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# Toward A New U.S. Human Rights Policy: An Interim Proposal

by Patricia A. Mayne\*

It is so easy to wound with words, and so easy to seem superficially plausible if one has no regard for truth.<sup>1</sup>

The Dalai Lama

## I. INTRODUCTION

**T**here is a great disparity between the hopes expressed in numerous articles concerning human rights and the actual problems with which we are faced regarding the implementation of such rights. Historical and cultural differences are blithely overlooked in the pursuit to find a universal ground on which to base a claim of human rights for all people. Analysis which ignores these differences ignores the substantive basis on which rest solutions to the problems of the definition of human rights and the subsequent implementation of those rights.

This note is an attempt to provide a fresh analytical starting point for a practical assessment of human rights on a national and global level. The first section addresses some of the inadequacies in the current theoretical foundation for human rights. The next section gives a general overview of the problems inherent in attempts made by the United States to implement its standard of human rights throughout the world. The final section recommends an interim proposal for adoption by the United States which would reduce the discrepancy between our human rights goals and our actual human rights accomplishments. The proposal is interim rather than "ultimate" because achievement of human rights is an evolutionary process and not a single end-point goal.

## II. THEORETICAL FOUNDATIONS FOR THE INTERIM PROPOSAL

The body of law concerning human rights is a relatively recent addition to international law. Traditionally, international law was concerned

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<sup>1</sup> THE DALAI LAMA OF TIBET, *MY LAND AND MY PEOPLE* 218 (1962).

almost exclusively with resolving conflicts between sovereign states. Under this law, individuals had no internationally recognized rights and were accorded international legal status only by virtue of being citizens of a sovereign State.<sup>2</sup> Infringements against the rights of the citizens of a sovereign country by another country were violations of the first country's sovereignty.<sup>3</sup> Only on such a limited basis was international law concerned with the rights of individuals. A sovereign country could do as it liked with its individual citizens within its own territorial borders.<sup>4</sup>

A significant change in international law concerning human rights occurred after the genocidal travesties of the Second World War.<sup>5</sup> The U.N. Charter proclaims that one of the purposes of the United Nations is to expend efforts "in promoting and encouraging respect for human rights and fundamental freedoms."<sup>6</sup> Subsequent documents embodying this purpose include the Universal Declaration of Human Rights,<sup>7</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>8</sup> the International Covenant on Civil and Political Rights (and associated Optional Protocol),<sup>9</sup> the International Covenant on the Elimination of all Forms of Racial Discrimination,<sup>10</sup> and the Convention on the Prevention and Punishment of Crime of Genocide.<sup>11</sup> While many countries have become parties to the Declaration, the Covenants, and the various Conventions, the record of the United States in signing these documents has been bleak.<sup>12</sup> (The reasons for this record will be discussed in section III of this Note herein.) Even without explicit recognition by all countries, however, these

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<sup>2</sup> See generally H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 33-49 (1976) [hereinafter cited as STEINER & VAGTS]. The nationals of sovereign states have traditionally been protected when living, travelling, or doing business in foreign countries only by reference to their sovereigns. Although areas such as deportation, exclusion, and the rights of aliens have been increasingly liberalized in many countries in recent years in terms of certain rights of individuals *qua* individuals, under international law individuals are still officially treated as subjects of particular sovereigns in regard to their individual rights.

<sup>3</sup> *Id.*

<sup>4</sup> See H. STEINER & D. VAGTS, *supra* note 2, at 329 where the authors state that the rules of classical international law "expressed the duties and rights of states, not individuals."

<sup>5</sup> See Lane, *Demanding Human Rights: A Change In The World Legal Order*, 6 *HOFSTRA L. REV.* 269, 281 (1978). The atrocities committed by the Nazis against individuals, collective ethnic and religious groups, and minorities generally alerted the international community to the need for international documents protecting the rights of individuals everywhere in the world.

<sup>6</sup> U.N. CHARTER art. 1, para. 4.

<sup>7</sup> G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

<sup>8</sup> G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

<sup>9</sup> G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

<sup>10</sup> G.A. Res. 2106A, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1965).

<sup>11</sup> G.A. Res. 260A, U.N. Doc. A/810, at 174 (1948).

<sup>12</sup> See STEINER & VAGTS, *supra* note 2, at 387-88.

documents have been increasingly relied upon to supply the "customary" definition of the rights of individuals under international law and of the obligations of states to accord their citizens certain basic rights.<sup>13</sup> The significance of the use of the Universal Declaration, the Covenants, and the various Conventions as a customary standard for human rights is that they bypass the sovereign in several areas of human rights concerns.<sup>14</sup> The result is that under certain circumstances interference with the governmental conduct of a sovereign state is not only allowable but condoned by the world community.<sup>15</sup>

The problem which has arisen in using a customary standard for human rights is that countries of various ideological persuasions have tended to emphasize those parts of the standard that support their ideological point of view and have tended to ignore or downplay those parts of the standard that fail to support their viewpoint. For example, scholars and statesmen from the United States tend to emphasize the International Covenant on Civil and Political Rights in their approach to human rights because as a nation the United States is dedicated to the concept of individual rights.<sup>16</sup> In contrast, scholars and statesmen from the

<sup>13</sup> Funk, *International Law as Integrators and Measurement in Human Rights Debates*, 3 CASE W. RES. J. INT'L L. 123, 127 (1973).

<sup>14</sup> Ferguson, *Global Human Rights: Challenges and Prospects*, 8 DEN. J. INT'L L. & POL'Y 367, 371-2 (1979).

<sup>15</sup> "Human Rights imply corresponding duties which devolve on states: *direct rights of human beings infer limitations on the powers of States.*" (Emphasis added.) Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT. & COMP. L.Q. 102 (1976).

The hope of human rights advocates generally is to effect a limitation upon the ability of governments to offend the basic dignity of their citizens. This limitation is generally conceived to be implemented either by external enforcement of these standards on individual states or, preferably, by internal implementation of these standards through domestic law within individual states. Almost all literature written in the human rights field is premised on the inherent need to place certain limitations on the behavior of any state towards its citizens.

[O]ne of the greatest contributions of the twentieth century to the development of civilization is the recognition of the principle that the historical accidents of national boundaries cannot be used as pretext for ignoring the human misery and degradation taking place along the arduous path leading from the consent of nations to the community of man. And we are not yet much beyond the first step. Wolf, *At the Apex of the Value Hierarchy - An International Organization's Contribution*, 24 N.Y.L. SCH. L. REV. 179, 180-181 (1978).

<sup>16</sup> See, e.g., comments made by Patricia M. Derian, Assistant Secretary for Human Rights and Humanitarian Affairs in the U.S. Department of State, such as:

[T]here is nothing parochial about the principles the United States seeks to promote. They respond to the universal yearnings of all mankind and have been adopted by virtually all governments . . . . Do the critics really mean to suggest that people struggling to break the bonds of mass misery are content permanently to trade their freedoms for material advancement? Those who make these suggestions fail to recognize the deepest aspirations of human beings.

U.S.S.R. tend to emphasize the International Covenant on Economic, Social and Cultural Rights in their approach to human rights because as a country the U.S.S.R. is dedicated to the concept of social rights.<sup>17</sup> Thus, while there is international agreement on the necessity of protecting human rights, consensus has not yet been reached as to what particular rights are or should actually be protected by the general standard:<sup>18</sup>

[T]o rely upon those doctrines of classic international law as a foundation for this generation of rights generated by the United Nations is a reliance on false premises. *This premise is a fundamental, theoretical problem of whether or not there is a basis for global consensus in human rights. We do not find it in religion; we do not find it in traditional international law; we do not find it in the historical origins of the period of the Enlightenment.*<sup>19</sup> (Emphasis added).

This lack of basic ideological agreement in the area of human rights has been exacerbated in recent years by the urgent needs and demands of the Third World countries. The Universal Declaration of Human Rights and the Conventions and Covenants are primarily oriented to the viewpoints of the relatively few countries which are already industrialized. This orientation has ignored the needs and viewpoints of countries which contain 90% of the world's population.<sup>20</sup> The developing countries of the Third World now face far more immediate population, economic, and social

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Derian, *Human Rights: Principles and Realism*, 64 A.B.A. J. 198, 199 (1978). See generally Jenkins, *The Concept of Rights and the Competence of Courts: Health Care As a Right*, 18 AM. J. JURIS. 1, 8-9 (1973), where that author distinguishes between "traditional" rights as being civil and political liberties as compared with "new" rights which encompass economic and social rights.

<sup>17</sup> See, e.g., Kudryavtsev, *The Truth About Human Rights*, 5 HUM. RTS. 193, 199 (1976), where the author says, "A right is an opportunity guaranteed by the state to enjoy social benefits and values existing in a given society." (Emphasis added). In criticizing the Western concept of human rights as being "anarchistic discourses on human rights," the author also says:

The bourgeois ideologues would make it appear as if human rights have nothing to do with the social and political nature of the given social system and state, and that the citizens' duties are something alien to the individual and imposed on him by society . . . [H]uman rights are a social and class concept. There are no human rights in the abstract, in isolation from society.

*Id.* See also Szawłowski, *International Protection of Human Rights*, 28 INT'L & COMP. L. Q. 775 (1979) for a more expansive exposition on the Soviet concept of human rights. See generally, 13 VAND. J. TRANSNAT. L. 249-500 (1980) for additional information regarding Soviet concepts of human rights and various implementation difficulties faced by the U.S.S.R.

<sup>18</sup> *Contra*, Marks, *Emerging Human Rights: A New Generation for the 1980's*, 33 RUTGERS L. REV. 435, 451 (1981), where he states that, "It is . . . true that the essential normative task in the field of human rights was accomplished during the first three decades after the founding of the U.N., and that the more urgent task now is implementation."

<sup>19</sup> Ferguson, *supra* note 14, at 371.

<sup>20</sup> *Id.* at 374.

problems than the United States, the European countries, or the U.S.S.R. have had to face at any time in their development.<sup>21</sup> The complex of stresses that face the Third World countries may provide the spawning ground for the synthesis of individual and social rights which must occur before an integrated theory or standard of human rights can be conceived.

Suggestions have already been made as to how to achieve this synthesis. While basic needs such as food and shelter are the primary concern of most Third World leaders, it is possible to begin to meet these needs and still provide for a certain minimum of civil and political rights. Neville Linton, a Third World scholar, writes:

Controls and acceptance of a common discipline for the sake of development do not necessarily mean that basic civil and political rights have to be suppressed and no one who looks at the writings of such thinkers as Franz Fanon or Julius Nyerere can have any doubt that in the Third World there are leaders who believe that it is possible to mobilise the people for development while keeping to democratic tenets.<sup>22</sup>

Following this thesis, Linton proposes a certain minimum of civil and political rights that he believes should be maintained while Third World countries pursue their development.<sup>23</sup> Any determination of minimum civil and political rights will require substantial debate and that debate should take place primarily in Third World countries. The determination of minimum civil and political rights should be made on the basis of Third World perceptions of their own needs.

S. Prakash Sinha has proposed a theory for human rights based on each country's needs and stages of development which he calls an "anthropocentric" theory.<sup>24</sup> The purpose of this theory is to "bypass the nation(al) state, rather than attempting to overcome it, through organizing internationally the achievement of certain specific values or the fulfillment of certain specific needs."<sup>25</sup> Sinha defines primary needs which every society needs to provide (or try to provide) for its citizens to be air, food, water, procreation, and protection from war, crime, disease, starva-

<sup>21</sup> Linton, *World Development, Change and The Challenge of Human Rights*, 1978 N.Y.L.J. 242, 246 (1978). There the author writes: "[M]ost underdeveloped countries cannot make progress by following the route of the now developed countries - the international and national, social, economic, and political environments are different. . . ." *Id.*

<sup>22</sup> Linton, *supra* note 21, at 245.

<sup>23</sup> *Id.* Linton enumerates a list of possible minimum basic rights which would be applicable to underdeveloped countries. His list may be too specific to be applied to the most underdeveloped countries. A list based on more primary minimum rights than the list Linton enumerates should be developed but it is beyond the scope of this Note to do so.

<sup>24</sup> Sinha, *The Anthropocentric Theory of International Law As A Basis For Human Rights*, 10 CASE W. RES. J. INT'L L. 443 (1978).

<sup>25</sup> *Id.* at 500.

tion, and the killers of modern life.<sup>26</sup> Sinha then defines as secondary needs, which should be met after a certain minimum of the basic needs are met, to be the needs for economic betterment, cultural enrichment, and achievement of intangible values.<sup>27</sup> Under an "anthropocentric" approach, a list of each country's needs would be made according to its cultural, ideological and economic realities,<sup>28</sup> which would be revised periodically according to its changing developmental status.<sup>29</sup> For Sinha, "the human rights imperative becomes the fulfillment of man's needs of his planetary existence with justice."<sup>30</sup> Sinha has, in summary, attempted to develop a flexible theory of human rights based on developmental stages.

While there has been little other theoretical work of this type in the legal field,<sup>31</sup> Sinha's theory coincides with certain needs and development theories in the psychology of individuals.<sup>32</sup> Of particular interest is Maslow's well-known "needs hierarchy" in which individuals must fulfill (or be able to fulfill) certain needs before they will take the next step in their own growth.<sup>33</sup> There are undoubtedly certain steps in the development of nations which conform to the steps in individual growth.<sup>34</sup> Developmental psychology may well be applicable to the development of nations. Further work will be required to see if this line of inquiry will bear fruit.

The lack of consensus regarding the human rights standard must be taken into account as we formulate an American response to human

<sup>26</sup> *Id.* at 497-98.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 501.

<sup>29</sup> *Id.* at 476.

<sup>30</sup> *Id.* at 501.

<sup>31</sup> Marks, *Emerging Human Rights: A New Generation for the 1980's*, 33 *RUTGERS L. REV.* 435 (1981), and Linton, *World Development, Change and The Challenge of Human Rights*, 1978 *N.Y.L.J.* 242 (1978), both show views which coincide with Sinha's theory. Neither author, however, gets beyond the point of observation of relevant trends to the formulation of new general theories as a basis for determining human rights standards.

<sup>32</sup> See generally A. MASLOW, *TOWARD A PSYCHOLOGY OF BEING* (1968); J. LOEVIGNER, *EGO DEVELOPMENT* (1976); and E. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968). These works and others like them (e.g. psychologists Piaget and Kohlberg) all emphasize that, until one stage of development is finished by fulfillment of the needs of that particular stage, growth is subsequently retarded, delayed, or only partial in attempts by the individual to grow to the next stage.

<sup>33</sup> A. MASLOW, *supra* note 32.

<sup>34</sup> Cf. the recent work of Wilber, *Ontogenetic Development: Two Fundamental Patterns*, 13 *J. TRANSPERSONAL PSYCHOLOGY* 33 (1981). Wilber's work would further suggest that certain aspects of each developmental stage are retained by individuals as growth continues through each stage and that the current stages of development in which individuals find themselves are those toward which the individuals' energies are primarily directed. This task orientation also seems to be evident in the growth of individual nations although in-depth work in this area has yet to be satisfactorily concluded. See also Pearce, *On Cycles and Schools*, *J. OF HOLISTIC HEALTH* 123, 125-7 (1981), for work of a similar nature.

rights questions. If we fail to be consistent and thoughtful in our responses to these questions we will lose credibility abroad and, ultimately, lose our self-confidence as a nation able to carry our moral good intentions into action.

### III. THE TRADITIONAL HUMAN RIGHTS POLICY OF THE UNITED STATES

The United States has a history of involvement in causes which it has believed on a moral level to be in the interest of securing the rights and freedoms of countries around the world.<sup>35</sup> Since the Second World War the United States has also been instrumental in helping to frame and implement policies of the United Nations with respect to human rights.<sup>36</sup> More recently, the United States involved itself in the Korean War and the Vietnam conflict in a substantial effort, rightly or wrongly, to stem the flow of Communism, an ideology which the United States has seen to be inimical to individual freedoms and rights.<sup>37</sup> Following Nixon's Presidency and the U.S. involvement in Vietnam, Jimmy Carter became

<sup>35</sup> See, e.g., BARNET, *THE GIANTS* 76-77 (1977). In comments about the articulation of American ideology, the author writes, "From Franklin Roosevelt to Jimmy Carter, the idea that America's mission was to spread freedom has taken many forms." *Id.* at 76. The American ideological interest in the freedom of other peoples pre-dates the Roosevelt era, however. For example, as early as 1917 there was considerable Congressional debate regarding the Bolshevik revolution and subsequent instability in areas surrounding the U.S.S.R.

<sup>36</sup> The U.N. Charter was the result of the work of the victorious nations of World War II, at the San Francisco Conference of 1945. The United States was a full party to the deliberations and efforts at the Conference. See C. BLACK & E. HELMREICH, *A HISTORY OF TWENTIETH CENTURY EUROPE* 587-88 (4th ed. 1972). Prior to the San Francisco Conference the United States had a hand in the preparation of the "Dumbarton Oaks Proposals" which were the foundation proposals upon which the U.N. Charter was framed. *Id.* at 586. The first U.S. representative to the U.N. Human Rights Commission was Eleanor Roosevelt who had an important hand in framing the Universal Declaration of Human Rights, the two International Covenants, and the Genocide Convention. *Id.* at 867. See also S. HERSHAN, *A WOMAN OF QUALITY* 247-48 (1970).

<sup>37</sup> See PHILLIPS, *THE TRUMAN PRESIDENCY* 306 (1966) where Phillips paraphrased NSC-68. NSC-68 is a classified national security policy paper analyzing the U.S. position *vis-a-vis* the U.S.S.R. in the 1950's. Phillips paraphrase states that:

Kremlin policy has three main objectives: (1) to preserve and to strengthen its position as the ideological and power center of the Communist world; (2) to extend and to consolidate that power by the acquisition of new satellites; and (3) to oppose and to weaken any competing system of power that threatens Communist world hegemony.

*These objectives are inimical to American ideals which are predicated on the concepts of freedom and dignity.* (Emphasis added)

See also DONOVAN, *THE COLD WARRIORS* 272-73 (1974). That author points out that the NSC policy papers were primarily based on the containment doctrine. The containment doctrine was used to justify increases in U.S. military involvement abroad in the 1950's and 1960's. Such involvement included Korea and Vietnam and was specifically based on the goal of halting the advance of Communism in those countries.



President and began to emphasize human rights as one of the principle concerns of U.S. foreign policy.<sup>38</sup> Carter pursued his human rights objectives with great zeal, primarily because he saw the need to re-establish the United States as a credible moral leader at home and abroad after the debacle of Vietnam and the Watergate scandal.<sup>39</sup>

While Carter's efforts were well received at home, they were far less well received abroad.<sup>40</sup> Other countries were understandably concerned about the degree to which the United States would attempt to thrust its human rights policy on them with the possible result that the United States would intervene in their conduct of foreign affairs and concomitant human rights policies.<sup>41</sup> This concern of other countries was little understood by the Carter Administration.<sup>42</sup> The open discussion of human

<sup>38</sup> See President Jimmy Carter, *The President's Commencement Address at the University of Notre Dame*, 53 NOTRE DAME LAW. 9 (1976). In that speech the President said the following regarding human rights:

We are confident that democracy's example will be compelling, and so we seek to bring that example closer to those from whom in the past few years we have been separated and who are not yet convinced about the advantages of our kind of life. *We are confident that democratic methods are the most effective and so we are not tempted to employ improper tactics at home or abroad.* (Emphasis added)

See also THE HOUSE SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS AND MOVEMENTS OF THE HOUSE COMMITTEE ON FOREIGN AFFAIRS, HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP, 93d Cong. 2d Sess. (Comm. Print 1974). In these hearings recommendations were made that the United States adopt a human rights policy that showed American concern for human rights in all countries of the world regardless of the ideological beliefs of particular countries. The hearings reflected then growing concern regarding the type of selectivity with which the United States had pursued its human rights policies. During his Presidency, Carter echoed many of the themes expressed in these hearings. *But cf.*, Derian (Assistant Secretary for Human Rights and Humanitarian Affairs in the U.S. Dept. of State under Carter), *Human Rights in American Foreign Policy*, 55 NOTRE DAME LAW. 264 (1979), in which Derian states:

[T]he international law of human rights must be applied through. . . a complex process, *through a wide range of efforts to induce, persuade, and cajole observance* — and to make it clear that violations will cost something in relations with other nations. The nations themselves, and to a lesser extent international organizations, control the means to enforce this human rights law and *the stronger a nation is, the better its ability to perform this function.* (Emphasis added)

The contradiction between Carter's remarks and Derian's comments show that Carter's Administration tried to win adherents to its human rights policy both by showing democracy's best side *and* use of coercive force abroad. This contradiction added to misunderstanding of Carter's human rights policy.

<sup>39</sup> See Schacter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63, 65 (1978).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *supra* note 38 and accompanying text. See also Linton, *supra* note 21, at 242, where Linton misunderstands the Carter Administration's emphasis on human rights as a "political fashion wave" rather than as a *bona fide* expression of the long-term political

rights initiated by the Carter Administration seemed to belie its stated preference for "quiet diplomacy."<sup>43</sup> It also raised questions in the world community about how much credence the United States actually accorded the international legal process. One commentator observed that:

The [Carter] Administration, and especially the Congress, seem to lack any understanding of the fact that both intergovernmental relations and human rights are increasingly subject to the international legal principles and instruments, whose provisions should at least be consulted and referred to before deciding on a course of action.<sup>44</sup>

Part of the reason for lack of understanding on the part of the United States of other countries' concerns is its belief in the superiority of its own form of government.<sup>45</sup> Other peoples and their governments have their own national historical predispositions and naturally do not automatically share American views.<sup>46</sup> Additionally, the United States has not fully appreciated the effect that its lack of consent to any of the international human rights agreements (except the U.N. Charter) has had on the credibility of U.S. involvement in human rights issues in the world community.<sup>47</sup> To the United States, lack of consent to the agreements has been fully understandable. Signature of those agreements could mean possible intervention in U.S. domestic affairs by other countries if those other countries perceived violations of human rights as occurring in the United States.<sup>48</sup> On the other hand, all signatories of those human rights agreements have risked the same intervention in their domestic affairs by other countries and do not understand why, if the government of the United States is the "best in the world," it will still not subject itself to

concern of the United States in the human rights area.

<sup>43</sup> See Vance, *Human Rights and Foreign Policy*, 7 GA. J. INT'L. L. & COMP. L. 223, 226 (1977). See also Derian, *Quiet Diplomacy Is Not Silent Diplomacy*, 9 HUM. RTS. 16, 17 (1979).

<sup>44</sup> Szasz, *The International Legal Aspects of the Human Rights Policy of the United States*, 12 CORNELL INT'L. L. J. 161, 162 (1979).

<sup>45</sup> Carter, *supra* note 38.

<sup>46</sup> See, e.g., Linton, *supra* note 21, at 243.

<sup>47</sup> The obligations of the U.N. Charter are perceived by the United States to be only generally binding. See Humphrey, *The Implementation of International Human Rights Law*, 24 N.Y.L. SCH. L. REV. 31, 35 (1978). The general binding nature of the Charter has not, however, implied specific implementation of the Charter in our human rights policies except where the United States has deemed such implementation to be in the best interests of the United States. *Id.* at 34-35.

<sup>48</sup> See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 151-52 (1972). The author states that: "[U]nder the Constitution only matters of international concern are permissible subjects for treaties." Since signing the international agreements could have domestic law implications for the United States, the United States has thus far not seen fit to sign them; signature to those agreements could potentially impinge on our national sovereignty. See also Humphrey, *supra* note 47, at 35.

outside scrutiny regarding human rights. Without such scrutiny, the U.S. has still felt comfortable in criticizing other countries' conduct and policies regarding human rights.<sup>49</sup> Therefore, what the U.S. may perceive as an understandable contradiction in the U.S. policy toward human rights, other countries may regard as hypocrisy.<sup>50</sup> Without attempting to resolve this contradiction in the American national stance regarding human rights, the U.S. will continue to confuse other countries about its actual intentions. Additionally, the United States has confined its national dialogue on human rights to internationally recognized human rights, thus avoiding the confrontation of the inherent contradiction between U.S. human rights policy abroad and the lack of U.S. adoption of that same policy at home.<sup>51</sup>

Concern for national security has further exacerbated the contradictions in the U.S. policy regarding human rights. National security is obviously within the federal government's domain.<sup>52</sup> To that end, Congress has rightfully given foreign assistance consistent with perceived national security needs.<sup>53</sup> A secondary objective in giving foreign assistance has

<sup>49</sup> Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 421 (1979). The author there states:

[T]he United States has not been a pillar of human rights, only a 'flying but-tress'—supporting them from the outside. Human rights have been a kind of 'white man's burden'; international human rights have been for export only. *Congress has invoked international human rights standards only as a basis for sanctions against other countries. President Carter has invoked human rights in criticism of others.*

In a word, we have not accepted human rights for ourselves. We supported the Universal Declaration only because it was not to have the status of law or international obligation. We have adhered to hardly any human rights agreements. (Emphasis added).

*Cf.* Schachter, *supra* note 39, at 69-73, who provides a good discussion about the use of censure by the United States and the fact that censure is close to, but does not constitute, intervention in the affairs of other countries.

<sup>50</sup> See Henkin, *supra* note 49 and accompanying text.

<sup>51</sup> Schachter, *supra* note 39, at 75.

<sup>52</sup> U.S. CONST. art. I, §§ 8 & 10; art. II, § 2.

<sup>53</sup> See 22 U.S.C. § 2301 (1976). This section contains the Congressional statement regarding the ends to which U.S. military assistance and sales are to be directed. This section, in part, specifically provides that:

In enacting this legislation, it is therefore the intention of the Congress to promote the peace of the world and the foreign policy, security and general welfare of the United States by fostering an improved climate of political independence and individual liberty, improving the ability of friendly countries and international organizations to deter or, if necessary, defeat Communist or Communist-supported aggression, facilitating arrangements for individual and collective security, assisting friendly countries to maintain internal security, and creating an environment of security and stability in the developing friendly countries essential to their more rapid social, economic, and political progress.

been the improvement of the human rights performance in recipient countries.<sup>54</sup> Because U.S. national security needs and human rights concerns often conflict, human rights concerns have been manifested in U.S. foreign assistance efforts in an inconsistent manner. Also because of this conflict, "we have too often tried to promote human rights in alliance with those very groups who were the chief violators."<sup>55</sup> Thus, the caprice of U.S. national security interests has promoted disregard of human factors in the giving of U.S. assistance.<sup>56</sup> Though this approach may meet the short-term security needs, it inhibits the achievement of stated U.S. human rights goals and damages U.S. credibility abroad. (See section IV of this Note.)

The emphasis on human rights shifts somewhat from administration to administration.<sup>57</sup> President Carter's public discussion of human rights has now been replaced by President Reagan's emphasis on various types of diplomatic conversation in this area. Regardless of the administration at the helm, however, the contradictory aspects of U.S. policies regarding human rights remain unresolved. Until such resolution is achieved, the United States will continue to pursue inconsistent human rights policies and consequently fail to reap adequate results from those policies.

#### IV. AN INTERIM PROPOSAL FOR THE HUMAN RIGHTS POLICY OF THE UNITED STATES

The United States must reassess its current policy on human rights by making it both more realistic and more credible. The human rights policy the U.S. has followed has not been realistic because it has based that policy more on its ideological vision of the world than on the actual

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<sup>54</sup> See 22 U.S.C. § 2151 (1976). This section contains the Congressional statement of limitations which have been imposed on the giving of U.S. development assistance to countries which engage in flagrant human rights violations. This section specifically provides in part (a) that:

No assistance may be provided under sub-chapter I of this chapter to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.

While the effectiveness of the means to implement this human rights limitation on the giving of development assistance have been questioned, the Congressional objectives contained in this section are clear.

<sup>55</sup> Dalley, *Human Rights: The Most Practical Concern of Effective Foreign Policy*, 8 HUM. RTS. 36, 40 (1979). See also Nayar, *Human Rights: The United Nations and U.S. Foreign Policy*, 19 HARV. INT'L. L.J. 813, at 829 (1978).

<sup>56</sup> McHendry, *Ethics, Values and the Common Good as Guidelines For a World Community*, 7 OTTAWA L. REV. 330, 357 (1975).

<sup>57</sup> See Szasz, *supra* note 44, at 161.

situations that face many of the countries with which it deals. U.S. policy has not been credible because it has been inconsistent in its formulation and implementation. However, regardless of the failings of current U.S. human rights policy, it has nonetheless shown the world that the U.S. has the will and the desire to meet its goals in this area. That will and desire can enable the U.S. to move beyond current inabilities in reaching its stated human rights goals. The foundation of the interim proposal contained in this Note is that the United States must base its human rights policy and foreign assistance on the needs and stages of development which are found in each foreign country. This proposal would also require the United States to make a clear national statement in writing of its human rights goals. Such a statement would remedy the contradiction between current lack of U.S. adherence to the international human rights agreements and the human rights goals which the U.S. purports to hold as a nation.

The first step toward improvement of the U.S. human rights policy is a reduction in its credibility gap.<sup>58</sup> Worldwide, "[t]he misuse of governmental powers and the massive violations of human rights often amounting to genocide, has brought international law and the rule of law into public contempt."<sup>59</sup> If the U.S. fails to reduce its credibility gap in the area of human rights, we risk deterioration of moral force abroad and face the possibility of immobilization of the entire human rights effort by incoherence and paralysis.<sup>60</sup>

The most potent means of reducing the U.S. credibility gap is for the U.S. to open itself to information in addition to that gained from the governmental elites of its own country and those of foreign governments.<sup>61</sup> It is inherent in the structure of elites to be closed in upon them-

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<sup>58</sup> See MacDermot, *The Credibility Gap in Human Rights*, 3 DALHOUSIE L.J. 262 (1974).

<sup>59</sup> MacBride, *The Enforcement of the International Law of Human Rights*, 1981 U. ILL. L. REV. 385, 389 (1981).

<sup>60</sup> Wolf, *supra* note 15, at 181. There Wolf comments that, "The present situation is too often analogous to a score of hypothetical national ministries issuing vast numbers of orders and regulations without any central coordination. The duplication of effort and the resulting overlapping or contradictory consequences may reduce the entire collective effort to incoherence and paralysis." *Id.*

<sup>61</sup> One of the most important problems facing the U.S. foreign policy elite is their reliance in decision-making on information from scholarly work that is more interested in particular ideological goals than realistic approaches to implementation of human rights. "Advocacy has replaced serious study to such an extent that law and wishful thinking are inextricably tangled." Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights*, 79 U. ILL. L. F. 609, 641 (1979). Advocacy has supplanted realistic analysis as the basis for much scholarship in the area of human rights. Additionally, attempts by scholars to convince others of a commonality of human rights before such commonality can be seen in the practice of nations confounds the possibility of formulating a realistic analy-

selves, thus breeding inability to execute their policies and arrogance in pursuit of their goals.<sup>62</sup> Lack of information from non-elite sources is an important defect in the policy-making ability of developed countries.<sup>63</sup> This defect is also equally evident in the policy-making ability of Third World countries who are often more eager to achieve modernity and a place in the developed world than they are concerned with the needs of indigenous populations and their rights.<sup>64</sup>

To remedy this defect, it is important that the U.S. gather information from its own governmental elite and the elites of other countries in conjunction with gathering additional information from non-governmental organizations.<sup>65</sup> This will enable the U.S. to make more realistic assessments of the current needs and stage of development existing in each country with which it deals. This is currently being done on a very limited scale. Needs assessment should be expanded and all available information should be integrated into the formulation of national U.S. policies toward other governments. This should be done before trying to implement U.S. human rights changes or voicing objections toward any country in the international community.<sup>66</sup> The United States cannot continue to

sis. See, e.g., McDougal, *et al*, *Human Rights and Jurisprudence*, 9 HOFSTRA L. REV. 341 (1981), in which the statement is made that, "Scholars have neither adequately clarified the common interest of all individuals in the greater production and wider sharing of human rights values *nor created among individuals the appropriate perceptions of such common interests.*" (Emphasis added).

Where common interests have not shown themselves to be articulable, how can scholars show such "commonality?" Can scholarly creation of a matrix of common interest be sure of its accuracy when it is not based on examination of the cultural relativity of human rights nor on the developmental stages shown in various societies? The earth has again become flat because we have yet to test our theories adequately to determine if they bear any actual relationship to the ground on which we stand. "Theory and reality grow farther apart as academics work zealously for implementation of human rights *as they understand them.*" (Emphasis added). Murphy, *Objections to Western Conceptions of Human Rights*, 9 HOFSTRA L. REV. 433, 435 (1980). Scholars in this area of inquiry must regain integrity in their analysis by setting aside their own ideological presuppositions as they begin their analyses. This is particularly important in an area in which scholars so much influence the policy-making elite of the United States.

<sup>62</sup> Jenkins, *The Concept of Rights and the Competence of Courts: Health Care as a Right*, 18 AM. J. JURIS. 1, 11 (1973).

<sup>63</sup> Linton, *supra* note 21, at 243.

<sup>64</sup> *Id.* at 244.

<sup>65</sup> *E.g.*, information from organizations such as Amnesty International which have a history of more unbiased and even-handed reporting on certain types of conditions in individual countries should be more consistently integrated into the formation of our human rights policy. See Steiner & Vagts, *supra* note 2, at 391-93. For an example of the practical problems which can be engendered by lack of information from non-governmental sources, see Balmer, *The Use of Conditions In Foreign Relations Legislation*, 7 DEN. J. INT'L. L. & POL. 197, 222 (1978).

<sup>66</sup> This type of integrated analysis would also assist the U.S. government and U.S. com-

act as if the right hand did not know what the left hand is doing in the formulation of national policy and still maintain its credibility abroad.

The importance of more open and unbiased information acquisition is that it will enable the United States to assess the developmental needs of each country. Each country is on a path of development which is particular to itself because of the peculiarities of its own history. Each country has different national attributes to contribute to the world community. The United States must stop its pursuit of and support for developmental homogeneity. If it can do so, it will contribute to the achievement of stronger self-identities within each nation. Also, expectations at each country would develop that would be compatible with the abilities of each to govern its own people and achieve peaceful co-existence with its neighbors. Peaceful co-existence is made more difficult when a country is obstructed by outside forces from pursuit of its own natural growth. The natural growth of each country may not entail development in the sense that Western industrialized nations now conceive of it.<sup>67</sup> Growth in most nations will probably entail certain aspects of Western developmental structure, but determination of the amount of emphasis on Western developmental structure must be determined by each country and not by external forces.

The second step toward improvement of the U.S. human rights policy should be to allow formation of the type of human rights within each country that will be recognizable as human rights to citizens of that country. Attempts to have Western-style human rights standards adopted in every country should not be allowed.

Different social systems, with their own economic, cultural, and ideological particularity, have different ways of going about achieving the satisfaction of the needs of those who comprise their membership. (T)he task of the human rights movements is to see that within the context of differing systems. . .the human rights imperative and justice in fulfillment of man's needs is satisfied.<sup>68</sup>

If the U.S. is truly interested in helping other countries achieve growth and freedom and are motivated to cultivate allies that will stand by her because of real self-interest on their part to align themselves with U.S.

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panies in assessing better the likelihood of expropriation of U.S. businesses abroad. The Hickenlooper Amendment, 22 U.S.C. § 2370(e)(1), presently is designed to enable U.S. government to withhold foreign assistance from any country that expropriates U.S. businesses abroad without giving compensation for such expropriations(s). Such sanction, however, is solely retrospective in nature. Better analysis of on-going situations within countries where U.S. companies are located would enable the U.S. to take interim preventative steps to protect U.S. companies abroad where expropriation looks likely *before* it occurs.

<sup>67</sup> See Linton, *supra* note 21, at 243-245.

<sup>68</sup> Sinha, *supra* note 24, at 501.

goals, the U.S. will not indiscriminately use coercion to achieve "freedom" or "development" in other countries. "Every State has an inalienable right to choose its political, economic, social and cultural systems without any interference in any form by another State."<sup>69</sup>

The United States should, instead, request every country with which she deals to make an official comprehensive statement of its human rights policy and methods used to implement that policy. By such statements, objective standards can be established which can be used to compare the stated human rights goals of each country with its actual performance.<sup>70</sup> Use of such objective standards would enable the United States to be more realistic about the human rights policies it chooses to support abroad. Additionally, use of such standards would encourage all governments to conform to their stated human rights objectives as much as possible to avoid the risk of loss of their credibility at home and abroad. If each country produced a statement of its own human rights objectives that was in accord with its actual historical development, a universal and achievable standard of human rights could be synthesized in the future.<sup>71</sup>

The third and last step towards improvement of the U.S. human rights policy is for the U.S. to support only those foreign governments that show they are making realistic strides toward the achievement of their human rights goals. As a corollary, in giving U.S. economic and military assistance to foreign governments, Congress should give such assistance only in ways that are potentially useful to the recipient country in achieving their stated human rights goals and *which are in concert with the human rights goals of the United States.*

National determination of what the United States perceives to be realistic goals for human rights must, therefore, be a priority for the United States.<sup>72</sup> Such determination is a prerequisite to the intelligent giving of

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<sup>69</sup> Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance With The Charter of the United Nations, *adopted* Oct. 24, 1970, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 30) at 1, U.N. Doc. A/8082 (1965).

<sup>70</sup> An objective standard would entail observation of whether a given country's stated goals are being reasonably fulfilled by its actual practices. Until relative conformity of goals with actual practice is achieved there cannot be said to exist enforceable human rights. See Watson, *supra* note 61, at 611 where he says, "If the practice of states does not show that there is an international regime of human rights, then one cannot conclude on the basis of custom that such rules exist." Sufficient custom has not yet been established in the area of human rights so as to enable the development of an international standard of human rights performance. (See section II of this note.)

<sup>71</sup> See MacDermot, *supra* note 58. The author comments, "It would undoubtedly be a useful contribution to the understanding and acceptance of human rights if lawyers from other legal systems could draw up authoritative statements of human rights based on their own legal traditions." *Id.* at 263.

<sup>72</sup> See Ferguson, *supra* note 14, at 376, where the author argues that, until we have internationally enforceable rights, national implementation of human rights standards is the



assistance to other countries. Just as we should require statements of human rights goals from other countries, the U.S. also should make an official comprehensive statement to the international community of its human rights goals and internal methods of implementation of those goals. Such a statement should be of greater specificity than a simple statement of general desire to comply with the U.N. Charter or a simplistic reliance on the U.S. Constitution or Bill of Rights to provide the U.S. statement of human rights goals to the international community. An official statement by the United States to this end would allow assessment by other countries of our goals and achievements in the area of human rights. It would also show the areas in which we are currently attempting to make progress. A statement of this kind would still some of the criticism directed at the United States for its failure to sign the Declaration, the Covenants and the various Conventions, as long as it continues to be unable to sign them because of constitutional limitations. Also, such a statement would subject the United States to a standard similar to that which all other countries are subjected. Under such an approach, the United States would be held only to such a human rights standard as is appropriate to its current needs and stage of development.

With or without proclamation of a national statement of U.S. human rights objectives, action by the Congress and the President regarding both military and economic assistance to other countries "must take into account the ethics and values of the people of the developing state."<sup>73</sup> The U.S. must integrate its own values into the granting of assistance to other countries so that it is not given solely on the basis of U.S. security interests. The U.S. must not give military aid to underdeveloped countries which would exceed their ability to utilize such assistance primarily for achievement of their own internal security. All assistance, including military assistance, must be given according to the developmental state and needs of the recipient country.

"Aid is the one area where the Constitution gives Congress almost complete control over policy issues normally reserved to the President. There it can attach the conditions it wishes and encourage or discourage practices it chooses."<sup>74</sup> Theoretically at least, it is also through influence on the Congress that the American people can attempt to directly affect the human rights policies of the United States. In its role as the voice of the American people, Congress must assert itself more forcefully in the formation and implementation of the human rights policies of the United States. Without Congressional influence on the Presidential formation of

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appropriate interim step.

<sup>73</sup> McHendry, *supra* note 56, at 356.

<sup>74</sup> Balmer, *The Use of Conditions In Foreign Relations Legislation*, 7 DEN. J. INT'L L. & POL. 197, 238 (1978).

the U.S. human rights policy, the United States will not be able to articulate a statement of its human rights goals that is in accord with its national values.

In the pursuit of a more realistic human rights policy worldwide, the United States must reduce its credibility gap in this area, allow other countries to formulate their own human rights policies according to their developmental needs, and give assistance to other countries only when their performances show that they are taking adequate steps toward implementation of their human rights objectives. Realistic achievement in the area of human rights must precede the formulation of a comprehensive theory of human rights.<sup>75</sup> By making a concerted effort in the directions outlined above, the United States can more realistically reassert itself as a proponent of human rights with greater moral credibility in the world community. These interim steps would enable a more practical policy toward human rights to be formulated and implemented by the United States at this time. These steps also would enable worldwide development of human rights objectives and standards with concomitant positive impetus toward the eventual formulation of a truly universal standard of implementable human rights.<sup>76</sup>

## V. CONCLUSION

This Note has proposed several ways to improve the human rights policy of the United States. The proposal itself is designed to bring our human rights rhetoric and performance closer together. Though not comprehensive, this Note provides a starting point for the use of a developmental analytical framework for the formation of modern human rights law.

Cooperation between countries with different needs and in different developmental stages will yield greater benefits for all than do our current over-generalized human rights goals and implementation strategies.

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<sup>75</sup> See Watson, *supra* note 61, at 620-21, where the author states: "At no time in the past has a legislative system preceded or created political stability. *The consistent pattern has been for political factors to create a status quo, a power structure within which a legal system subsequently evolves.* To this extent, *reality must always precede theory.*" (Emphasis added).

<sup>76</sup> A universal standard of implementable human rights must precede any construction of "supranational" or "world" law. International law has been changed by the press of human rights concerns in the direction of changing the international legal system toward a world legal system; but such change will not be possible to achieve until articulation of the rights which are to be protected by a world system is accomplished. The concept of world law has only been seriously discussed in recent years. See Humphrey, *Implementation of International Human Rights Law*, 24 N.Y.L. Sch. L. Rev. 31, 33 (1978). But see Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights*, 79 U. ILL. L.F. 609 (1979).

With more open interaction between Congress and the Executive, the United States can resolve its internal contradictions in the area of human rights and diminish its lack of credibility abroad. The United States should issue a national statement of U.S. human rights goals and request that other countries do the same. Assessment of the efforts toward implementation of human rights policies of each country can then be made by comparing the statements of human rights goals made by a country and its actual performance.

"[F]or the first time in history we can be prophetic without being missionary, we can be practical without succumbing to 'realpolitik', [and] we can be effective without imposing our will by means of our might."<sup>77</sup> Coercion of other governments and peoples to conform to American standards of human rights without including cultural relativity in the equation will result in further erosion of U.S. credibility abroad. The United States finally may have reached the level of maturity in its own development where it can allow other countries to pursue their own paths of development, help those countries whose goals and implementation policies conform to our own values in human rights, and hold less malice toward (and give no aid to) those countries whose behavior towards their own citizens we do not wholeheartedly support. This stance on human rights would be realistic for the United States. It would also bring us back to the forefront as a promoter of the rights and freedoms of all peoples. Our hope for the achievement of universal human rights in the future rests on the realistic pursuit of human rights policies today.

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<sup>77</sup> Dalley, *supra* note 55, at 41.