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Introduction

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INTRODUCTION

Richard B. Lillich*

For twenty years after the adoption in 1948 of the Universal Declaration of Human Rights,¹ progress in the area of the international protection of human rights was confined almost exclusively to clarifying and codifying the substantive law norms: nearly two dozen covenants and conventions, for instance, were promulgated during this period under the auspices of the United Nations alone. Comparatively little progress, on the other hand, was made toward creating effective procedural machinery to protect the rights of individuals throughout the world. After 1968, which was celebrated as International Year for Human Rights, a much-needed evaluation of the entire human rights area, substantive and procedural, began. In a landmark article, Professor Richard B. Bilder, long a supporter of the human rights movement, raised a series of hard questions about the efficacy of the international approach.² At the same time Mr. John Carey, in a provocative monograph, surveyed in nuts and bolts fashion various existing and proposed UN implementation techniques.³ The eight articles in the present Symposium, much to the credit of the Board of Editors of the *Santa Clara Lawyer*, represent yet another valuable contribution to the continuing reassessment of where we stand and where we should go in this most important area of international law.

For the lawyer and the concerned citizen in the United States, the Symposium brings home the necessity for action on three fronts. First, the United States, long a vocal advocate of the international protection of human rights, must start to practice what it has been preaching. Its timid approach to the ratification of human rights conventions—of the three minor conventions President Kennedy transmitted to the Senate for its advice and consent in 1963, only the Supplementary Convention on Slavery⁴ received the consent

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¹ G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948).

² See Bilder, *Rethinking International Human Rights: Some Basic Questions*, 1969 Wis. L. Rev. 171.

³ See J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS (1970) [hereinafter cited as J. CAREY].

⁴ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, [1967] 18 U.S.T. 3201, T.I.A.S. No. 6418 (effective Dec. 6, 1967).

of the Senate and subsequently was ratified—must give way to a vigorous policy aimed at the prompt approval of as many of these conventions as possible. The spurious constitutional arguments against ratification, based upon the mistaken belief, reiterated by Professor Raymond in his contribution to this Symposium, that “human rights are matters that concern the relations between a government and its subjects, or between the people themselves, and that they can only be dealt with by internal action of the country concerned,”⁵ have long been discredited.⁶ Mr. Bitker captures the present writer’s astonishment at their invocation today in his first sentence: “It is unbelievable in light of American history that anyone could question the right of the United States to enter into international agreements to protect human rights.”⁷ He rightly notes that “[i]n the national interest as well as in the interest of men everywhere, the United States should act promptly in ratifying those human rights treaties which it has supported in the United Nations and its affiliated agencies.”⁸

Secondly, the United States, assisted by lawyers, concerned citizens, and private organizations, must make a greater effort to survey recent and contemplated human rights conventions, and to identify other areas where the international approach to the pro-

⁵ Raymond, *Genocide: An Unconstitutional Human Rights Convention?* 12 SANTA CLARA LAW. 294, 306 (1972). Recent events in Bangladesh, in the opinion of most observers, have demonstrated beyond a doubt that “genocide is a matter of international concern and is, therefore, an appropriate subject for the exercise of the treaty-making power. In our shrinking world the massive destruction of a racial, religious or national group in one country has its impact on members of this group in other countries, stimulates demands for intervention and inevitably troubles international relations.” Goldberg & Gardner, *Time to Act on the Genocide Convention*, 58 A.B.A.J. 141, 142 (1972). Last year the Foreign Relations Committee, accepting this reasoning, recommended that “the Senate give its advice and comment to ratification of the Genocide Convention by an overwhelming vote.” S. EXEC. REP. NO. 92-6, 92d Cong., 1st Sess. 18 (1971). Its Chairman, Senator Fulbright, correctly prophesized “that action by the full Senate might be delayed pending the drafting of legislation to carry out the treaty within the United States.” N.Y. Times, March 31, 1971, at 11, col. 1.

⁶ See e.g., McDougal & Arens, *The Genocide Convention and the Constitution*, 3 VAND. L. REV. 683 (1950). More recently, Professor Henkin has demonstrated conclusively that “the argument that the United States is without power under the Constitution to adhere to such treaties has no basis whatever—in the language of the Constitution, in its *travaux préparatoires*, in the institutions it established, in its principles of federalism or of separation of powers, in almost two centuries of constitutional history, or in any other consideration relevant to constitutional interpretation.” Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1014-15 (1968). See also MacChesney, *Should the United States Ratify the Covenants? A Question of Merits, Not of Constitutional Law*, 62 AM. J. INT’L L. 912 (1968).

⁷ Bitker, *The Constitutionality of International Agreements on Human Rights*, 12 SANTA CLARA LAW. 279 (1972).

⁸ *Id.* at 292. These remarks equally apply to those treaties, such as the American Convention on Human Rights, not drafted under United Nations auspices. See text accompanying notes 9 and 10, *infra*.

tection of human rights might be most useful. The article in this Symposium by the Professors Thomas on the American Convention on Human Rights⁹ is an excellent example of the needed scholarly critique of one recent convention.¹⁰ Professor Claydon's pioneer article on the Draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,¹¹ which has received scant attention in a United Nations preoccupied by the racial issue, is another fine example.¹² Both substantively and procedurally, it seems, this draft convention has suffered from "double standard" treatment by Third World countries.¹³ Finally, Professor Bond's article, suggesting that the laws of war, one of the areas where the international community first exhibited an interest in protecting the rights of individuals, should be made applicable to all armed conflicts, whether international or internal, contains a host of valuable comments about ways to improve the substance and the implementation of the laws of war. As he observes about various pending draft documents, "[t]he urgent need now is to analyze and integrate these various proposals."¹⁴

Thirdly, and just as important, attention must be focused upon the measures and procedures which the international community must adopt if it truly wishes to guarantee the effective application of substantive human rights norms. Professors Nanda and Bassiouni, in their article on slavery, point out that "due to the clandestine nature of the slave trade at present, effective measures, which are world-wide and internationally coordinated, are necessary to destroy the remaining vestiges of the institution."¹⁵ Mr. Harris, in his perceptive comments about the Nuremberg Judgment, concludes with a plea "to create an international court of criminal justice as an independent body or as a division of the International

⁹ O.A.S. Official Records, OEA/Ser.K/XVI/1.1, doc. 65, rev. 1, corr. 1 (English 1970). The text may be found in 65 AM. J. INT'L L. 679 (1971).

¹⁰ Thomas & Thomas, *Human Rights and the Organization of American States*, 12 SANTA CLARA LAW. 319 (1972). For a considerably more pessimistic view of this convention, see Buergethal, *The American Convention on Human Rights: Illusions and Hopes*, 21 BUFFALO L. REV. 121 (1971).

¹¹ ECOSOC Res. 1233, 42 U.N. ECOSOC, Supp. 1., at 13, U.N. Doc. E/4393 (1967).

¹² Claydon, *The Treaty Protection of Religious Rights: U.N. Draft Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 12 SANTA CLARA LAW. 403 (1972).

¹³ *Id.* at 421. For other examples of this "double standard," see J. CAREY, *supra* note 3, at 143-53. See also text accompanying note 18, *infra*.

¹⁴ Bond, *Proposed Revisions in the Law of War Applicable to Internal Conflict*, 12 SANTA CLARA LAW. 223, 225 (1972).

¹⁵ Nanda & Bassiouni, *Slavery and Slave Trade: Steps Toward Eradication*, 12 SANTA CLARA LAW. 424, 441 (1972). However, one may question their conclusion that insofar as implementation is concerned the international community "must place the highest priority on those programs which lead to attitudinal changes rather than coercive-repressive measures." *Id.* at 442.

Court of Justice with jurisdiction over individuals for crimes committed by them in international law."¹⁶ Mr. Greenspan's article, however, warns us that even when procedures exist they must be utilized fairly if respect for the international approach to the protection of human rights is to be maintained, much less developed.¹⁷ His study of the various bodies set up to investigate complaints of infringement of human rights by Israel in the so-called "occupied territories" shows the extent to which the United Nations once again has applied a "double standard" against Israel, obviously for political reasons.¹⁸

This Symposium, challenging as it is, by no means exhausts the range of problems now current in the human rights field. Omitted, for instance, is any consideration of the new United Nations rules governing the right of individual petition,¹⁹ surely the most significant procedural breakthrough of the past quarter century. As Mr. Carey recently remarked, "[t]heir adoption is a milestone in the evolution of U.N. practice on human rights protection."²⁰ Such an omission, however, merely underscores the numerous issues which still need serious study if the movement to protect human rights internationally is to continue apace. By bringing pressure upon the United States to ratify existing human rights conventions, by surveying contemplated human rights conventions and identifying new areas where international agreement on the protection of the rights of individuals might be productive, and by suggesting procedural devices for the effective implementation of substantive human rights norms, lawyers and concerned citizens in the United States can contribute greatly to the protection of every man throughout the world.

¹⁶ Harris, *International Human Rights and the Nuremberg Judgment*, 12 SANTA CLARA LAW. 209, 221 (1972). In view of frequent misconceptions about the extent of the Nuremberg Judgment, it is worth noting his observation that "[g]enocide and other crimes against humanity are punishable under the Nuremberg decision only when connected with a war of aggression. . . . The Nuremberg Judgment does not, therefore, interdict genocide, or like atrocities, as crimes in international law when committed independently of war." *Id.* at —. These remarks underscore the importance of universal acceptance of the Genocide Convention. See text accompanying note 5, *supra*.

¹⁷ Greenspan, *Human Rights in the Territories Occupied by Israel*, 12 SANTA CLARA LAW. 377 (1972).

¹⁸ *Id.* at 378. See Rodley, *The United Nations and Human Rights in the Middle East*, 38 SOCIAL RESEARCH 217 (1971). See also note 13 and accompanying text, *supra*.

¹⁹ U.N. Doc. E/CN.4/Sub.2 (XXIV) CRP. 6 (Aug. 18, 1971).

²⁰ Carey, *Progress on Human Rights at the United Nations*, 66 AM. J. INT'L L. 107 (1972).