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Frank C. Newman

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# UNITED NATIONS HUMAN RIGHTS COVENANTS AND THE UNITED STATES GOVERNMENT: DILUTED PROMISES, FORESEEABLE FUTURES

*Frank C. Newman\**

Regarding Civil and Political Rights, '[t]he Covenant . . . codifies the essential freedoms people must enjoy in a democratic society, such as the right to vote, freedom of peaceful assembly, equal protection of the law, the rights to liberty and security, and freedom of opinion and expression,' wrote President Bush on August 8, 1991 to Clairborne Pell of the Senate Foreign Relations Committee.<sup>1</sup>

These topics are here considered: (1) What About the International Covenant on Economic, Social and Cultural Rights?;<sup>2</sup> (2) The International Covenant on Civil and Political Rights<sup>3</sup> and the Assistant Secretary of State for Human Rights and Humanitarian Affairs; (3) The Civil and Political Covenant and Administrative Law; (4) The Covenant's "Human Rights Committee," Nuremberg Law, and Weapons of Mass Destruction; and (5) The Covenant's Impact on U.N. Peacekeeping.

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\* Jackson H. Ralston Professor of International Law (emeritus), University of California, Berkeley; and California Supreme Court Justice (retired).

1. Letter from President George Bush to Hon. Clairborne Pell, Senate Foreign Relations Committee (August 8, 1991), SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 23, 102d Cong., 2d Sess. 25 (1992), *reprinted in* 31 I.L.M. 645, 660 (1992). The *American Bar Association Journal* reported that "[t]he Senate gave its advice and consent to ratification of the International Covenant on Civil and Political Rights, which requires ratifying countries to provide and protect civil and political rights patterned after the United States Bill of Rights." *Good Deeds*, A.B.A. J., Dec. 1992, at 130.

That last clause is myopic, even more than the Bush excerpt quoted above. United States lawyers soon will learn that the Covenant's scope greatly extends the U.S. Bill of Rights.

2. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), 6 I.L.M. 360 (1967) [hereinafter ICESCR].

3. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992) [hereinafter ICCPR].

## I. WHAT ABOUT THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS?

President Jimmy Carter in a 1978 letter to the Senate noted that "[t]he two human rights Covenants are based upon the Universal Declaration of Human Rights, in whose conception, formulation and adoption the United States played a central role."<sup>4</sup> Like U.N. personnel, and also like the Honorable Warren Christopher (whose State Department letter recommended that both Covenants be ratified), Carter accorded *No. 1* status to the Economic, Social, and Cultural Covenant.<sup>5</sup> The Civil and Political Covenant was expected to be *No. 2*.<sup>6</sup>

That *No. 1* primacy for the Economic, Social and Cultural Covenant still reflects U.N. views, which also are those of most other governments. But during the Reagan and Bush years our government continued to espouse, with vigor, a view that the economic, social, and cultural rights articulated do not merit U.S. endorsement.<sup>7</sup> No one knows yet what the impact of these pertinent words in the now-ratified Civil and Political Covenant may be:

[I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want *can only be achieved* if conditions are created whereby everyone may enjoy his civil and political rights, *as well as* his economic, social and cultural rights . . . .<sup>8</sup>

It seems unlikely, I am sad to say, that U.S. ratification of the Economic, Social and Cultural Covenant will occur soon.<sup>9</sup>

4. Message from the President Transmitting Four Treaties Pertaining to Human Rights, 14 WEEKLY COMP. PRES. DOC. 395 (Feb. 23, 1978) [hereinafter Message from the President].

5. *Id.*

6. *Id.*

7. Nearly five years prior to the U.N. adoption of the Universal Declaration of Human Rights, Franklin D. Roosevelt in his State of the Union Message on Jan. 11, 1944, had this to say to Congress:

As our nation has grown in size and stature . . . political rights proved inadequate to assure us equality in the pursuit of happiness. . . . [T]rue individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.' People who are hungry and out of a job are the stuff of which dictatorships are made. . . . In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a *second bill of rights* . . . .

8. ICCPR, *supra* note 3, pmbl, 999 U.N.T.S. at 173 (emphasis added).

9. Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an 'Entirely New Strategy'*, 44 HAST. L.J. 79 (1992). "Covenant" is a word rarely used. I doubt, however, that any confusion resulted when "Bill Clinton called for 'a new covenant' to heal the nation as he accepted the Democratic nomination . . ." See S.F. CHRON., July 19, 1992, at 1.

## II. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE ASSISTANT SECRETARY OF STATE FOR HUMAN RIGHTS AND HUMANITARIAN AFFAIRS

The president and his secretary of state are the CEOs of U.S. human rights policy. Congress nonetheless — with no ifs, ands, or buts — has prescribed that the Assistant Secretary of State for Human Rights and Humanitarian Affairs has *overall policy responsibility for the creation of United States Government human rights policy*.<sup>10</sup>

That awesome responsibility is distinct and separate from the Assistant Secretary's additional duties to "maintain continuous observation and review of *all matters pertaining to human rights . . . in the conduct of foreign policy*" — including:

- (1) "gathering detailed information" regarding other nations' governments;
- (2) preparing the annual Country Reports on Human Rights Practices;
- (3) making recommendations and advising as to certain A.I.D. projects; and
- (4) "performing other responsibilities which serve to promote increased observance of *internationally recognized human rights* by all countries."<sup>11</sup>

That fourth item, *inter alia*, commands "continuous observation and review of all matters pertaining to" the performance of the United States as a leading member of the United Nations and of other international organizations.<sup>12</sup> Yet it is not clear that the Assistant Secretary from now on (awkwardly, with probable embarrassment) must distinguish nearly all other countries' duties under the Civil and Political Covenant from the notably less demanding duties that now govern U.S. officials, which as we must concede *are* less demanding because of the numerous U.S. reservations, declarations, understandings, and a proviso.

Further, in various international forums where nations are criticized for consistent patterns of gross and reliably attested violations of internationally recognized human rights, must U.S. representa-

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10. 22 U.S.C. § 2384(f)(2)(C) (1988) (emphasis added); see also *id.* § 2384(f)(1) ("The Secretary of State shall carry out his responsibility under section 2304 of this title [i.e., human rights and security assistance] through the Assistant Secretary.").

11. *Id.* § 2384(f)(2) (emphasis added).

12. *Id.*

tives (in presumed good conscience) now say: "Your government is bound by certain clauses of the Covenant even though we in the United States chose not to be bound. Therefore an appropriate investigation of your allegedly illegal practices is of course warranted, even though the United States itself would enjoy immunity from such an investigation?"

### III. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND ADMINISTRATIVE LAW<sup>13</sup>

According to our Constitution's Article II, section 3, one of President Clinton's essential chores is to "take Care that the Laws be faithfully executed . . . ."<sup>14</sup> The mandate includes not only statutes but also treaties; and the Civil and Political Covenant is now, at last, a U.S. treaty.

The Constitution also commands in Article VI, with respect to treaties like the Covenant, that "[j]udges in every State shall be bound."<sup>15</sup> A U.S. declaration, however, now proclaims that "[t]he

13. Administrative law is perhaps the overall subject most consistently ignored by human rights scholars (and also by American Society of International Law leaders). I predict, for instance, that careful monitoring would disclose State Department violations of several commands of the Federal Administrative Procedure Act — e.g., these words of 5 U.S.C. § 552(a)(1) (1988):

Each agency shall separately state and currently publish in the Federal Register for the guidance of the public —

(A) descriptions of its central and field organization and the established places at which, the employees . . . from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; . . . .

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

5 U.S.C. § 552(a)(1).

Note, too, that Article 14(1) of the Covenant prescribes for certain procedures that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal." ICCPR, *supra* note 3, art. 14(1), 999 U.N.T.S. at 176, *cf.* Frank C. Newman, *Natural Justice, Due Process, and the New International Covenant on Civil and Political Rights: Prospectus*, 1967 PUBLIC L. 274, 304 ("Mrs. Roosevelt and Suit at Law"); *see also* 5 U.S.C. § 555(b) ("[S]o far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function."); *cf.* FRANK C. NEWMAN & STANLEY S. SURREY ON THE LEGISLATIVE PROCESS 213 n.6 (1955).

14. U.S. CONST. art. II, § 3.

15. U.S. CONST. art. VI.

provisions of Articles 1 through 27 of the Covenant are not self-executing."<sup>16</sup> That phrase is thought by many observers to mean that judges — federal and state — must patiently await the enactment of congressional statutes that make the Covenant effective in courts.<sup>17</sup>

So far as I can discover, no authoritative discussions are available that focus on this question: *Must U.S. executive and administrative officials whose work is affected by treaties follow the "non-self-executing" rules designed for judges?*

Suppose, for instance, that an alien lawfully within U.S. territory is restricted regarding the "freedom to choose his residence" prescribed by the Covenant's Article 12.1.<sup>18</sup> Suppose also that the restriction affecting him (1) is not "provided by law" or not "necessary to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others,"<sup>19</sup> or (2) is not consistent with the right accorded by Article 10(1) to be "treated with humanity and respect for the inherent dignity of the human person."<sup>20</sup>

Should a Department of Justice lawyer or other cognizant official nonetheless rule that, since Congress has not yet acted via statute, Articles 12 and 10(1) of the Covenant are not applicable? I find no authority for such a result. The Bush Administration in its explanation of proposed reservations, understandings, and declarations had this to say:

For reasons of prudence, we recommend including a declaration that the

16. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 19; reprinted in 31 I.L.M. at 657.

17. Since the Second Circuit opinion in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), many of us have been enlightened by Stefan Riesenfeld's *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win At Any Price?*, 74 AM. J. INT'L L. 892 (1980). Even more enlightening, I think, is his recent review of certain sections of the *Restatement (Third) of the Foreign Relations Law of the United States*. See Stefan Riesenfeld, *International Agreements*, 14 YALE J. INT'L L. 455 (1989). After reviewing three centuries of history, he states:

The President and Congress may have to decide initially whether to call for or enact implementing legislation. But their ultimate interpretation of the international agreement rests with the courts. . . . [T]here are instances where the Department of State's views were rejected both by the courts and Congress. . . . [D]espite the views expressed in the *Restatement*, it is questionable whether the Senate can bind the courts by appending an understanding to its resolution of advice and consent.

*Id.* at 466. See, too, his and Frederick Abbott's *Forward: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293, 295 (1991) ("Declarations regarding self-execution").

18. See ICCPR, *supra* note 3, art. 12(1), 999 U.N.T.S. at 176.

19. See *id.* art. 12(3), 999 U.N.T.S. at 176.

20. *Id.* art. 10(1), 999 U.N.T.S. at 176.

substantive provisions of the Covenant are not self-executing. The intent is to clarify that the Covenant will not create a private cause of action *in U.S. courts*. As was the case with the Torture Convention, existing U.S. law generally complies with the Covenant; hence, *implementing legislation is not contemplated*.<sup>21</sup>

Also, responding to Senator Moynihan's questions regarding U.S. labor laws that affect Article 22 ("freedom of association, the right to organize, and collective bargaining"), the Bush Administration stated:

As a non-self-executing treaty, Article 22 of the Covenant would not, if ratified, become directly enforceable as United States law *in U.S. courts*. As the preceding discussion has made clear, the First Amendment to the U.S. Constitution already brings the United States into compliance with the Covenant. *No additional implementing legislation is required*.<sup>22</sup>

That last sentence is revealing. Unless some other U.S. declaration (or reservation, understanding, or proviso) applies, the implication seems to be that, of course, the Covenant's commands are to be promoted and respected by U.S. officials acting otherwise than "in U.S. courts." Specifically and illustratively, if (via either rule-making or adjudication) federal or state officials jeopardize the right prescribed in Article 22 to "freedom of association with others," an individual or group may appeal administratively, via whatever channels are available, and also claim "Violation!" while seeking, say, recourse via members of Congress or a state legislature. Those channels differ often and significantly from recourse to courts.

Consider too this excerpt from the Covenant's Article 2(3):

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent *judicial, administrative or legislative authorities, or by any other competent authority* provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies

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21. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 19, *reprinted in* 31 I.L.M. at 657 (emphasis added). Clearly the final sentence of that somewhat baffling excerpt refers to the Covenant as well as the Torture Convention. *Cf.* 137 CONG. REC. S5728, 5731 (daily ed. May 14, 1991) (regarding U.S. understandings *re* the Abolition of Forced Labor treaty and stating that certain ILO "conclusions and practice . . . have no force and effect on *courts* in the United States" — nor does the treaty "limit the contempt powers of *courts*" (emphasis added)).

22. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 27, *reprinted in* 31 I.L.M. at 661 (emphasis added).

when granted.<sup>23</sup>

Except for “judicial” (and other words arguably affected by specific U.S. reservations or declarations, understandings, or proviso), should not Article 2(3)’s powerful assurances about “administrative or legislative authorities or . . . any other competent authority” benefit every U.S. person?

*A. The Office of the Assistant Secretary of State for Human Rights and Humanitarian Affairs*

Administrative law deals with rule-making as well as adjudicating, and many State Department rules concern human rights. Detailed instructions govern embassies, for example, and other units that help prepare February Country Reports on Human Rights Practices. And the assistant secretary is “responsible” not only for that annual document but also, pursuant to 22 U.S.C. § 2384(f)(2)(C), “for the creation [sometimes via rule-making] of United States Government human rights policy.”<sup>24</sup>

Our focus here is partly on the content of that created policy but also on the indisputable power of the State Department to promulgate interpretive rules.<sup>25</sup> The question is whether, to help ensure our government’s compliance with its innumerable duties under the Covenant, the assistant secretary should now draft and then, if appropriate, seek approval of interpretations that on major issues are designed to instruct countless officials in nearly all federal departments (e.g., Pentagon, Commerce, Energy, Interior, Justice, Labor) and also independent agencies such as the Federal Communications Commission. Most personnel affected, I predict, will never have heard about possible applicability of the Covenant to their work; and — to whet more than those officials’ mere curiosity — formal rules could be instructive.

Consider illustratively the Covenant’s Article 17, which reads: “1. No one shall be subjected to arbitrary or unlawful interference with

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23. ICCPR, *supra* note 3, art. 2(3), 999 U.N.T.S. at 174.

24. 22 U.S.C. § 2384(f)(2)(c) (1988).

25. *See, e.g.*, Country Reports on Human Rights Practices for 1990, at 1624 (“United States diplomatic missions are given guidance in September for submission of draft reports”); *cf.* last sentence of first paragraph on p. 1627 (“additional guidelines” for compliance with Generalized System of Preferences Renewal Act of 1984).

*See generally* CFR INDEX AND FINDING AIDS 711-14 (Office of the Federal Register National Archives and Records Administration, Revised as of Jan. 1, 1992) (providing the listings under “State Department”).



his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation. 2. Everyone has the right to the protection of the law against such interference or attacks."<sup>26</sup>

"[P]rotection of the law," in that last sentence, sometimes does include reasonable assurance of a judicial remedy.<sup>27</sup> More importantly, the phrase appears to call for an overall review of statutes and rules guiding most federal departments and agencies that now, expressly or impliedly, do command or permit interference with privacy, family, home, or correspondence. The Covenant mandates that "arbitrary . . . interference" must be proscribed; many existing statutes and rules are inadequate to help promote that effect, and Article 17(2) clearly is aimed in part at needed enactment or promulgation of new statutes and rules.

By way of illustration: Administrators of the immense body of federal law that involves procurement say, or varying federal-licensing functions, indeed will need State Department guidance for a Covenant-required examination of existing practices regarding "privacy, family, home or correspondence."

### B. Attorneys' Duties

Not many practicing lawyers have, to date, learned much about detailed requirements of the Covenant. Illustratively, contemplate again Article 17(1), which states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."<sup>28</sup>

In U.S. law schools the first-year torts course traditionally introduces laws that govern "unlawful attacks on . . . honour and reputation." But what about "arbitrary . . . interference with . . . family, home or correspondence?" Is that now sufficiently protected by existing law — federal, state, local? I believe not. Similarly, the "privacy" now required to be protected by executive, administrative, and legislative officials covers a much broader range of interests than do traditional tort laws and *Roe v. Wade* progeny.<sup>29</sup>

26. ICCPR, *supra* note 3, art. 17, 999 U.N.T.S. at 177-78.

27. Does "non-self-executing" conceivably mean that judges reviewing administrative action may reject arguments involving interpretation of the Covenant? I hope not!

28. ICCPR, *supra* note 3, art. 17(1), 999 U.N.T.S. at 177.

29. See *City of Santa Barbara v. Adamson*, 27 Cal. 3d 123, 129-30 (1980) (citing Article 12 of the Universal Declaration of Human Rights).

Other words of comparable reach that lawyers will have to address appear in Article 18 (“freedom of thought, conscience and religion”), Article 19(2) (“freedom to . . . receive . . . information”), and Article 24 (“[e]very child shall have . . . the right to such measures of protection as are required by his status as a minor”). Malpractice charges against lawyers who find it hard to believe that laws possibly inapplicable to judges nonetheless *are* applicable to administrators and legislators might well become more than mere brooding omnipresences.

#### IV. THE COVENANT’S HUMAN RIGHTS COMMITTEE, NUREMBERG LAW, AND WEAPONS OF MASS DESTRUCTION

Article 6.1 of the Covenant prescribes that “No one shall be arbitrarily deprived of his life,”<sup>30</sup> and derogations from Article 6 are (by Article 4.1) forbidden — even “[i]n time of public emergency.”<sup>31</sup> Those words are not mentioned in the U.S. ratification documents, and the only implied reference is in the U.S. reservation affecting the death penalty.<sup>32</sup>

What might President Clinton’s representatives say, I wonder, if (at a session set for critique of the U.S. initial report to the United Nations under Article 40), a member of the Covenant’s Human Rights Committee were to ask: “Concerning Article 6.1, what steps have been taken by the White House or other bodies with respect to *deprivation of life and your stockpiles of nuclear weapons?*”

The immediate reaction of U.S. spokespeople would, I believe, be the silent thought, “Why is *that* any of your damn business?” Yet nearly a decade ago, in General Comment No. 14, which supplemented an earlier comment on Article 6, the Committee’s final two paragraphs prescribed as follows:

6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as *crimes against humanity*.
7. The Committee accordingly, in the interest of mankind, calls upon all States, whether Parties to the Covenant or not, to take urgent steps, unilaterally and by agreement, to rid the world of this menace.

Countless people whose rights the Covenant was designed to protect, throughout the world, know a little bit about crimes of aggres-

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30. ICCPR, *supra* note 3, art. 6(1), 999 U.N.T.S. at 174.

31. *Id.* art. 4(1), 999 U.N.T.S. at 174.

32. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 7, *reprinted in* 31 I.L.M. at 651.

sion, war crimes, and crimes against humanity. Indisputably those crimes (and threats thereof) can grossly violate internationally recognized human rights. *Exactly which rights?* To answer that question (having roots in Nuremberg), most pundits turn initially to laws administered by the International Committee of the Red Cross, which shares with governments a jurisdiction over war crimes. Similarly, U.N. Security Council rulings (e.g., as to Iraq and Serbia) are generally treated as authoritative as to crimes of aggression. No such references, however, seem to guide various experts who seek authentic pronouncements on Nuremberg's proscription No. 3, crimes against humanity.<sup>33</sup>

My view is that for the clearly most authoritative guidance we should turn to Allied Control Council Law No. 10 (crafted in 1946 to augment the now more famous Charter of the International Military Tribunal), which for decades has been international customary law.<sup>34</sup> These are the definitions:

33. Cf. N.Y. TIMES, Dec. 17, 1992, at A1 ("We know that crimes against humanity have occurred, and we know when and where they occurred") (quoting Secretary of State Lawrence S. Eagleburger speaking to delegates at a conference on the fighting in the Balkans). He added, "We know, moreover, which forces committed those crimes, and under whose command they operated. And we know, finally, who the political leaders are and to whom those military commanders were — *and still are* — responsible." *Id.* (emphasis added); cf. *id.* at A10 ("The United States has already submitted four war-crimes reports to the United Nations that detail specific episodes of Serbian brutality, and Mr. Eagleburger described nine incidents of Serbian 'crimes against humanity,' including murders of men, women and children, mass executions, torture and the forced expulsion of civilians from their villages.").

34. "The Civil and Political Covenant . . . refers to criminal offenses that exist 'under national or international law' and deals with 'any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations' [Article 15]. The laws of the [Nuremberg] International Military Tribunal, as refined by Allied Control Council Law No. 10, do indeed exemplify those 'general principles of law.'" Frank C. Newman, *The U.S. Bill of Rights, International Bill of Human Rights, and Other 'Bills,'* 40 EMORY L.J. 731, 741 (1991).

For intriguing mini-memoirs, see Telford Taylor's *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 275 (1992):

Fahy's office in Berlin was working on . . . Control Council Law No. 10, signed on December 20, 1946, by the members of the Council: General McNarney, Field Marshal Bernard Montgomery, General Louis Koeltz for the absent General Pierre Koenig, and Marshal Georgi Zhukov.

The preamble to Law No. 10 declared that its purpose was 'to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter [of the International Military Tribunal] issued pursuant thereto.' Law No. 10 accomplished little by way of zonal uniformity on war crimes. The British proceeded under the Royal Warrant guidelines, and made no provision for crimes against peace. The French were chiefly interested in German crimes in France against Frenchmen and generally relied on French law rather than international law, even in war crimes cases. As for the Russians, only occasional scraps of

(a) *Crimes against Peace*: Planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) *War Crimes*: Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

(c) *Crimes against Humanity*: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds . . . .

Are the wrongdoings those definitions proscribe the concern of "criminal" law only? Of course not. Because of the definitions, uncountable thousands of Nazis and other WWII violators suffered civil penalties, rather than — and/or in addition to — "criminal" punishment. Moreover, uncounted millions of victims obtained restitution, rehabilitation, reparations, etc., which were based on the definitions but were prescribed pursuant to traditions of civil, rather than criminal, law.<sup>35</sup> As years pass, respect for the Civil and Political Covenant will of course require parallel responses, even as to crimes committed during armed conflict.

#### V. THE COVENANT'S IMPACT ON U.N. PEACEKEEPING

"Blue helmets"; U.N. missions; U.S.-led forces; "sovereignty"; "Allied Jets Bomb [Iraqi] Missile Sites"; etc.? In recent months, mainline-media have not often focused, for instance, on threats of

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war crimes information emerged from behind the Iron Curtain. . . . In the American Zone, however, Control Council Law No. 10, together with the amended Executive Order, laid the legal and administrative basis for the war crimes cases at Nuremberg which were to follow the pending trial before the International Military Tribunal.

*Id.*

35. Frank C. Newman, *Redress for Gulf War Violations of Human Rights*, 20 DENV. J. INT'L L. & POL'Y 213, 215 (1992) ("A powerful fact is that the . . . Nuremberg trials enlightened us regarding not only criminal law, but also civil law."); cf. David D. Caron, *Introductory Note to U.N. Compensation Commission Report [re Iraq] With Decisions of the Governing Council* (1992) 31 I.L.M. 1009-17 (1992); see also SEMINAR ON THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (Theo van Boven et al. eds., 1992). Also, note the 1986 decision of the International Court of Justice in *Nicaragua v. USA*, 1986 I.C.J. 4 (June 27), voting 12 to 3 that "the United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above . . . ." *Id.*

armed conflict in Cyprus, Namibia, Salvador, Guatemala, or Northern Ireland. But U.N. personnel and "Whose troops?" certainly have been newsworthy as to peacekeeping in Yugoslavia, Somalia, Angola, Cambodia, and other frightening arenas.

The U.N. Charter in Article 1 proclaims a primary purpose

[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace . . . and to bring about by peaceful means, and in conformity with *the principles of justice and international law*, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.<sup>36</sup>

Now, after nearly a half-century of varied U.N. activities, the substantive rules of the Civil and Political Covenant indeed do proclaim "principles of . . . international law." And U.N. peacekeeping may be governed too by the "principles of justice" that the U.N. Charter's Article 1 acknowledges. Consider, for instance, these comments of the International Tribunal in its 1946 "Judgment of the Nürnberg Trial":

In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law, and not with administrative matters of procedure. The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from *the general principles of justice* applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.<sup>37</sup>

The Tribunal added: "Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of *the elementary dictates of humanity*. Civilian populations in occupied territories suffered the same fate."<sup>38</sup>

Consider, too, Article 2(3) of the U.N. Charter: "All members shall settle their international disputes in such a manner that international peace and security, *and justice*, are not endangered."<sup>39</sup>

So, when they act pursuant to Security Council decisions based

36. U.N. CHARTER art. 1 (emphasis added).

37. Judgment of the Nürnberg Trial, 6 F.R.D. 69, 109 (1946) (emphasis added).

38. *Id.* at 113 (emphasis added).

39. U.N. CHARTER art. 2.3 (emphasis added).

on Chapter VII of the Charter, are not Blue Helmets and other U.N. personnel clearly governed by clauses of the International Bill of Human Rights, including of course the Civil and Political Covenant?

*A. Do Clauses of the Covenant Apply to U.S. Military and Civilian Officials in Yugoslavia and Somalia?*

The answer to that question is yes. The command of the Covenant's nonderogable Article 6 is that "[n]o one shall be arbitrarily deprived of his life"; that is, no one. It should be irrelevant whether individuals are within U.S. territory and subject to U.S. jurisdiction.<sup>40</sup> Article 7, also nonderogable, is limited by the first U.S. reservation: "The United States considers itself bound . . . to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution . . . ."<sup>41</sup> Nonderogable Article 16, however, significantly requires that "[e]veryone shall have the right to recognition *everywhere* as a person before the law."<sup>42</sup> And, under nonderogable Article 18, all permissible limitations on "[f]reedom to manifest one's religion or beliefs [must be] prescribed by law" even when they are claimed to be "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."<sup>43</sup>

The Articles 9 and 10 rights to liberty and security of person (e.g., to be treated with humanity and with respect for the inherent dignity of the human person) are derogable, under Article 4, (1)

40. ICCPR, *supra* note 3, art. 6(1), 999 U.N.T.S. at 174. I have not completed an historical search of these words in the Covenant's Article 2(1): "to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *Id.* art. 2(1), 999 U.N.T.S. at 173; *cf.* DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 270 (1991).

Textual analysis of the Preamble and other words of the Covenant (through Article 50) persuades me that the drafters of Article 2(1) crafted what may be the world's most complete and exact nondiscrimination clause. I wish, for instance, it had been considered as a possible model for an Ethics Committee proposal in February 1993 that Canon 2C of the California Code of Judicial Conduct be amended by striking the italicized words in these sentences: "A judge shall not hold membership in any organization that practices invidious discrimination *on the basis of race, religion, or national origin*. This Canon does not apply to membership in a religious organization."

41. SENATE COMM. ON FOREIGN RELATIONS, *supra* note 1, at 12, *reprinted in* 31 I.L.M. at 654.

42. *See* ICCPR, *supra* note 3, art. 16, 999 U.N.T.S. at 177 (emphasis added).

43. *Id.* art. 18(3), 999 U.N.T.S. at 178.

only "to the extent strictly required by the exigencies of the situation" and (2) only when measures taken "are not inconsistent with . . . other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."<sup>44</sup> An illustrative question is: In any situation could U.S. personnel legally deny "the right to the protection of the law" (which Article 17 mandates) against rape?<sup>45</sup> Also, how about the assurance of Article 27 concerning "ethnic, religious or linguistic minorities?" Are its guarantees inapplicable whenever an armed conflict interferes? I think not.<sup>46</sup>

### B "Peacekeeping" Generally

I suggest that all officials who direct Blue Helmet troops and other U.N. personnel *are* governed by the International Bill of Human Rights (and, thus, clauses of the Civil and Political Covenant). Yet the most appropriate routes for channeling those "non-state actors" are perhaps via the paths of customary international law.<sup>47</sup> Slippery slopes, however, lie awaiting; accordingly, I limit remarks here to treaty obligations. Their scope under the Civil and Political Covenant can be fortified too by its general clauses like these:

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44. ICCPR, *supra* note 3, art. 4(1), 999 U.N.T.S. at 174. I do not address here, e.g., (1) the phrase "life of the nation" in Article 4; (2) Article 12(4), which states that "[n]o one shall be arbitrarily deprived of the right to enter his own country"; (3) Article 24's protections of children; or (4) the second sentence of U.S. Understanding No. II(1), using the phrase "distinction that may have a disproportionate effect upon persons of a particular status."

45. *Cf.* Robin Morgan, *Isolation Incidents*, Ms., Mar./Apr. 1993, at 1 ("Last year, when the U.N. Transitional Authority in Cambodia (UNTAC) received protests about the troops' behavior, UNTAC chief Yashushi Akashi replied that '18-year-old, hot-blooded soldiers' have a right to drink and chase 'young, beautiful beings of the opposite sex.' *Rape in a way has always been a weapon* — one that should be as expressly forbidden in international law as chemical weapons and germ warfare.").

That Akashi quote may be accurate; and explicit reference to rape ought to be made generally, not only in Allied Control Council Law No. 10. My contentions, however, are: (1) that the Covenant's Article 7 is explicit enough ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment.") and (2) that, regardless of the U.S. reservations as to Article 7, U.S. personnel are covered by Article 17. *Query*: Does that reservation affect the second sentence of Article 7? *Cf.* Elliot J. Schuchardt, *Walking a Thin Line: Distinguishing Between Research and Medical Practice During Operation Desert Storm*, 26 COLUM. J.L. & SOC. PROBS. 77 (1992).

46. For recent commentary, see Marc F. Plattner, *The Protection of Displaced Persons in Non-international Armed Conflicts*, Int. Rev. of Red Cross No. 291, 567, 569 (1992) ("[I]n situations of armed conflict international human rights law and international humanitarian law are applied concurrently."); *cf.* Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationships of the Laws*, 31 AM. U. L. REV. 935, 939 (1982).

47. See Newman, *supra* note 23, at 738.

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.<sup>48</sup>

[T]he individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.<sup>49</sup>

### CONCLUSION

Mostly in these pages I have explored topics that appear to have received meager attention on hundreds of thousands of pages that, since 1966, have dealt with the U.S. and the U.N. Covenants. My hunch is that authors (and drafters) during our next quarter-century will deal with a Covenant's jurisprudence destined to become almost overwhelming — in the same way that a gargantuan literature on civil liberties and civil rights law too often tends to confound us in the United States.

It seems predictable that international activities of "United Nations people" — as well as other international organization people — will guide uses of the International Bill of Human Rights dramatically, much more dramatically than mere foreign and "comparative" developments (including, e.g., the old "law of nations" recognized by our First Congress<sup>50</sup>) have nurtured phantasmagoric, troubling "solutions" of innumerable problems addressed by U.S. Bill of Rights clauses — federal and state.

Demonstrably, the international repute of our government has been diminished by (1) truly too many delays in ratifying and (2) administrations' persistence as to vague and erratic reservations, declarations, and understandings. Might good faith compliance with the Civil and Political Covenant (here and abroad), supplemented by honest efforts "to take joint and separate action in cooperation

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48. ICCPR, *supra* note 3, art. 5, 999 U.N.T.S. at 174.

49. *Id.* pmb1 para. 1, 999 U.N.T.S. at 173.

50. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (citing the Alien Tort Statute, 28 U.S.C. § 1350).



with the [U.N.] for the achievement of the purposes set forth in Article 55,"<sup>51</sup> enhance immensely these words in a congressional command now seventeen years in effect?

The United States *shall*, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, *promote and encourage* increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, *a principal goal* of the foreign policy of the United States *shall be to promote the increased observance* of internationally recognized human rights by all countries.<sup>52</sup>

The two final words — “all countries” — indeed do include our country, too.

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51. U.N. CHARTER art. 56.

52. 22 U.S.C. § 2304(a)(1) (1988) (emphasis added).