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Aggressive Smugness: The United States and International Human Rights

*Bryant G. Garth**

The United States is at once both the best friend and most strident foe of international human rights. The eighteenth century ideal of the "rights of man" helped to inspire the American revolution, and this tradition has provided considerable impetus for the international human rights movement.¹ After the Second World War, in fact, Eleanor Roosevelt of the United States was a key figure in the creation of the Universal Declaration of Human Rights and the development of the International Covenants.² And it is probably true that leaders in the United States invoke the language of human rights unusually often and with particular vigor in international discourse.³ Every year the Department of State prepares a lengthy study entitled *Country Reports on Human Rights Practices*, and submits it to the Congress pursuant to legislative mandate.

Yet the United States has yet to ratify any of the major international human rights agreements; nor does it participate in the human rights conventions of the International Labor Organization. Remarkably to the outsider, the United States Senate still has failed even to ratify the Genocide Convention of 1948. In short, the United States has chosen to stand aloof from the burgeoning *international* institutional and legal framework for the protection of human rights. That is why an appropriate title for this report is "aggressive smugness."

Since the basic situation in the United States is well-known, this report will not provide detail on the domestic setting for the protection of human rights. It will begin by summarizing the domestic institutional situation, linking it to the prevailing domestic political ideology, and discussing why, with a few exceptions, the United

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1. L. Henkin, *The Rights of Man Today* (Boulder: Westview Press, 1978).

2. J. Humphrey, *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry: Transnational Publishers, 1984).

3. See, e.g., W. Korey, *Human Rights and the Helsinki Accord* (Euphrata, Pa.: Science Press 1983).

States has opted out of the international framework and remained essentially smug.

The second part will explore the aggressiveness that can also be found, especially in three areas: (1) treating international human rights as customary international law or a plausible interpretation of the U.N. Charter; (2) using international standards in the implementation of U.S. foreign policy; and (3) promoting international human rights through the activities of non-governmental organizations. The third part will then critically assess the approach found in the United States.

I. The Domestic Setting and the Protection of Human Rights

One proposition provides the starting point. Almost no one in the United States would trade the protections of human rights in domestic law for the promise of an international scheme. The domestic scheme is basic to the U.S. self-image, and the reasons for that premise are well-known. The written constitution, the Bill of Rights, and judicial review by the Supreme Court comprise the institutional structure for federal law; and each state has its own constitution and its own supreme court. This general pattern represents an article of faith among the American public.

Among the most notable achievements of the U.S. Supreme Court in interpreting the U.S. Constitution are in the areas of freedom of speech and of the press, protection against discrimination on the basis of race, ethnicity, religion and, to a lesser extent, gender; safeguards for criminal defendants, including a mandate to provide counsel and to exclude illegal confessions or illegally-obtained evidence; and liberal requirements for an adequate hearing before property can be taken from an individual by the state, even temporarily. Whatever the composition of the U.S. Supreme Court, most of these doctrines are solidly entrenched in American constitutional law.

Those who oppose the ratification of the major international human rights treaties cite these achievements and make three major arguments. One, which had much more power before the 1960s, was that such treaties would disrupt the balance of power between the federal and state governments. States, the argument went, were the primary protectors of human rights for individuals; and the standards set out in a treaty would unduly or perhaps unconstitutionally federalize the law. States would lose the ability to experiment with their own approaches to the protection of human rights. Variations of this argument still surface,⁴ but it has lost much of its force today.

4. Hearings before the Committee on Foreign Relations, U.S. Senate, 98th

Federal law today substantially overshadows state law in the human rights area.

Second, it is feared by opponents of the conventions that ratification will allow foreign dominated institutions and perhaps also foreign countries to assume jurisdiction over matters that can be handled adequately within the United States. According to former Senator Sam Ervin, testifying recently against ratification of the Genocide Convention, the Convention would subject "our citizens and other persons within our territorial jurisdiction to trial, conviction, and sentence for acts of genocide committed in the United States by an international penal tribunal where they would not be surrounded by the constitutional safeguards and legal rights accorded persons charged with domestic crimes."⁵ In the words of Howard Phillips, Chairman of the Conservative Caucus, "There is absolutely no sound argument for making American citizens subject in any way to the World Court, or other international bodies heavily influenced and sometimes dominated by personnel from Communist dictatorships."⁶ These views still have much support even though the Reagan administration has chosen to favor ratification—at least in principle—of at least the Genocide Convention. The negative opinion is probably enough once more to prevent ratification of even the Genocide Convention.

Third, there is a widespread concern that treaty obligations could undermine or otherwise adversely affect rights protected currently in the United States.⁷ This fear has led the Presidents who have submitted the human rights treaties to the Senate to propose reservations or understandings that would, for all practical purposes, assure that the conventions would have no impact on domestic law.⁸ President Carter thus sent the International Covenant on Economic, Social, and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of all Forms of Racial Discrimination; and the American Convention on Human Rights to the Senate on February 23, 1978; but he included reservations, for example, on freedom of speech,⁹ capital

Cong., 2d Sess., on the Convention on the Prevention and Punishment of the Crime of Genocide Sept. 12, 1984, at 7 (Comm. Print 1984).

5. *Id.* at 15.

6. *Id.* at 81.

7. This is the argument for limitations on the genocide convention, criticized in LeBlanc, "The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding," 78 *American Journal of International Law* 369 (1984).

8. R. Lillich, *U.S. Ratification of the Human Rights Treaties: With or Without Reservations* (Charlottesville: Univ. of Virginia Press, 1981).

9. For example, Art. 4 of the Convention on the Elimination of All Forms of Racial Discrimination condemns propaganda and organizations based on racial hatred or superiority. The U.S. Constitution has been interpreted to permit such advocacy of ideas on the theory of "free marketplace of ideas."

punishment,¹⁰ and double jeopardy,¹¹ in addition to a general understanding that the provisions of the two covenants would not be "self-executing."¹² Ratification would accordingly have had no specific impact on U.S. law.

The current attitude, therefore, clearly reflects an unwillingness among policy makers to effect changes in the positions of human rights in the United States through the mechanism of new international obligations. Some commentators take a different approach, and a few have promoted the idea that the eighteenth century constitution of the United States can in effect be modernized by ratification. They hope, for example, that the International Covenant on Economic, Social, and Cultural Rights might foster the development of new protections of "social rights."¹³ They note that in the 1960s there was a movement in the United States to constitutionalize some aspects of the welfare state, but it failed in part because of the limitations of the U.S. constitutional text. The current political climate, in any event, as discussed below, is quite hostile to the creation of "rights" to the governmental benefits and programs.

Indeed, many persons allied with the Reagan administration have been arguing in recent years that the courts have gone too far in interpreting the U.S. Constitution.¹⁴ They wish to halt what they see as a profligate expansion of rights led by legal activists and promoted by federal judges. And they would favor a retreat to an interpretation of the Constitution closer to the vision of the framers in the eighteenth century. Within the United States, therefore, there is very little momentum for the idea that the country should commit itself fully to the "international bill of rights."

II. PROMOTING THE NOTION OF INTERNATIONAL HUMAN RIGHTS

The opinions of most commentators in the United States, reflected in the draft of the Restatement of the Law on Foreign Relations, understandably looks beyond new treaty commitments. It emphasizes the binding nature of international human rights for the

10. An example is Art. 5 of the International Covenant on Civil and Political Rights, which forbids the execution of persons under the age of 18 or pregnant women.

11. Under U.S. law, it is not an unconstitutional violation of the double jeopardy principle if there is a second trial by federal as opposed to state courts.

12. According to Professor Henkin, one defining U.S. principle in submitting the treaty was that, "while the U.S. will adhere to this covenant, it will not agree to any change in U.S. law as it is today." Henkin, "The Covenant on Civil and Political Rights," in R. Lillich ed., *supra* note 8 at 22.

13. See, e.g., Good, "Freedom from Want: The Failure of United States Courts to Protect Subsistence Rights," 6 *Human Rights Quarterly* 335 (1984); M. Perry, *The Constitution, the Courts, and Human Rights* (New Haven: Yale, 1982).

14. See, e.g., R. Morgan, *Disabling America* (New York: Basic Books 1984); T. Sowell, *Civil Rights: Rhetoric or Reality* (New York: William Morrow, 1984).

United States and others regardless of the ratification of the major instruments. The sources for the binding nature are seen to be the U.N. Charter, the Universal Declaration on Human Rights, or simply customary international law.¹⁵ The draft Restatement, for example, explains its emphasis on customary human rights law as follows:

Almost all states are parties to the U.N. Charter, which contains human rights obligations. While there has been no authoritative determination of the full content of those obligations, it is increasingly accepted that state parties to the Charter are legally obligated to respect at least some of the rights recognized in the Universal Declaration. A violation of the rights protected by customary law . . . may be seen as a violation of the Charter too.¹⁶

This emphasis on the Charter and customary law, although not without detractors,¹⁷ has been used to make international human rights significant both in the United States and with respect to foreign policy decisions. For present purposes three cases merit attention for their emphasis on international law in the U.S. courts. The first points to the potential to fill gaps in the United States and the others to using U.S. courts to punish abuses that take place elsewhere.

In the case of *Rodriguez-Fernandez v. Wilkinson*,¹⁸ the plaintiff was an individual who had tried to enter the United States as part of the "Freedom Flotilla" from Cuba in 1980. He was found to be "excludable" because he had committed a crime in Cuba, and was detained indefinitely in a federal prison because Cuba would not take him back. He sued to challenge the detention under federal law, the U.S. Constitution, and international customary law. The federal district court found that he had no constitutional rights because of his status as an excludable alien, that federal law also did not protect him, but that nevertheless "arbitrary detention is prohibited by customary international law."¹⁹ The case was justly celebrated by commentators as a unique example of international law expanding the rights of persons within the territory of the United States.²⁰

Reflecting a traditional reluctance of the courts to base deci-

15. See, e.g., D'Amato, "The Concept of Human Rights in International Law," 82 *Columbia Law Review* 1110 (1982).

16. American Law Institute, *Restatement of the Law, Foreign Relations*, § 701 (Tentative Draft No. 3, March 15, 1982).

17. See, e.g., Watson, "Normativity and Reality in International Human Rights," 13 *Stetson Law Review* 221 (1984).

18. 550 F. Supp. 787 (D. Kan. 1980); 654 F.2d 1382 (10th Cir. 1981).

19. 505 F. Supp. at 718.

20. See generally, "A Discussion of Human Rights in the 1980's," 4 *Houston Journal of International Law* 133 (1981); "Symposium, Conference on International

sions on international law, however, the Court of Appeals for the 10th Circuit declined to uphold the lower court's reliance on international law. Nevertheless, the appellate court also found that international law should be taken into account in interpreting the relevant statutes and the Due Process clause of the U.S. Constitution.²¹ When in doubt as to the proper meaning of a constitutional provision, accordingly, the decision suggests that courts should look to international human rights provisions and try to interpret the constitutional provisions to be in harmony.

Both these approaches, therefore, offer some promise for a domestic impact of international human rights—at least in limited areas. So far they are relatively isolated decisions, but there is no doubt that they provide good evidence that judges are today more willing in the United States to at least entertain arguments that international human rights have some bearing on the resolution of domestic lawsuits.²²

Such enthusiasm was also generated by the case of *Filartiga v. Pena-Irala*.²³ The Court of Appeals for the Second Circuit allowed a lawsuit to proceed between Paraguayan nationals for torture and death alleged to have taken place in Paraguay. The basis for the cause of action in the courts of the United States was a little-known law enacted in 1789 entitled the Alien Tort Claims Act. It granted jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁴ According to the Court of Appeals, supported by an amicus memorandum of the U.S. Department of State, “deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”²⁵ On remand, the district court recognized a tort based on the law of nations,²⁶ which then provided the substance for a case granted jurisdiction by the Alien Tort Claims Act. Accordingly, the court in 1984 awarded the plaintiffs over 10 million dollars for the torture and death of the brother and son of the plaintiffs.

Human Rights Law in State and Federal Court,” 17 *University of San Francisco Law Review* 2 (1982).

21. See generally, Christensen, “The Uses of Human Rights Norms to Inform Constitutional Interpretation,” 4 *Houston Journal of International Law* 39 (1981).

22. For a recent perspective see Lillich & Hannum, “Linkages Between International Human Rights and U.S. Constitutional Law,” 79 *American Journal of International Law* 158 (1985).

23. 630 F.2d 876 (2d Cir. 1980).

24. 28 U.S.C. § 1350.

25. 630 F.2d at 884. The State Department Memorandum can be found in 19 *International Legal Materials* 585 (1980).

26. 577 F. Supp. 860 (E.D.N.Y. 1984).

This remarkable civil lawsuit thus allowed U.S. courts to police certain international activity by creating a tort for damages to remedy violations of international human rights.²⁷ Of course, it is not clear how much this case extends beyond torture, nor its relationship to the defense of act of state, cleverly circumvented in this case; and the case also depends on the fortuity of finding the defendant within the United States for the purpose of jurisdiction. The potential for such a legal development would thus be difficult to realize at best. Even on limited terms, however, it is far from clear that this precedent will lead very far.

Plaintiffs in the recent case of *Tel-Oren v. Libyan Arab Republic*²⁸ tried to build on the holding of *Filartiga*. A number of Israeli citizens and a few others who were the survivors and representatives of deceased victims of an armed attack on a bus in Israel in 1978 brought suit in Washington D.C. They alleged torture and summary executions against a group of defendants including the Libyan Arab Republic and the Palestine Liberation Organization. The district court refused to grant jurisdiction, and the Court of Appeals affirmed, focusing on the problem of jurisdiction over the Palestine Liberation Organization. The three opinions agreed that it would be inappropriate to extend *Filartiga* to an incident where there was not *official* torture. But they disagreed strongly as to whether the Alien Tort Claims Act merely granted jurisdiction or also recognized or created a substantive claim. They therefore reargued the implications of *Filartiga*, with Judge Bork's opinion suggesting that *Filartiga* cannot stand up in its finding that the U.S. courts would provide a remedy for the torture. Thus, while the holding of the *Tel-Oren* case may be defensible, two of the three opinions²⁹ suggest a remaining hostility to lawsuits brought on the basis of international customary human rights law and the Alien Torts Claim Act.³⁰

The enthusiasm for this vision of international human rights law continues, nevertheless, and it is found also in the activities of the various non-governmental human rights groups currently found in the United States. Among the more notable groups are the Law-

27. See discussion in Blum and Steinhart, "Federal Jurisdiction over International Human Rights Claims: 'The Alien Tort Claims Act After *Filartiga* v. Penabaz-Cordero,'" 22 *Harvard International Law Journal* 52 (1981).

28. 517 F. Supp. 542 (D.D.C. 1981), 726 F.2d 774 (2d Cir. 1984). See also, *Siderman v. Argentina* (D.C. Cal. 1985) (not yet published) (sovereign immunity held to prevent suit claiming damages for torture against the government of Argentina); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985) (sovereign immunity also).

29. One of the three opinions relied on the "political question doctrine." 726 F.2d at 823.

30. See the criticisms by D'Amato in 79 *American Journal of International Law* 92 (1985).

yers Committee for International Human Rights, International Human Rights Law Group, Americas Watch, and Helsinki Watch, in addition to active branches of the International Commission of Jurists and Amnesty International. It is probably fair to say that in recent years there has been a dramatic increase in the number and scope of activities of these and similar organizations. According to a recent assessment of "public interest law" in the United States,

While a variety of fields such as civil rights, environmentalism, and consumerism have become part of the institutional fabric of public interest in this country, international human rights issues, most notably immigration topics, are becoming the new public interest frontier of the Eighties with lawyers carrying their involvement into U.S. courts, international forums, and courts abroad.³¹

One of the focal points of these organizations is the foreign policy of the United States as it applies to international human rights.

It is often stated by such activists that the Reagan administration has undermined the Carter Administration's focus on human rights. According to David Carliner, the Chairman of the International Human Rights Law Group, for example,

I think that President Carter is entitled to enormous gratitude from the people of the world because he has recognized the White House as a conspicuous public pulpit. A statement made from the White House in support of human rights that is made eloquently . . . has an enormous electrifying effect for people not only in the United States but particularly in those countries where people have suffered violations of human rights.

This is not a question of diplomacy, of conducting negotiations among various countries, but it is making the concern about human rights a primary focus of administration. I think that the [Reagan] administration has not used that occasion.³²

Using various forums, the human rights organizations keep persistent pressure on the Reagan administration to modify its approach to foreign policy.

It is important, however, to distinguish several aspects of U.S. foreign policy as it concerns international human rights. First, the statutory framework remains essentially the same as it was during the Carter administration. Second, it may be, as the Reagan admin-

31. "Public Interest on a Global Scale," in *Pipeline*, Fall 1984 at 4.

32. Hearing before the Subcommittee on Human Rights and International Organizations of the Committee on Foreign Affairs, House of Representatives, 98th Cong. 1st Sess. March 3, June 28, Sept. 21, 1983, at 90 (Comm. Print, 1984).

istration insists, that the administration has changed more the style than the substance of foreign policy on human rights generally. And third, there has been a Reagan initiative in human rights; the Reagan administration contends that its positive efforts on behalf of "democracy" improve upon the Carter reactive approach.

Federal law requires that human rights be considered in various ways in the foreign policy process. The first legislative enactment came well before the Carter Administration. The Foreign Assistance Act of 1973 provided that it was "the sense of Congress" that no foreign aid be given to a foreign government "which practices the internment or imprisonment of that country's citizens for political purposes."³³ Just prior to and during the first years of the Carter administration, Congress amended the Foreign Assistance Act of 1961 to strengthen that sense into a legal requirement:

Except under circumstances specified in this section ["extraordinary circumstances"], no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. . . .

[T]he term "gross violations of internationally recognized human rights" includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person. . . ."³⁴

The law also imposes a reporting requirement on the Executive branch, which leads to the *Country Reports* already mentioned. And numerous other laws also draw on a comparable basis on the situations regarding human rights in particular countries.³⁵ The reports are generally recognized to be accurate in most respects, but of course the real question is how the Reagan administration (and indeed its predecessor as well) uses the reports. It is clear, as noted before, that the rhetoric of this administration has changed.

First, the emphasis is colored strongly by the administration's strident anti-communism. That leads to the strongest possible statements being made about conditions within Eastern Europe, the Soviet Union and its allies, while it leads to a "quiet diplomacy" among countries friendly to the United States and opposed to communism,

33. For the history see e.g., N. Petro, *The Predicament of Human Rights* 13 (Lanham, Md.: University Press 1983).

34. 22 U.S.C. § 2304.

35. See International Human Rights Law Group, *U.S. Legislation Relating Human Rights to Foreign Policy* (3d ed. 1982).

such as Chile, El Salvador, the Philippines, and South Africa. While the Carter administration also remained pretty quiet with certain countries, such as Indonesia, it did act openly and with some power in a few instances, such as with respect to Argentina and Guatemala.³⁶

The justification for the general differential treatment under Reagan is in part a belief that such "authoritarian" countries may evolve into democracies if we continue to support them, while our opposition could push them toward communism. In the words of Elliot Abrams, Assistant Secretary of State for Human Rights and Humanitarian Affairs, defending aid to El Salvador,

In Vietnam, in Nicaragua, in Iran, we were told that the government we supported was corrupt and oppressive and that the other side was the progressive side and would respect democracy. . . . We want to be very sure that in a situation such as El Salvador, we do not trade the serious but solvable human rights problems of today for a permanent Communist dictatorship. Resisting the expansion of communism is a key human rights goal.³⁷

The administration is thus quieter about the abuses and less willing to impose sanctions on U.S. "allies." That does not necessarily mean that the Reagan administration is less committed than its predecessor to human rights; indeed, the invasion of Grenada might be seen as part of the Reagan approach to human rights. The administration simply defines that commitment in terms of its general preoccupation with communism and the Soviet Union.

On the "positive side," in addition, the emphasis is on democracy, which is "the nearest thing we have to a guarantee of human rights."³⁸ Thus considerable importance is attached to elections in, for example, El Salvador, Guatemala, Honduras, and the Philippines in the *Country Reports* for 1984, even though in other respects the countries are criticized pretty strongly. According to Secretary of State Schultz, "Elections are a practical yardstick of democracy,"³⁹ and the administration has celebrated the number of persons who have participated in elections during the past several years.

36. Cohen, "Conditioning U.S. Security Assistance on Human Rights Practice," 76 *American Journal of International Law* 246 (1982).

37. N. Petro, *supra* note 33, at 55.

38. Department of State, *Country Reports on Human Rights Practices for 1984* 1440 (1985).

39. Hearings before the Subcommittee on Western Hemisphere Affairs of the Committee on Foreign Affairs, House of Representatives, 98th Cong. 2d Sess. June 6, 26, and July 31, 1984 (Comm. Print 1984).

III. A PERSPECTIVE ON THE U.S. APPROACH

The most obvious limitation on the approach of the United States to international human rights is the dependence on customary international law rather than the important international treaties yet to be ratified by the U.S. Senate. The general U.S. smugness about its own human rights record and the reluctance of U.S. politicians to submit to judgment according to foreign or international standards clearly limits the role that international human rights can play. It would be foolish to expect this situation to change in the immediate future.

The United States is thus limited in the "law" that it can invoke in its analyses of human rights conditions elsewhere. It cannot, for example, easily argue that another country is in violation of commitments undertaken according to one of the International Covenants. This makes even more difficult the distinction between "law" and "politics" or "ideology" that supporters of international human rights seek to invoke. Human rights activists understandably fear that they will be labelled as "political."

The Reagan administration not surprisingly has itself been criticized on the ground that it fails to keep close enough to the law. To quote again from David Carliner, Chairman of the International Human Rights Law Group, "the human rights policy of this administration is based on ideology rather than law. Communism is seen as the worst human rights violation and to prevent that, other abuses will be endured."⁴⁰ It is difficult, if not impossible, to make such a neat distinction, but the effort to make it has had a clear impact on all participants in these debates.

One vision of "ideology"—anti-communism—is easy to see, but there is a deeper sense in which the current administration and most U.S. groups are wedded to ideology in their positions on human rights. A central domestic theme of the administration, for example, has been to cut back on governmental services, promote private enterprise, and dismantle as much as possible of the apparatus of the so-called "welfare state." The general faith is of course that economic growth from private enterprise will make everybody, including the poor, better off than they would be from governmental programs.⁴¹ The Reagan opposition to communism relates closely to this politico-economic vision.

Thus, while the Carter administration paid some attention to the idea of "socio-economic rights" as represented in the International Covenant on Economic, Social, and Cultural Rights and in the

40. Hearings, *supra* note 32, at 48.

41. See, e.g., note 14 *supra*.

Universal Declaration, the Reagan administration has taken a hostile attitude. According to Jeane Kirkpatrick, then U.S. Ambassador to the United Nations,

[The Carter administration] used a concept of human rights that was far too broad. It included not only legal personal rights, such as freedom from arbitrary arrest and torture and a guarantee of due process, and a full range of democratic rights, such as freedom of speech, assembly, elections, but also a full range of economic rights—the right to food, shelter, education, medical care—which amounted to the demand that all countries become affluent social democracies.⁴²

The *Country Reports* since 1982 no longer refer to the terms, economic and social rights. The explanation is that “the idea . . . is easily [sic] abused by repressive governments which claim that they promote human rights even though they deny their citizens the basic rights to the integrity of the person, as well as civil and political rights.”⁴³

This position leads the United States to an unwillingness to question the distribution of goods, services, and even power in any given society, as long as the economy is mainly privately owned and certain formal rights are respected (or “gaining” respect). The current attention to the process of elections as the key to democracy reflects a comparable unwillingness to look beyond the market. This unwillingness in turn blinds policymakers to the broader issues that are unavoidably linked to the election process.

As Garry Wills wrote in 1969,

Free elections are created by free men, not vice versa. The machinery of election will not call up, establish, or guarantee political freedom. The belief that it will reveals our trust in “the market,” our belief that *competition* of itself makes excellence prevail. Our faith in the electoral process is based entirely on myths of the market. We think we can be “open” to all political alternatives (we cannot). . . . We think the process will work automatically for others (it will not).⁴⁴

Before elections take place, important questions of power must be resolved, including who gets to vote, what the institutions of government will be, and who will be permitted to serve in them. The U.S.

42. “Overhaul U.S. Policy on Human Rights? Pro and Con,” *U.S. News and World Report*, March 2, 1981, at 49.

43. Department of State, *Country Reports on Human Rights Practices for 1982* 5 (1983).

44. G. Wills, *Nixon Agonistes* 416 (New York: Signet 1971).

emphasis on elections, to the neglect of other questions raised by a broader and seemingly more "political" conception of human rights, implies a particular ideology of economy and politics.

The prevailing idea that a focus on certain "legal personal" and civil rights along with political procedures is the only appropriate "non-political" human rights activity also affects in important ways the activities of non-governmental organizations based in the United States. They have spent little time on issues beyond "violations against the integrity of the person"—"torture, disappearances, killing, denials of due process. . . ." ⁴⁵ One justification for this concern is of course that such issues appear most pressing, but it should be noted that the focus is consistent with the administration's avoidance of any explicit discussion of power and the distribution of resources. The organizations want to be based on law, and the U.S. position seems to limit the "non-political" realm quite severely. Almost any concern with the quality of life beyond torture and disappearances may be deemed to be political.

The limitations of the approach to international human rights taken by both the non-governmental organizations and the Reagan administration are notable for several additional reasons not generally recognized. The concluding part of this report will suggest some potential impacts that ought to be considered.

First, the considerable international enthusiasm, at least among commentators, ⁴⁶ for a "generational" model of human rights fares poorly in the United States. The United States either stays away or is actively hostile to social and economic rights and even more adverse to such ideas as a "right to development." To the extent that international human rights is supposed to synthesize the positions of East and West, and North and South, the United States is currently not willing to go beyond its own traditional ideological position.

Second, there may be a disturbing implication, namely that the newer claims of right are "luxuries" that must take second place to the needs for economic growth of individual nations. The Reagan administration position can be seen as an argument for the primacy of certain rights *and* economic growth of a private economy. Other rights will not be recognized if they challenge the growth. While this is not the place to develop the argument, note the potential parallel to one that can be made by countries more wedded to the economic and social rights. They can assert that such "basic" rights and economic growth are essential, while civil liberties and other indi-

45. Hearings, *supra* note 32, at 88 (statement of Michael Posner).

46. See, e.g., Sohn, "The New International Law: Protections of the Rights of Individuals Rather than States," 32 *American University Law Review* 1 (1982).

vidual rights must take second place to the requirements for growth (not necessarily under a market economy).

Finally, the current position in the United States may have an impact in particular situations. The best example is probably the condition of migrant workers from Mexico who seek employment in the United States. At present there are millions of undocumented workers in the United States without permission to be there.⁴⁷ The current situation is characterized by many as a crisis, but the question is what to do about it. One possibility is to allow more immigration; another is to try harder to control the American borders. A third is a "rotation system" of guestworkers denied the rights of U.S. citizens or even the possibility of becoming such citizens.⁴⁸ Such a system has been rejected since the 1960s on "human rights" grounds, but the argument today is increasingly that guestworkers make good "economic" sense because they promote growth and limit the expenditures of the welfare state. It appears that U.S. policy is moving strongly in that direction under the current administration.⁴⁹ Some commitment to economic and social *rights* might make such a policy questionable.⁵⁰ The question, put simply, is whether the United States treats foreign workers as mere factors of production or as entitled to a certain base of human rights including, for example, the following one enumerated in the Covenant on Economic, Social, and Cultural Rights:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, . . . national or social origin, . . . or other status

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the

47. See generally P. Brown and H. Shue, eds., *The Border that Joins: Mexican Migrants and U.S. Responsibility* (Totowa: Towman & Littlefield, 1982).

48. The assumption of a rotation or pure migrant worker system is that the workers will depart rather than utilize such welfare state benefits as unemployment insurance; they are supposed therefore to absorb the fluctuations of the market.

49. Pear, "U.S. Plans to Ease Alien Labor Rules," *N.Y. Times*, January 27, 1985, at 1 col. 5.

50. For perspectives on the human rights issues, contrasting the domestic economic orientation with emerging, but not yet accepted, human rights perspectives, see United Nations, *Migrant Workers: Pertinent Legislative and Administrative Regulations on the Welfare of Migrant Workers and their Families* (New York, 1983). See also Chaney, "Migrant Workers and National Boundaries: The Basis for Rights and Protections," in *Boundaries* 37 (P. Brown & H. Shue eds., Totowa, N.J.: Rowman & Littlefield, (1981); Garth, "Migrant Workers and Rights of Mobility in the United States and Western Europe," in *Forms and Potential for a European Identity* (M. Cappelletti, M. Seccombe, J. Weiler eds., forthcoming 1985).

present Covenant to non-nationals.⁵¹

The idea is that nationals and non-nationals should be treated comparably in developed nations. The rotation system of guestworkers rejects that idea.

CONCLUSION

The United States today takes human rights very seriously both domestically and in foreign policy, but the vision of human rights is a relatively narrow one. With respect to the domestic situation, there has been a pronounced unwillingness to become participants in the systems set up by the major international human rights treaties. While there has been some increased willingness to invoke customary law in the U.S. courts, those situations will be infrequent and not very disruptive. Pride in U.S. accomplishments, in short, does not lead many to want to submit to international measures.

The U.S. approach to human rights in other nations, both historically and in recent years, reflects the domestic smugness. The emphasis has been on the extremes of torture and disappearances, colored especially in this administration by an overriding anti-communism. And even those who do not share that aspect of the administration's ideology also are restrained in their approaches to what is and is not within the domain of human rights for activist groups. The ideal promoted in foreign policy is a gradual evolution of market economies toward economic growth, less domestic repression of dissident groups, and more or less open elections.

The danger is that this image fails to accommodate other views of economic priorities and the relative importance of particular policies and individual rights. The "double standard" is by now a routine criticism by everyone against everyone else in international affairs, and most countries are guilty to some extent. It is clear that the administration believes in a double standard—market economies are entitled to the benefit of any doubt, while countries that appear to be socialist or communist are questioned. Elections in Nicaragua are looked at very differently from elections in El Salvador. It may be that this double standard encourages some of the other notorious double standards in the world.

Finally, as noted above, the U.S. unwillingness to embrace the ideas of other views of human rights may help promote policies based on economic expediency and inconsistent with the high ideals to which many in the United States aspire. There will be important domestic debates in the next few years on precisely this important

51. International Covenant on Economic, Social, and Cultural Rights, Art. 2.

question: the line between the domain governed by “economic rationality” and the domain governed by claims of right.