1992. A bill, The Human Rights Conformity Act of 1993, designed to make the United States fulfill its human rights commitments, has made little progress to date.

With the end of the Cold War, the United States is no longer constrained by its role as leader of the free world. The end of the Cold War, however, has also diminished inducements for cooperation. We still live in the spirit of the Bricker Amendment,[16] which, forty years ago, sought to amend the Constitution to make it impossible for the United States to adhere to human rights treaties. That spirit still walks the halls of the U.S. Senate and, without leadership in support of international cooperation, it may become the attitude of the country at large. A common view seems to be that international human rights are good, but not for us. We are not a pillar in the human rights church; we are only a flying buttress supporting it from the outside. It will take effort to change this attitude.

The Bricker Amendment opposed U.S. participation in extending international law to areas that were thought to be inherently national matters; the international human rights movement has made it clear that human rights are everybody's business. Now that the Cold War is over, the world community is even considering when to intervene in a country by force to curtail human rights abuses there. No one argues that intervention is an ideal solution or one that should be frequently employed, but no one now insists that gross violations are no one else's business.

Finally, we have to pay attention to the opinions of mankind. Once we had constitutional doctrine that required us to respect the conscience of mankind, to pay attention to what others thought.[17] Recently, we have taken some steps backwards towards parochialism. In *Stanford v. Kentucky*, for example, the Supreme Court held that executing a minor does not violate our Constitution, no matter what international human rights standards provide, and that we don't care what Amnesty International thinks.[18] We should care. We have to care if we believe in *human rights*.

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14. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/RES/39/708 (1984).

15. *See* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 85 AM. J. INT'L. L. 334, 337 (1991).

16. S.J. Res. 130, 82d Cong., 2d Sess. (1952); S.J. Res. 1, 83d Cong., 1st Sess. (1953); S.J. Res. 73, 83d Cong., 1st Sess. (1953); S. Rep. No. 412, 83d Cong., 1st Sess. (1953).

17. *See, e.g.*, Adamson v. California, 332 U.S. 46 (1947); Rochin v. California, 342 U.S. 165 (1952).

18. *See* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (citing Thompson v. Oklahoma, 487 U.S. 815, 868-69 n.4 (1988) (Scalia, J., dissenting)).