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A PERSONAL REFLECTION ON INTERNATIONAL COVENANTS ON HUMAN RIGHTS

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Many of us Americans look upon the United States as the "citadel" of human rights in the world. We have a far-reaching Bill of Rights in a written constitution which is enforced by the courts against the executive and legislative branches of the federal government, state and local governments and agencies, and individuals and corporate entities in the private sector. Congressional acts supporting human and civil rights penetrate in hundreds of ways into the detailed workings of our society. An extraordinary American, Eleanor Roosevelt, played a major role in drafting and publicizing the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in 1948.[1] The United States has played a leading role in pressing for more progress toward compliance with the human rights portions of the Helsinki Accords.[2] American foreign policy is steadily influenced by human rights considerations, sometimes quietly and discreetly behind the scenes, at other times more openly and assertively, with linkages to such matters as trade and aid. Indeed, our Congress now requires the Department of State to report annually to it on the status of human rights in every country in the world—except in the United States!

However, when one examines the rather detailed table of contents of the most recent Treaties in Force, published annually by the Department of State, one finds no heading for "human rights" or "civil rights." There are headings for slave trade, traffic in women and children, and political rights of women. There are human rights aspects to other entries, for instance, relating to prisoners of war and the rules of warfare, to certain limited aspects of na-

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

2. Conference on Security and Co-Operation in Europe: Final Act, Aug. 1, 1975, *reprinted in* 14 INT'L LEGAL MATERIALS 1293 (1975).

tionality, and to cultural and intellectual matters. And, of course, many bilateral treaties and agreements impact upon human rights; these range from national treatment of each other's nationals under treaties of Friendship, Commerce, and Navigation[3] to rather careful safeguards for individuals under extradition treaties.[4] However, major international covenants on human rights are absent from Treaties in Force. For example, missing are the overwhelming majority of agreements dealing with labor relations and conditions proposed by the International Labor Organization.[5] How does it happen that the United States, which has played such a major role in promoting human rights on the world scene, has been so reluctant to ratify central international covenants in the same field? What follows is an effort to throw a little light on that question.

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On February 23, 1978, President Carter submitted to the Senate for its advice and consent four major covenants: An International Convention on the Elimination of All Forms of Racial Discrimination,[6] an International Covenant on Economic, Social and Cultural Rights,[7] an International Covenant on Civil and Political Rights,[8] and the American Convention on Human Rights.[9] The first three emanated from the United Nations, the fourth from the Organization of American States. In each case, United States representatives played an active part in negotiating and drafting these covenants.

In submitting these four covenants to the Senate for the process of gaining its advice and consent, the administration proposed a total of twenty-seven reservations, declarations, understandings, and statements. While these will not be examined in detail here, broadly speaking they would have the effect of: Making the covenants non-self-executing for the United States; clarifying the supremacy of the United States Constitution in the event of any conflict with provisions of the covenants; leaving to the states those matters that are now considered state responsibilities; reducing

3. *See, e.g.*, Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432.

4. *See, e.g.*, Convention on Extradition, Dec. 10, 1962, United States-Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476.

5. Convention concerning the Abolition of Forced Labour, *adopted* June 25, 1957, 320 U.N.T.S. 291.

6. G.A. Res. 2106A, 20 U.N. GAOR, Supp. (No. 14) 47, U.N. Doc. A/6014 (1965).

7. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

8. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

9. *See, e.g.*, American Convention of Human Rights, *signed* Nov. 22, 1969, OAS Official Records OEA/Ser.K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1 (Jan. 7, 1970).

some provisions of the covenants to "goals" rather than binding obligations; and making it clear that no present federal or state laws would be required to be changed by ratification. It may be argued that these reservations, etc., so lacerate the four covenants as to make ratification a farce. On the other hand, it may be said that these reservations, etc., are made in the interest of "higher" standards of human rights, which would be well understood internationally if we were to ratify them, albeit in a somewhat fragmented form. The latter view attaches importance to the presence of the United States among ratifying states, even if largely symbolic in result. Further, ratification might give us stronger "standing" to raise such issues with other governments and give impetus to efforts to continue with our unfinished business at home. The covenants have yet to receive advice and consent.

Let us go back in time a bit. In 1949, it was this writer's privilege, as an Assistant Secretary of State, to appear before the Senate Foreign Relations Committee, in company with the Solicitor General, to lead off testimony urging advice and consent for the Genocide Convention.[10] The Convention was short, simple, and compelling in the aftermath of Hitler's holocaust. That appearance occurred more than thirty years ago, but the Genocide Convention has not received advice and consent. President Truman and each of his successors have expressed a desire that action be taken.[11] The Senate Foreign Relations Committee has recommended advice and consent to the full Senate. Almost annually, the leadership of the Senate has consulted its colleagues on the subject, but this type of informal nose count has not found the two-thirds vote required for successful passage. Understandably, the leadership would not wish to bring the matter to a vote with a prospect of defeat. There is no way of knowing whether this informal estimate accurately reflects what the vote would be in a public roll call, but the risk has not been taken.

This writer has, over many years, discussed these issues with a considerable number of Senators of varying points of view as well as with some members of the House of Representatives. Some clear impressions have emerged concerning why general covenants on human rights have had such rough sledding in our own body

10. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260A, U.N. Doc. A/810 (1948).

11. Within a few months of taking office, President Carter sent the Genocide Convention to the Senate for ratification. *See* President's Address to the General Assembly, 13 WEEKLY COMP. OF PRES. DOC. 397, 401 (Mar. 17, 1977).

politic. It may be of interest to share these impressions; no attempt is made here to distinguish between real reasons and mere pretexts—that judgment is left to the reader.

It must be said, first, that there have been and are a number of Senators who simply have not wanted the federal government to intrude into human or civil rights. Those of us who were in the fray at the time, recall the heated debate and parliamentary difficulty in winning approval for civil rights legislation during the 1960's. There were times when these bills were in great jeopardy, although they required only a majority of votes in each house of Congress. The task of getting a two-thirds vote for an international instrument such as the Genocide Convention appeared formidable indeed. Whether rightly or wrongly, the Johnson Administration did not send to the Senate the U.N. Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which had been recommended by the U.N. General Assembly in December, 1966. This decision stemmed partly because of the executive branch's displeasure with certain aspects of the covenants themselves, and partly because submission at that time was looked upon as a hopeless cause. Too much political blood had been spilled over major changes in our national laws aimed at bringing all of our citizens under the roof of our Bill of Rights.

Another aspect of our own domestic controversy over civil rights was the reluctance of many, including some supporters of civil rights, to offer other nations and peoples any possible role in our own travail.[12] If these outside voices had intruded into our own debate, xenophobia and other like emotions could have made our own solutions more difficult to find. Whether this fear was real or fancied is not easy to say. Federal troops and federal marshals were acting in situations of greatest tension; there are those who are thankful that outside interference did not make matters worse. It was noted and appreciated at the time that the United States was not hauled before international bodies for debate over our domestic turmoil. During this period, a Foreign Minister of a nonwhite country put it to this writer in the following terms:

> You have no monopoly on such problems. Wherever there are different races, religions and cultural groups in direct contact with each other there are problems. We all have them. What we find stimulating is that your President, your Congress and your

12. *See generally* Rusk, Book Review, 12 COLUM. J. TRANSNAT'L L. 609 (1973) (reviewing L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972)).

> Supreme Court, as well as a majority of your people, are trying to find better answers than you have found before. If you succeed, it will be important not just for you but also for us in trying to sort these matters out for ourselves.

Serious attention to international covenants on human rights has been partly undermined by skepticism and cynicism about lip service that is not translated into practice. Some of the most oppressive regimes in the world call themselves "peoples democratic republics." The Soviet Union has ratified the U.N. Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; it has also accepted the Helsinki Accords. Human rights resolutions are usually passed unanimously by the Organization of American States. Liberally using the benefit of the doubt, one can count about thirty constitutional democracies in which human rights are in reasonably good order. In Western Europe, the European Convention on Human Rights[13] has both substantial meaning and institutional support. But human rights were generally supported and respected in Western Europe without such arrangements.

For the United States, a treaty is constitutionally a part of "the supreme Law of the Land. . . ."[14] We are compelled to take treaties seriously as law; we cannot play games with them. Whether we involve this solemn process in a field in which, for so many nations, words are cheap and performance is scarce is a troubling question for some, including some Senators.

A more substantial question arises if provisions of international covenants appear inconsistent with our own United States Constitution. No treaty has thus far been declared unconstitutional by our Supreme Court. The extravagant language of Mr. Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*[15] encourages some to believe that the treaty power is plenary and not subject to constitutional limitations. Subsequently, the Supreme Court warned, through Mr. Justice Black in *Reid v. Covert*,[16] that

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13. Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221.

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

15. 299 U.S. 304 (1936) (delegation empowering President to declare illegal provisions of arms to states involved in Chaco conflict held constitutional). Mr. Justice Sutherland wrote: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *Id.* at 319.

16. 354 U.S. 1 (1957) (American civilian dependents of military personnel abroad entitled to civilian trial).

the United States is a creature of the Constitution and that treaties must meet constitutional requirements—especially those fundamental guarantees of the rights of individual citizens.[17]

Is it sound policy for the United States to ratify international covenants that seem to set lower standards than does the United States Constitution? This question arose thirty years ago with a provision of the Genocide Convention, requiring that "direct and public incitement to genocide" be made punishable.[18] How does that fit into our own first amendment? Can we take for granted that any variance between our Constitution and these covenants would be decided in favor of the Constitution? Despite *Reid v. Covert*, the point has not been clearly and definitively established. It seems most likely, therefore, that any resolution of advice and consent would include a reservation to clarify this fundamental question. Senators would consider it too important a matter to be left to the judges.

A further constitutional question arises from the federal nature of our political system. There are a number of provisions in these international covenants concerning questions that are still state matters in the United States. Marriage, wills, property, the handling of accused persons prior to conviction, and a goal of free higher education are only examples. Here the famous case of *Missouri v. Holland*[19] has cast a long shadow: The Supreme Court seemed to say that Congress can enact legislation (which Missouri claimed violated its tenth amendment powers) supporting a treaty which it would have no power to enact absent a treaty.[20] The result was to move powers to Washington that had theretofore supposedly resided in the states.

There is a certain irony in this objection to international covenants. There has been considerable comment on the increase in presidential powers in recent decades. There has been less atten-

17. Mr. Justice Black wrote that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 16.

18. Art. III(c), G.A. Res. 260A, U.N. Doc. A/810 (1948).

19. 252 U.S. 416 (1920) (absent enumerated power to enact legislation protecting migrations of wild birds, Migratory Bird Treaty of 1916 provides valid basis for Congress to act under necessary and proper clause).

20. Mr. Justice Holmes, for the Court, wrote: "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could. . . ." *Id.* at 433 (citation omitted).

tion to the extraordinary increase in the power exercised by the Congress during the same period. The Congress now, by legislation and resulting regulations, has reached into myriad details of the lives of most citizens. Senators are, of course, members of Congress and have participated fully in this aggrandizement of power, much of it at the expense of the states. There are moments, however, when Senators remember that they began as delegates of the states and become reluctant to modify federal-state responsibilities through the treaty power—especially treaties dealing with human rights.

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This writer believes that the United States should play a forthright role in promoting human rights on the world scene. The U.N. Charter reflects the intimate connection between respect for human rights and the possibility of organizing a durable peace—now in a nuclear world. In any event, the world in which we live could become a chilling and hostile place for Americans who feel deeply about the values that are central to our political life. Of course, there are problems concerning how far we go in "linking" human rights to the rest of the world's business and about how we can avoid sanctimony about aspirations regarding which we ourselves have much unfinished business. I would hope that the Senate would give advice and consent to the Genocide Convention, with a reservation regarding the first amendment. On the four major covenants sent to the Senate by President Carter, I would support advice and consent with two, and only two, reservations. The first would make it clear that if there be any variance between any part of these covenants and the U.S. Constitution, the Constitution would prevail. The second would provide that these covenants are not self-executing, and that the extent to which they would be given effect as law within the United States would be determined by the Congress and state legislatures in accordance with their respective constitutional responsibilities.

It is not known at this moment what attitude the Reagan Administration will take on such covenants. Given the Senate's present membership and the known views of key committee chairpersons, one cannot anticipate a high degree of enthusiasm for international covenants on human rights. Whatever the present prospects, however, one can reflect on many turbulent events that have occurred since the proclamation of the Universal Declaration of Human Rights more than thirty years ago, and find reason to be-

lieve that the most revolutionary and powerful political force in the world today remains the simple notion that governments derive their just powers from the consent of the governed and that those who treat simple human dignity with contempt do so at their peril.