

1-1-1988

# American Human Rights Diplomacy: The Next Phase

W. Michael Reisman  
*Yale Law School*

Follow this and additional works at: [http://digitalcommons.law.yale.edu/fss\\_papers](http://digitalcommons.law.yale.edu/fss_papers)

---

## Recommended Citation

Reisman, W. Michael, "American Human Rights Diplomacy: The Next Phase" (1988). *Faculty Scholarship Series*. Paper 751.  
[http://digitalcommons.law.yale.edu/fss\\_papers/751](http://digitalcommons.law.yale.edu/fss_papers/751)

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact [julian.aiken@yale.edu](mailto:julian.aiken@yale.edu).

# American Human Rights Diplomacy: The Next Phase

W. MICHAEL REISMAN\*

---

There is no dearth of serious human rights issues. High on my short list would be the resolution of the Palestinian problem, the dismantling of apartheid and its replacement by a liberal democratic multi-racial society in South Africa, and the encouragement of the incipient processes of democratization and liberalization in the socialist states.

Unfortunately, the opportunity to do something positive and meaningful about such issues may not present itself in the life of the coming administration. The big-ticket human rights issues are by their nature complex social problems that are integrated in even more complex regional and international contexts. Their solubility often depends on what the French call *l'instant propice*, that constellation of factors without which the best of intentions and the greatest of efforts will fail. You may try to induce these constellations to form, but they just may not congeal during your term of office. Whatever can be done should be done to alleviate the big problems, but none of us should entertain illusions that all problems can be solved simply by targeting and then throwing resources at them. Indeed, that could be counterproductive. Given the limited resources available for human rights, choosing the wrong targets at the wrong time may simply expend the limited pool of money and potential indignation that might have been effective elsewhere.

This does not mean that the new administration should forego all planning. There is much to be accomplished at the structural level, where planning is not only helpful but indispensable. From one perspective, the constitutive structure of the international human rights

---

\* Hohfeld Professor of Jurisprudence, Yale Law School.

program is comprised of seven distinct functions;<sup>1</sup> some of them are manifestly "legal," others less obviously so. The effective performance of each is critical to a meaningful human rights program. These functions include:

- The gathering, processing and dissemination of information about the conditions of people in terms of the now accepted quotient of human dignity throughout the planet and, where necessary, the determination of the reasons for failure to achieve an acceptable standard;
- The formulation and promotion of new policy programs to enhance human dignity;
- The installation of these new programs as norms of international law;
- The provisional characterization of violations of the norms that have been established and the insistence that something be done about them;
- The application and sanctioning of human rights violations and the development of appropriate corrective and rehabilitative programs;
- The termination of obsolete normative arrangements that impede the attainment of human rights goals;
- The appraisal of the aggregate performance of the international human rights program.

Obviously, national governments and their apparatus are only one participant in the performance of these various decision functions. International and national organizations, business units, political parties, religious groups, private associations and individuals, not the least human rights lawyers, play an important and sometimes decisive role. For some functions, non-governmental entities are often the most important actors. In planning what it might do to improve the performance of these functions, the new administration should consider the resources of these other actors as well as its own and attempt, where it seems promising, to coordinate them.

Let us briefly consider what might be done in each of the functions.

---

1. For further development of these decision functions, see McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision* (pts. 1 & 2), 19 *J. Legal Educ.* 253, 403 (1967), reprinted in 1 *The Future of the International Legal Order* 73 (C. Black & R. Falk eds. 1969) and, in revised form, in McDougal & Reisman, *International Law Essays* 191 (1981).

### *1. Information.*

For many years, members of the human rights movement believed that the media could ferret out and provide the information necessary for rapid reaction to gross violations of human rights. It is now apparent that a variety of market forces fatigue audience attention and dictate foci to the media, substantially limiting their capacities in this function.

The governments of modern industrial and science-based countries, such as the United States, gather enormous amounts of information as part of their political, economic and military activities. Much of it could be pertinent to the international human rights program. For example, satellite surveillance and other national means of verification were probably used to gather information about the uses of poison gas by Iraq during the Gulf War. That information could have been released immediately, even if the United States, for political reasons which may or may not have been valid, felt that it could not participate in sanctions against an erstwhile ally.

The roadblock in that case, as well as many others, was that the same organization that has had to deal, negotiate, secure concessions or seek accommodations from a foreign government, has also had to decide on release of information that would predictably anger the other government and increase transaction costs. There is a parallel here to the situation before 1977 with regard to decisions about sovereign immunity: the Department of State made the decision to deny immunity and then had to deal directly with the government of the state it had irritated. This magnified the political cost of every decision to withhold immunity. The immunity problem was alleviated by effectively shifting the competence to make immunity decisions from Foggy Bottom to the U.S. courts.<sup>2</sup> The same type of separation may be achieved with regard to human rights information.

I would propose that the new administration establish a statutory human rights information agency (HRIA), which would be obliged, under the terms of its statute, to monitor all intelligence gathered by the government and to release information about possible violations of statutorily designated human rights matters as soon as it was available. HRIA could characterize the information as "soft" (i.e., unconfirmed), "provisional" or "confirmed," depending on its degree of

---

2. See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-11 (1982)).

corroboration. Once the information was public, human rights organizations could take up the matter.

If HRIA operated under an independent statutory regime, it would be relatively insulated from short-term pressure from the executive to withhold certain information that might be inconsistent with other national policies. Once the statute was publicized, foreign governments would appreciate that they could not stop the release by directing pressure at the executive.

There are, to be sure, political costs in government release of sensitive information. Some of them could be minimized by the design of HRIA. Because HRIA would not have access to sources or means of collection, it would not compromise intelligence-gathering. Because the agency would not be influenced by the executive, it would deflect pressure from those parts of the government charged with the conduct of foreign relations. One would hope that the new administration would, by this or some other method, adopt a policy in favor of releasing information that could facilitate private actors' initiatives in human rights matters.

## 2. *Promotion.*

The United States was a prime initiator of the Draft Convention Against Torture.<sup>3</sup> It may not have been as active in the actual formulation of the Convention as it might have been and the text that has emerged may not be satisfactory in every way, but that instrument is a model for a more prominent role by the United States in the shaping of new international human rights norms. The coming administration should instruct all relevant agencies of government to play a much more active role in the initiation and formulation of new human rights instruments and programs.

But the selection and timing of projects should be taken with care. A project should be initiated at the propitious moment, when contextual factors augur for its success. U.S. government officials may not be in the best position to gauge that. I would propose that the next administration create an expanded International Human Rights Advisory Committee (IHRAC) for the Department of State. IHRAC would be composed of a wide range of lawyers and others engaged in human rights work in the United States and would recommend and review possible initiatives. Given the heterogeneity of its composi-

---

3. Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, U.N. Doc. E/CN.4/L.2 (1984), reprinted in 23 I.L.M. 1027 (1984) and in 24 I.L.M. 535 (1985).

tion, there would be a *de facto* "networking" with human rights personnel and organizations elsewhere in the world. IHRAC might aid the U.S. government's human rights activities in other decision functions as well.

In identifying appropriate projects for legislative programs, the new administration should, in my view, hew to a more traditional rather than expansive conception of the international program of human rights. The human rights program was, at its core, an international effort to restrict the powers of governments in their relations with their own citizens. Of late, a number of initiatives have reversed that pattern, purporting to expand the powers of governments *vis-à-vis* their citizens, ostensibly to enhance development. Governments do not need international authorization or encouragement to increase their powers.<sup>4</sup>

### 3. *Prescription.*

A large bureaucracy devoted to creating a new human rights formula is now in existence. But I am not convinced that this function is the best current use of the limited resources of governments. I think it is more urgent to develop techniques for invoking and applying the formula that already exists. If a formula must be drafted, I would recommend, as mentioned, that it focus on the core objective of the human rights program — restricting the arbitrary powers of governments against their own citizens — and not dilute the energies available to the program by spreading them over other, possibly laudable, but nonetheless not centrally relevant, concerns. In this narrower field, the new administration should be active, if only to ensure that the law-making activities of the international bureaucracy remain concentrated rather than diffused.

One unfinished item from previous administrations remains to be addressed. The new administration should press the Senate for its advice and consent to the Covenants and the Convention on the Elimination of Racial Discrimination.<sup>5</sup> It is not that we need to become party to them in order to comply with their substantive norms. Our record is good. But failure to become a party has severely limited the role the United States can play in the elaboration and application of these instruments.

---

4. This point is developed in Reisman, *Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs*, 72 *Iowa L. Rev.* 391 (1987).

5. *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

#### 4. *Invocation.*

In most instances, enforcement agencies do not move into operation *sua sponte*. An important, but frequently ignored decision function is the provisional characterization of certain events as unlawful and the insistence that something be done about them. Potential enforcement agencies are goaded by many actors. In the recent past, the United States undertook rare but vigorous invocation in the Human Rights Commission with regard to human rights violations in Cuba. That was praiseworthy, but it was so unusual that it necessarily raised questions about deeper political motives. In general, the new administration should instruct its agents in such settings to maintain a more constant relationship with Secretariat officials and to seek many more opportunities to invoke.

#### 5. *Application.*

Different actors have different responsibilities; their priorities for some or all human rights programs necessarily vary with them. Human rights lawyers may be willing to devote their lives and energies to the promotion of the international human rights program. Government officials, in contrast, are obliged to enhance the security of their country and to forward its vital interests. While it is always appropriate to insist that these objectives be accomplished with as much conformity to the international human rights program as possible, it is unrealistic to believe that human rights diplomacy will (or, indeed, should) regularly supersede all the other objectives of national diplomacy. Given the diverse responsibilities that government officials are charged with, they will necessarily perform differently (though not necessarily inappropriately) from their counterparts in the private sector in different functions and in different cases. In some functions, especially those in which direct access to formal international arenas is critical, government officials can do things that their private counterparts cannot. In others, cross-purposes or compelling short-term interests will effectively paralyze governmental action.

The conflict between the broad legitimate objectives of government officials and those of private human rights lawyers is nowhere more apparent than in application. A government official must frequently subordinate concerns about human rights matters to other urgent national objectives and that fact should be faced squarely.

The methods of application available to the government official are also different from those available to the human rights lawyer. In the

absence of compulsory international jurisdiction, human rights application frequently involves massive use of the media and public denunciations of a government engaged in violations. Those techniques may work but may not be optimum for states or, for that matter, for international organizations. The U.N. High Commissioner for Refugees, Jean-Pierre Hocke, has recently written: " 'Shouting murder' is rarely a useful activity for an international organization. It may provide short-term satisfaction, but our experience has been that governments respond best when confrontations are handled behind closed doors."<sup>6</sup> In my experience, "shouting murder" is sometimes useful and necessary, though in some contexts a government or inter-governmental organization may not be the best P.A. system. Public denunciation of Iranian executions of Bahai did secure a suspension of them. On a number of occasions, massive public demonstrations against the Soviet Union for mistreatment of Jews have also produced some positive results.

The determination of whether a vociferous public or discrete private strategy is appropriate will depend on many features of the context, such as the identity of the violator, its dependence on world community approval in a variety of other vital programs, the sympathy available for the victims and the degree of interest or issue-fatigue of the general public with regard to the matter. Many of the strategic techniques of application are more effective for private sector actors than they would be for governments.

In general, I would recommend to the new administration that it avoid grandiose promises about human rights applications. They create expectations that cannot be fulfilled. When, inevitably, the heightened expectations are not fulfilled, they make the entire program seem cynical.<sup>7</sup> Promise only to do the best you can in the conditions under which you must operate.

## 6. *Termination.*

The new administration should be particularly sensitive to the fact that — however compelling the reasons for inaction — failure to take any action with regard to certain human rights violations can lead to the termination of the norms in question. In the international system, norms are effective as long as actors expect others to protest their violation and to insist upon compliance with them. When there is a

---

6. Letter to the Editor, *Wall St. J.*, Sept. 2, 1988, at 13, cols. 1-2.

7. For criticism of the Carter administration's human rights diplomacy on this point, see Reisman, *The Pragmatism of Human Rights*, 224 *The Nation* 554 (1977).

clear pattern of violation and there is no protest, others inevitably draw the conclusion that the norm is terminated.

The United States, by its own inaction during the long period in which Iraq used poison gas, may well have contributed to the erosion of this norm.<sup>8</sup> The new administration should be sensitive to the fact that while it may not be able to develop new international human rights law, it can, by its behavior, terminate much law that is good. In circumstances where you feel you cannot use the big stick, use the big mouth, if only to confirm your conviction that the norm is still viable.

### *7. Appraisal.*

As with the intelligence function, the U.S. government is in an excellent position to perform an ongoing appraisal of the aggregate achievements of the international human rights program, both at the international and domestic levels. Realism and humility are important in the performance of this task. Often the issue is not only particular human rights violations, but the aggregate human rights quotient in a particular setting and whether that quotient is on a self-motivated vector toward human rights improvement or decay. The method employed in the annual human rights surveys may not be the most effective means for accomplishing this and others should be explored. Since appraisals are ultimately action-oriented, it is also important to bear in mind that well-intentioned interventions may leave a situation worse-off rather than better-off in terms of its human rights quotient.

## CONCLUSION

There are never enough resources or actors for human rights. Those who are committed to the program — whether in the government, non-profit or private sector — should appreciate the varied responsibilities of all of their potential collaborators so that they can work in tandem and not at cross-purposes and so that they do not waste time and energy needlessly attacking or repeating each other. During the next four years, the private human rights bar and government officials should project realistic goals.

---

8. See Reisman, *Silent World Fuels Growth of Chemical Arsenals*, L.A. Times, Aug. 24, 1988, pt. 2 (Metro), at 7.