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ARTICLES

THE INTERNATIONAL LEGAL ASPECTS OF THE HUMAN RIGHTS PROGRAM OF THE UNITED STATES*

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The United States has traditionally maintained and expressed a concern for human rights throughout the world, although the extent of that concern and the vigor with which it has been pursued have waxed and waned, reflecting the priorities and preoccupations of successive Presidents and Congresses. At present, both the executive and the legislative branches appear to be at one in considering human rights a major ingredient in for-

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eign policy decisions, and in particular in the allocation of assistance, both civil and military, to countries throughout the world.¹ Although this is an attitude that I, for one, strongly welcome—speaking now not as an international official but as an American citizen and as a lawyer trained in international law—there is an aspect of this development that makes me somewhat uneasy: the decisions in this ongoing campaign—that is, the choices of actions to be taken—appear to be debated and made entirely in terms of tactics, politics, and even emotional and moral preferences, with scant attention paid to requirements and precepts of international law that might have a direct or indirect bearing on these decisions and choices. The Administration, and especially Congress, seem to lack any understanding of the fact that both intergovernmental relations and human rights are increasingly subject to international legal principles and instruments, whose provisions should at least be consulted and referred to before deciding upon a course of action.

In this talk I shall explore two manifestations of this attitude. First, I shall comment on U.S. attempts to take account of a recipient country's human rights record as a factor in granting international economic assistance, both multilateral and bilateral. Second, I shall examine the reasons why, despite its concern about human rights, the United States has compiled such a poor record of participation in international agreements in this field.

I

U.S. HUMAN RIGHTS POLICY AND INTERNATIONAL ECONOMIC ASSISTANCE

A. MULTILATERAL ASSISTANCE: THE WORLD BANK

During the past two years, Congress has considered various authorizations and appropriations for capital payments to the International Bank for Reconstruction and Development (IBRD) or for replenishing the related International Development Association (IDA) (together known as the World Bank). These have been opposed in Congress on the ground that the World Bank had made loans to countries with bad human rights records. Therefore, proposals were made to condition further U.S. payments on the cessation of such loans, or on the establishment by the Bank of a human rights evaluation procedure similar to that required for U.S. bilateral assist-

1. For a simple summary of the nonlegal considerations underlying the current U.S. foreign policy in relation to human rights, see U.S. Dep't of State, Human Rights and U.S. Foreign Policy, Dep't of State Publication 8959 (1978).

ance.² All these proposals, however, failed to take into account that the IBRD's Articles of Agreement, an international treaty to which the United States is a party, specifically provide that:

[t]he Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions. . . .³

These Articles also contain an additional prohibition of political considerations,⁴ and IDA's Articles of Agreement include the same prohibitions.⁵

President Robert McNamara of the World Bank therefore bluntly informed the United States that the Bank would be unable to accept capital subscriptions or contributions made subject to restrictions such as those proposed in Congress.⁶ This gave rise to the possibility that Congress might decline to authorize any funds at all—a violation of U.S. reciprocal commitments to the other contributors to the World Bank, which had been carefully negotiated in a number of technically nonbinding, but morally and politically valid, arrangements. To forestall such a congressional reaction, President Carter undertook to instruct the U.S. Executive Director of the World Bank to vote against loans to seven countries objectionable to the United States on several grounds, including their attitudes toward human rights;⁷ Congress itself then included certain milder but still definite directives as to how the United States is to vote in the World Bank on projects that give rise to human rights objections.⁸ These presidential and congressional instructions do, however, present the interesting question whether an Executive Director who complies with such instructions thereby violates, or

2. In particular, see the two versions of the "Harkin Amendment." 123 CONG. REC. H3121 (daily ed. Apr. 6, 1977) (proposing a new § 601(e) for the bill that became the Foreign Assistance and Related Programs Appropriation Act, 1978 Foreign Assistance Act, Pub. L. No. 95-148, 91 Stat. 1240); S. CONF. REP. NO. 95-363, 95th Cong., 1st Sess. 4 (1977) (proposing a new Title VII for the same bill). For the final version, see 22 U.S.C.A. § 262d-1 (1979 Repl.).

3. *Opened for signature and entered into force* Dec. 27, 1945, art. IV, sec. 10, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134. The "World Bank," strictly speaking, means only the IBRD, but in recent usage the term also includes its two affiliates, IDA and the International Finance Corporation (IFC).

4. *Id.*, art. III, sec. 5(b).

5. *Done* Jan. 26, 1960, art. V, secs. 1(g), 6, 11 U.S.T. 2284, T.I.A.S. No. 4607, 439 U.N.T.S. 249.

6. Letter from President McNamara of the World Bank to Secretary of the Treasury Blumenthal, July 5, 1977, reprinted in *Foreign Assistance and Related Agencies Appropriations for 1979: Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives*, 95th Cong., 2d Sess. 492 (1978).

7. Letter from President Carter to Chairman Long of the House Appropriations Committee's Subcommittee on Foreign Operations, reprinted in 123 CONG. REC. H11203 (daily ed. Oct. 18, 1977).

8. See 22 U.S.C.A. §§ 262d(d), (f), -1 (1979 Repl.).

attempts to induce the Bank to violate, the prohibition against interfering in the political affairs of any member.

Furthermore, it may be worthwhile to examine whether a vote cast by an Executive Director on clearly improper grounds—that is, in order to induce the Bank to violate the prohibition against interference in the internal affairs of a member country—might be considered invalid and thus ineffective. As it happens, the International Court of Justice implicitly addressed a similar issue in its first two advisory opinions. It held that, although the Soviet Union's vetoes of the admission of certain states to the United Nations were legally improper because they were based on grounds not allowed by the Charter, they were still effective to block the admission of those states.⁹

In connection with this question it is also interesting to recall that in 1966-67 the United Nations took strong issue with the Bank's reservation of its right to make loans to Portugal and South Africa, in spite of a number of General Assembly resolutions asking the specialized agencies to refrain from assisting these two countries in any way.¹⁰ At that time, the United States—of course under a different Administration—supported the Bank's view that its Articles precluded it from taking account of such "politically" motivated resolutions.

B. BILATERAL ASSISTANCE

Certain congressional opponents of the international lending institutions have proposed that resources now allocated to multilateral assistance programs be shifted to bilateral economic aid, over which the United States could exercise unfettered control.¹¹ Surely there can be no objection to a

9. Advisory Opinion on Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), [1947-48] I.C.J. 57; Advisory Opinion on Competence of the General Assembly for the Admission of a State to the United Nations, [1950] I.C.J. 4.

10. For a discussion of the Bank's obligation to comply with General Assembly resolutions barring grants of assistance to Portugal and South Africa, see Annex to *Consultation with the International Bank for Reconstruction and Development: Report of the Secretary-General*, 22 U.N. GAOR, II Annexes (Agenda Item 66) 2, U.N. Doc. A/6825 (1967) (exchange of memoranda between the U.N. Secretariat and the IBRD General Counsel, Mar. 3, 1967, May 5, 1967).

11. See, e.g., The Foreign Assistance Act of 1961, 22 U.S.C. §§ 2151-2443 (1976) (as amended). Note in particular § 2151n(d) ("Human rights and development assistance: Report to Speaker of the House and Committee on Foreign Relations of the Senate" in the Declaration of Policy relating to Development Assistance Authorizations), § 2199(l) ("Human rights" as part of the "General provisions and powers" of the Overseas Private Investment Corporation), and § 2304 ("Human rights and security assistance: Observance of human rights as principal goal of foreign policy" in the Declaration of Policy relating to Military Assistance and Sales). See also CENTER FOR INTERNATIONAL POLICY, HUMAN RIGHTS AND THE U.S. FOREIGN ASSISTANCE PROGRAM, FISCAL YEAR 1978 (1978).

country conditioning the aid it freely offers to others on adherence to its own concept of human rights? Or maybe there can be! A number of resolutions passed by international bodies are relevant to this subject:

(1) In 1965 the U.N. General Assembly declared impermissible any intervention in the domestic affairs of states and endorsed the protection of their independence and sovereignty:

1. No State has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention *and all other forms of interference* or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.

2. *No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights* or to secure from it advantages of any kind. . . .¹²

(2) The U.N. Conference on the Law of Treaties:

[solemnly condemn[ed]] the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent. . . .¹³

(3) In 1970 the General Assembly incorporated its 1965 declaration¹⁴ practically verbatim in the wider Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, under the heading: "The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter."¹⁵

(4) Finally, article 32 of the Charter of Economic Rights and Duties of States, adopted by the General Assembly in 1974, states that:

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.¹⁶

12. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131(XX), Dec. 21, 1965, 20 U.N. GAOR, Supp. (No. 14) 11, U.N. Doc. A/6014 (1966) (emphasis added).

13. Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties, *annexed to* Final Act of the United Nations Conference on the Law of Treaties, para. 1, U.N. Doc. A/CONF.39/26, reproduced in *United Nations Conference on the Law of Treaties, Official Records*, U.N. Doc. A/CONF.39/11/Add.2 (1971), at 285 (emphasis added).

14. See note 12 *supra* and accompanying text.

15. G.A. Res. 2625(XXV), Oct. 24, 1970, 25 U.N. GAOR, Supp. (No. 28) 121, at 123, U.N. Doc. A/8028 (1971).

16. Art. 32, G.A. Res. 3281 (XXIX), Dec. 12, 1974, 29 U.N. GAOR, Supp. (No. 31) 50, at 55, U.N. Doc. A/9631 (1975).

Now formalists may argue that all these resolutions are mere non-binding recommendations of the General Assembly.¹⁷ This may be true of the resolutions as a whole, and of many of the other principles they proclaim. But I think it can also be asserted that the principle prohibiting economic coercion has become—although perhaps not on the level of the prohibition of the use of force in article 2(4) of the U.N. Charter—a generally accepted principle of international law, binding on all States.

Another argument that might be raised is that the term “economic coercion” refers solely to measures such as a restriction of trade relations or a refusal to grant “most favored nation” treatment, and thus should be considered entirely inapplicable to the granting or withholding of economic, technical or military assistance. Several responses can be made. One, which surely would not be accepted by most capital-exporting nations although it is being increasingly urged by developing countries, is that the granting of economic and technical assistance has in effect become a duty for those able to do so.¹⁸ A more cogent response is that the very term “economic coercion” implies any use of economic power, and cannot be restricted solely to certain transactions; in particular, it does not refer solely to those, like trade and communication, that are in any event governed largely by bilateral or multilateral treaty relations, whose violation would be objectionable even if the purpose were not coercive. In other words, acts, such as a failure to grant assistance, that might otherwise be legal—because they did not violate any treaty obligations—might become illegal if carried out for an impermissible coercive purpose.

One argument that surely supports the overt withholding of assistance from notorious violators of human rights is that these rights are no longer

17. For an extensive discussion of this question in relation to the Charter of Economic Rights and Duties of States as well as to certain other General Assembly resolutions relating to foreign investments, see *Arbitration between Texaco Overseas Petroleum Co./California Asiatic Oil Co. and Government of Libya* (René-Jean Dupuy, Sole Arbitrator), 17 INT'L LEGAL MATERIALS 1, paras. 80-91, at 27-31 (1977).

18. For various statements of this principle, see the following declarations of the U.N. General Assembly, which were in most cases adopted by consensus or by overwhelming numerical majorities: Charter of Economic Rights and Duties of States, art. 22, G.A. Res. 3281(XXIX), Dec. 12, 1974, 29 U.N. GAOR, Supp. (No. 31) 50, at 54, U.N. Doc. A/9631 (1975); Declaration on the Establishment of a New Economic Order, paras. 4(i), 4(k), G.A. Res. 3201 (S-VI), May 1, 1974, S-VI U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974) (“The new international economic order should be founded on full respect for the following principles: . . . (i) Extending of assistance to developing countries . . . ; (k) Extension of active assistance to developing countries by the whole international community, *free of any political or military considerations*” (emphasis added)); Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202(S-VI), May 1, 1974, S-VI U.N. GAOR, Supp. (No. 1) 5, U.N. Doc. A/9559 (1974); International Development Strategy for the Second United Nations Development Decade, paras. 42-47, G.A. Res. 2626(XXV), Oct. 24, 1970, 25 U.N. GAOR, Supp. (No. 28) 39, U.N. Doc. A/8028 (1971).

matters of purely domestic concern solely within the sovereign jurisdiction of a particular state. Rather, at least since the establishment of the United Nations, they have become considerably internationalized. To bolster this position it might be pointed out that organs of the United Nations have frequently disregarded the injunction in article 2(7) of the Charter against intervention "in matters which are essentially within the domestic jurisdiction of any state," when there has been a serious accusation of a violation of human rights.¹⁹ In part this internationalization has taken place through certain provisions of the Charter itself, particularly the preamble and articles 1(3) and 55(c). Largely, however, it has occurred through numerous declarations, proclamations, and other resolutions emanating from the General Assembly and from representative organs of other international organizations, and especially through a whole network of treaties, both worldwide and regional, in the human rights area.²⁰ But can the United States, either as a matter of law or of rhetoric, rely on the internationalization of human rights concerns through international treaties, when it has failed—for reasons to be analyzed in the following section—to become a party to most of these?

II

U.S. PARTICIPATION IN HUMAN RIGHTS TREATIES

Having discussed some legal questions concerning the attempts by the United States to impress its own human rights standards on other countries, it may be interesting to consider the opposite side of the coin: the extent to which the United States has agreed to subject itself to the emerging international standards of human rights.

A. THE RECORD

On its face, the record is a sorry one. Even though most of the human rights treaties that have been promulgated by the United Nations or by organizations associated with it express principles to which this country is

19. For an analysis of the action of various U.N. bodies in this respect, see I REPERTORY OF UNITED NATIONS PRACTICE 55, art. 2(7), especially paras. 412-21, at 143-46 (1955); I REPERTORY OF UNITED NATIONS PRACTICE, SUPPLEMENT No. 1 at 25, art. 2(7), paras. 145-51, at 61-63, (1958); I REPERTORY OF UNITED NATIONS PRACTICE, SUPPLEMENT No. 2 at 121, art. 2(7), paras. 155-66, at 170-73, (1964); I REPERTORY OF UNITED NATIONS PRACTICE, SUPPLEMENT No. 3 at 67, art. 2(7), paras. 329-35, at 117-19 (1972).

20. See *Human Rights: A Compilation of International Instruments*, U.N. Doc. ST/HR/1/Rev.1 (1978), which lists 50 such instruments adopted or promulgated on a worldwide basis, including the 19 referred to in note 21 *infra*, but does not include the many important regional instruments, such as those concluded among Western European as well as American nations.

devoted through its Declaration of Independence and its Constitution, and even though the United States has usually taken an active, and formerly often a leading, part in formulating these treaties, it has chosen to commit itself to only a very few of them.

For example, of nineteen such treaties deposited with the U.N. Secretary-General, the United States has become a party to only five.²¹ They include the 1967 Protocol Relating to the Status of Refugees,²² the 1953 Convention on the Political Rights of Women,²³ and the 1926 Slavery Convention,²⁴ its amending Protocol,²⁵ and its Supplementary Convention.²⁶ In addition, the United States has signed five more: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,²⁷ to which the Senate has refused to consent for an entire generation;²⁸ the 1962 Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages;²⁹ the 1966 International Convention on the Elimination of All Forms of Racial Discrimination;³⁰ the 1966 International Covenant on Economic, Social and Cultural Rights;³¹ and the 1966 International Covenant on Civil and Political Rights.³² President Carter signed the last two agreements in October 1977 and submitted the

21. *Status of international conventions in the field of human rights in respect of which the Secretary-General performs depositary functions*, U.N. Doc. A/33/143, Aug. 17, 1978, reporting the signatures and ratifications of and declarations concerning 19 international treaties, as of June 30, 1978. U.N. Docs. A/33/147, A/33/148, and A/33/149, Sept. 19, 1978, provide slightly more up-to-date and extensive information as to five of these treaties. For a relatively recently compiled history and analysis of the U.S. reaction to these instruments, see *The Ratification of U.N. Human Rights Instruments by the United States*, Prepared by the Staff of the World Peace Through Law Center for the Washington World Law Conference, Oct. 12-17, 1975 [hereinafter cited as *Ratification Paper*].

22. *Done* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (U.S. accession, Nov. 1, 1968).

23. *Done* Mar. 31, 1953, 27 U.S.T. 1909, T.I.A.S. No. 8289, 193 U.N.T.S. 135 (U.S. accession, Apr. 8, 1976).

24. *Convention to Suppress the Slave Trade and Slavery*, *done* Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253, as amended (U.S. accession with reservation, Mar. 21, 1929).

25. *Done* Dec. 7, 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51 (U.S. accession, Mar. 7, 1956).

26. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, *done* Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3 (U.S. accession, Dec. 6, 1967).

27. *Adopted* Dec. 9, 1948, 78 U.N.T.S. 277.

28. For a history of U.S. Senate consideration of the Genocide Convention, see *Ratification Paper*, *supra* note 21, at 1-4.

29. *Opened for signature* Dec. 10, 1962, 521 U.N.T.S. 231 (U.S. signature, Dec. 10, 1962).

30. *Opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (U.S. signature, Sept. 28, 1966).

31. Annex to G.A. Res. 2200(XXI), Dec. 16, 1966, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967) (U.S. signature, Oct. 5, 1977).

32. Annex to G.A. Res. 2200(XXI), Dec. 16, 1966, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1967) (U.S. signature, Oct. 5, 1977).

last three to the Senate in early 1978.³³ No action at all has been taken on certain important instruments, such as the 1951 Convention relating to the Status of Refugees,³⁴ the 1954 Convention relating to the Status of Stateless Persons,³⁵ the 1961 Convention on the Reduction of Statelessness,³⁶ and the Optional Protocol to the International Covenant on Civil and Political Rights.³⁷ This record is poorer than that of almost any other Western state, including Canada and the United Kingdom, whose legal traditions are similar to our own. It is considerably worse than, for example, that of the Soviet Union,³⁸ which thirty years ago was one of eight states that abstained on the adoption of the Universal Declaration of Human Rights.³⁹

B. REASONS FOR LACK OF U.S. PARTICIPATION

It is useful to explore briefly the reasons—good, bad, or doubtful—that may explain this apparently anomalous U.S. attitude: a strong commitment to human rights and a desire to express that commitment on a worldwide basis, coupled with a reluctance to undertake international legal or even quasi-legal obligations.⁴⁰

Let me start with what may be considered as a good but not really sufficient reason that relates to several otherwise worthwhile instruments.

33. See *Four Treaties Pertaining to Human Rights*, SEN. EXEC. DOCS. C, D, E, AND F, 95th Cong., 2d Sess. (1978) (Message from President Carter) [hereinafter cited as Presidential Message].

34. Done July 28, 1951, 189 U.N.T.S. 137.

35. Done Sept. 28, 1954, 360 U.N.T.S. 117.

36. Done Aug. 30, 1961, U.N. Doc. A/CONF.9/15 (1961).

37. Annex to G.A. Res. 2200(XXI), Dec. 16, 1966, 21 U.N. GAOR, Supp. (No. 16) 59, U.N. Doc. A/6316 (1967) [hereinafter cited as Optional Protocol].

38. With respect to the 19 instruments referred to in note 21 *supra*, the record is:

	<u>signed but not ratified</u>	<u>ratified</u>
Canada	0	12
United Kingdom	0	14
U.S.S.R.	0	11
U.S.A.	5	5

39. The vote was 48:0:8. U.N. Doc. A/PV.183 (1948).

40. For example, the United States was not one of the nine countries that had responded by Oct. 1, 1978, see U.N. Doc. A/33/197 (1978), to the General Assembly's invitation to all U.N. members, G.A. Res. 32/64, Dec. 8, 1977, 32 U.N. GAOR, Supp. (No. 45)137, U.N. Doc. A/32/45, to reinforce their support of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), Dec. 9, 1975, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/10034 (1976), by depositing with the Secretary-General a unilateral nonbinding declaration of intention to comply with the Declaration and to implement it through appropriate measures. Nor was the United States one of the 26 countries that responded to a questionnaire on the implementation of that Declaration, U.N. Doc. A/33/196, Add.1, Add.2 (1978), that the Secretary-General had circulated in response to G.A. Res. 32/63, Dec. 8, 1977, 32 U.N. GAOR Supp. (No. 45) 137, U.N. Doc. A/32/45.

Several of these treaties contain ancillary provisions that violate fundamental American values and principles. For example, article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination requires all parties to "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, [and] incitement to racial discrimination,"⁴¹ and to recognize participation in organizations that promote and incite racial discrimination "as an offence punishable by law."⁴² Manifestly these requirements violate the first amendment to the U.S. Constitution, and obviously the United States could not agree to them. But it would be possible to make a reservation to this provision, as have many Western states that have become parties to this Convention⁴³ and to others containing similar restrictions. Naturally, in signing and submitting this treaty to the Senate, President Carter has recommended such a reservation.⁴⁴ In other words, for most of the instruments in question, such aberrations are curable by carefully drafted reservations that would be acceptable under international legal principles as not "incompatible with the object and purpose of the treaty."⁴⁵

In contrast, another reason often given for U.S. refusal to become a party to certain human rights treaties is entirely inadequate: that these would grant rights greater than those guaranteed by the federal or state constitutions or legislation. This attitude was most clearly expressed in what I understand was the original proposal for a general reservation to be suggested to the Senate in connection with the four human rights treaties submitted to it in February 1978: this reservation was to negate all provisions that would in any way change existing federal or state laws. Such a proposal seems to misunderstand the supremacy clause of the U.S. Constitution⁴⁶ as well as the purpose of treaty making in general and of human rights treaties in particular. These instruments are designed not merely to

41. Note 30 *supra*, art. 4(a).

42. *Id.*, art. 4(b).

43. See, for example, the declarations and reservations of Austria, Bahamas, Belgium, France, Italy, and the United Kingdom. *Multilateral Treaties in respect of which the Secretary-General Performs Depositary Functions*, U.N. Doc. ST/LEG/SER.D/12 (1979), 91, 93, 94, 97-98.

44. For the reservation made upon signature, see *id.* at 98. For the proposed reservation on ratification, see Presidential Message, *supra* note 33, at VII.

45. Vienna Convention on the Law of Treaties, done May 23, 1969, art. 19(c), U.N. Doc. A/CONF.39/27 (1969), reprinted in *United Nations Conference on the Law of Treaties, Official Records*, *supra* note 13, at 291 [hereinafter cited as Vienna Convention]. This Convention has not yet entered into force, though the required 35 ratifications have almost been attained; the United States signed the Convention on Apr. 24, 1970, but has not yet ratified it. Nevertheless, the principles it expresses are for the most part accepted as constituting a codification of the prevailing rules of customary international law.

46. U.S. CONST. art. VI, cl. 2.

maintain the status quo but to raise it, and to do so not only for "lesser breeds without the Law"⁴⁷ but for all countries.

That extreme reservation was rejected—perhaps because of a perceived conflict with article 19(c) of the Vienna Convention on the Law of Treaties.⁴⁸ But the presidential message actually sent to the Senate⁴⁹ reflects the same thinking: it proposes a reservation, understanding, or explanatory statement on every specific point that would change American law in any way. For example, the President's message declared the International Covenant on Civil and Political Rights to be, "of the . . . treaties submitted, the most similar in conception to the United States Constitution and Bill of Rights."⁵⁰ Nevertheless, the message proposed four formal reservations, as well as four statements, declarations, and understandings, including an omnibus declaration "that the provisions of Articles 1 through 27 of the Covenant are not self-executing."⁵¹ One illustration of the nitpicking nature of some of the proposed reservations concerns article 6(5) of the Covenant: that article would prohibit the execution of persons under the age of eighteen and of pregnant women—not really a drastic restriction, considering the disordered state of American law on capital punishment. Nevertheless, the administration proposed that the United States reserve "the right to impose capital punishment on any person duly convicted under existing and future laws permitting the imposition of capital punishment."⁵²

Finally, the American aversion to allowing treaties to expand rights and remedies already available is shown by the President's explicit decision not to submit to the Senate at this time the Optional Protocol to the Covenant.⁵³ Adherence to that Protocol would permit individuals who have exhausted all available domestic remedies, presumably including an attempt to appeal to the United States Supreme Court, to appeal to the Human

47. R. Kipling, *Recessional*, in RUDYARD KIPLING'S VERSE: DEFINITIVE EDITION 328, at 329 (1940).

48. Vienna Convention, *supra* note 45, art. 19(c).

49. Presidential Message, *supra* note 33.

50. *Id.* at XI.

51. *Id.* at XI-XV, quotation at XV. The same Presidential Message proposes corresponding reservations for the other three treaties to which it refers. *Id.* at VI-XXII.

52. *Id.* at XII.

53. Presidential Message, *supra* note 33, at XV. Similarly, the President has not recommended ratification of a declaration under Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 30, that would assign corresponding powers to receive individual complaints to the Committee on the Elimination of Racial Discrimination (CERD). The Economic, Social and Cultural Rights Covenant does not establish any similar body or right of petition, but merely provides that the parties submit reports to the U.N. Economic and Social Council (ECOSOC) in accordance with a program established by the Council, International Covenant on Economic, Social and Cultural Rights, *supra* note 31, arts. 10-17; for the reporting procedure established by the Council, see ECOSOC Res. 1988(LX), May 11, 1976, 60 U.N. ESCOR, Supp. (No. 1) 11, U.N. Doc. E/5850 (1976).

Rights Committee established by article 28 of the Covenant—a body that is already functioning.⁵⁴ At least for the present, therefore, that right is not to be accorded to Americans.

Other reasons that are given for not participating in these treaties may be characterized as plausible but weak, or perhaps cowardly. It is no secret that, in the political organs of the United Nations, the majority of countries do not necessarily see eye to eye with the United States on certain human rights issues. To some extent this is also true of the expert treaty organs established to implement the provisions of some of the treaties already discussed, such as the Committee on the Elimination of Racial Discrimination⁵⁵ and the Human Rights Committee.⁵⁶ It is this political fact that explains why some of these treaties contain provisions that are manifestly offensive to such concepts as freedom of speech or of association. The United States and other Western countries have frequently objected that some of these organs have practiced a double standard, for example by their chronic preoccupation with the activities of South Africa and Israel⁵⁷

54. International Covenant on Civil and Political Rights, *supra* note 32, art. 28. The Human Rights Committee (HRC) has three basic functions: (a) To study reports required to be submitted by the states parties to the Covenant on the implementation of its provisions, *id.*, art. 40; (b) To consider communications from a party to the Covenant claiming that another party is not fulfilling its obligations under the Covenant, *id.*, art. 41, provided that both such parties have made declarations recognizing this competence of the HRC, and provided at least ten parties have made such declarations; (c) To consider complaints from individuals against a party to the Covenant, if the party is also a party to the Optional Protocol, *supra* note 37, arts. 1-5. As of Sept. 1, 1978, six countries had recognized the HRC's competence described in (b) above, U.N. Doc. A/33/149, Annex II, at note (c) (1978); 19 had become parties to the Optional Protocol, *id.*, Annex III.

55. The 18 experts who comprised CERD in 1978 came from the following countries: Argentina, Austria, Bulgaria, Ecuador, Egypt, France, Germany (Federal Republic), Ghana, Greece, India, Iran, Kuwait, Nigeria, Pakistan, Panama, Senegal, U.S.S.R., and Yugoslavia. The most recent report of the Committee, including summaries of its consideration of the reports from 35 states, appears in *Report of the Committee on the Elimination of Racial Discrimination*, 33 U.N. GAOR, Supp. (No. 18), U.N. Doc. A/33/18 (1978).

56. The 18 experts who comprised HRC in 1978 came from the following countries: Bulgaria, Canada, Columbia, Costa Rica, Cyprus, Denmark, Ecuador, German Democratic Republic, Germany (Federal Republic), Iran, Mauritius, Norway, Romania, Rwanda, Syrian Arab Republic, Tunisia, U.S.S.R., and the United Kingdom. The most recent report of the Committee, including summaries of its consideration of the reports of 16 states, appears in 33 U.N. GAOR, Supp. (No. 40), U.N. Doc. A/33/40 (1978). This Committee, which is a "treaty organ" established by the International Covenant on Civil and Political Rights, *supra* note 32, is not to be confused with the U.N. Commission on Human Rights, which is a "functional commission" of ECOSOC and is the organ that largely formulated the Covenant and many other U.N. human rights instruments.

57. For example, the agenda of the 33d regular session of the U.N. General Assembly, U.N. Doc. A/33/251/Rev.1 (1978), contained items on "Policies of *apartheid* of the Government of South Africa," *id.*, Agenda Item 32; "Status of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*," *id.*, Agenda Item 81(c); "Question of Palestine: report of the Committee on the Exercise of the Inalienable Rights of the Palestinian People," *id.*, Agenda Item 31; and "Report of the Special Committee to Investigate Israeli

and the blind eye they often turn to accusations of massive violations by other Asian or African states.⁵⁸ In the examination of the periodic reports required of all parties to the Racial Discrimination Convention and the Civil and Political Rights Covenant,⁵⁹ the respective Committees have tended to accept at face value the anodyne self-congratulatory reports of states with notoriously poor human rights records, while examining in great detail and sometimes even with a certain hostility the honestly self-critical reports of manifestly democratic states.

It is naturally understandable that the United States hesitates to expose itself to such critical and potentially unfair forums—particularly given the diversity of its population and the number of disaffected groups and individuals that could take advantage of the propaganda opportunities these international examinations would offer. But understanding is not agreement, and hesitancy should not lead to permanent abstention. After all, many other democratic states have decided to become parties to these treaties and thus to invite the criticisms of the supervising organs these treaties establish—an experience that may of course be valuable for any country. In return, these states have gained the right to participate in these organs and to bring their own principles and standards to bear in these international arenas. To my mind, this appears to be the better way to play the game: to descend to the hurly-burly of sometimes disagreeable political struggles, rather than to attempt to stay above them as a self-appointed and exempt umpire unilaterally declaring and imposing decrees. This country's self-assurance, particularly in the field of human rights, should be sufficient to counter and answer any unfair criticism of our domestic practices,⁶⁰

Practices Affecting the Human Rights of the Population of the Occupied Territories," *id.*, Agenda Item 55.

58. For example, the serious accusations against Kampuchea (Cambodia) have not come before the General Assembly in any form, though the Commission on Human Rights did decide to address some inquiries to that Government. Commission Decision 9 (XXXIV), *reprinted in Report of the 34th Session of the U.N. Human Rights Commission*, 1978 ESCOR, Supp. (No. 4) 137, U.N. Docs. E/1978/34, E/CN.4/1292 (1978). For a short summary of the discussion of this issue by the Commission, see *id.*, paras. 213-15.

59. For summaries of the consideration of such national reports during 1978, see the reports of the respective committees to the U.N. General Assembly, notes 55-56 *supra*.

60. The United States regularly submits to ECOSOC periodic reports on national developments relating to particular aspects of human rights, pursuant to ECOSOC Res. 1596, 50 U.N. ESCOR, Supp. (No. 1) 20, U.N. Doc. E/5044 (1971); ECOSOC Res. 1074C, 39 U.N. ESCOR, Supp. (No. 1) 24, U.N. Doc. E/4117 (1965), which are examined by the Ad Hoc Committee on Periodic Reports of the Commission on Human Rights. The following is a list of the latest such reports: civil and political rights, July 1, 1968-June 30, 1971, U.N. Doc. E/CN.4/1098/Add.15 (1972); economic, social and cultural rights, July 1, 1969-June 30, 1973, U.N. Doc. E/CN.4/1155/Add.26 (1974); freedom of information, July 1, 1970-June 30, 1975, U.N. Doc. E/CN.4/1214/Add.10 (1976). The United States also contributes accounts on salient developments to the U.N. YEARBOOK ON HUMAN RIGHTS. See, e.g., [1973-74] Y.B. ON HUMAN RIGHTS 243-47 (United Nations) (1977).

while perhaps accepting improvements suggested by the experience of other nations.

In this short survey I have not attempted to take firm positions or to give any definitive answers. Instead, my objective has been to introduce an additional dimension—that of public international law—to the consideration of the complex questions involved in implementing on a worldwide basis our traditional national concern for human rights.