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# THE CONSTITUTIONALITY OF INTERNATIONAL AGREEMENTS ON HUMAN RIGHTS

Bruno V. Bitker\*

I feel more strongly than ever that the worth of the individual human being is the most unique and precious of all our assets and must be the beginning and the end of all of our efforts. Governments, systems, ideologies and institutions come and go, but humanity remains. The nature and value of this most precious asset is increasingly appreciated as we see how empty organized life becomes when we remove or suppress the infinite variety and vitality of the individual.<sup>1</sup>

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. However, there continues to exist a belief by some lawyers that under the United States Constitution human rights generally are not a proper subject for agreement between nations.<sup>2</sup>

This paper approaches the issue from three viewpoints: One, that the constitutional treaty power does not bar such agreements; Two, that historically the power to enter into such international agreements has been exercised by the United States since the earliest days of the Republic; and, Three, that by contract (treaty) the United States is obligated internationally to protect human rights. Within the limitations of the length of this paper, reference will also be made to questions raised as to the constitutionality of some specific provisions of certain treaties.

## HISTORICAL POSITION OF THE UNITED STATES

Entering into treaties for the protection of human rights is not uniquely American. International concern for human rights has

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<sup>1</sup> INTRODUCTION TO THE REPORT OF THE SECRETARY GENERAL, U.N. Doc. A/8401/Add. 1 at 55 (1971).

<sup>2</sup> For the principle objections by certain lawyers see Holman, *International Proposals Affecting So-Called Human Rights*, 14 LAW & CONTEMP. PROB. 479 (1949). *Hearings on Exec. O*, 81st Cong. 1st Sess. before a Subcom. of the Senate Comm. on Foreign Relations, 92d Cong. 1st Sess., at 23 (1971); *Hearings on Execs. J, K, and L*, before a Subcom. of the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. 2, 40 (1967); *Hearings on Exec. O*, before a Subcom. of the Senate Comm. on Foreign Relations, 81st Cong., 2d Sess., at 154, 206, 221 (1950).

existed for centuries.<sup>3</sup> In fact, the very first treaty entered into by the United States recognized protection of the rights of individuals: the Definitive Treaty of Peace with Great Britain, concluded at Paris, 1783.<sup>4</sup> Article VI provided, *inter alia*, that because of participation in the Revolutionary war "no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property . . . ."<sup>5</sup> Even the rights of foreign persons to go to any part of the United States for a specified period to regain assets were specifically recognized.<sup>6</sup> And, in the Jay Treaty of 1794,<sup>7</sup> which was the final formalized treaty, there are other provisions protecting individual rights.

In 1795, the United States entered into a treaty with Algiers<sup>8</sup> which related to rights of Americans in Algiers, and, *inter alia*, provided that the Consul of the United States "shall have liberty to exercise his religion in his own house."<sup>9</sup> This was an early recognition by the United States of certain rights of privacy and freedom of religion as proper subjects for an international treaty. While the phrase "human rights" may not have been in common usage in the 18th century, the individual rights then recognized would now come under the broad umbrella of human rights.

Many of these early 18th century treaties dealt with the rights of American persons abroad. They clearly demonstrate that individual rights are proper subjects for international agreements. The more modern treaties on human rights are logical developments in the protection of these rights. These developments are in keeping not only with American ideals but also with the early historical practice of the United States. Thus it may be said that concern for human rights by treaty is traditionally American.

Subsequent American history bears this out as indicated by a sampling of 19th century treaties. The treaty with Austria-Hungary of 1848 covers the right to dispose of property upon death,<sup>10</sup> a matter usually considered controlled by municipal law. The 1868 treaty with Belgium<sup>11</sup> covered matters relating to naturalization, also customarily considered sacrosanct to national sovereignty. In

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<sup>3</sup> See L. SOHN & T. BURGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (Prelim. ed. 1972). [hereinafter cited as SOHN & BURGENTHAL].

<sup>4</sup> 1 W. MALLOY, TREATIES, CONVENTIONS, ETC., BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 586 (1910) [hereinafter cited as W. MALLOY]; S. DOC. No. 357, 61st Cong., 2d Sess. (1910).

<sup>5</sup> W. MALLOY, *supra* note 4, at 589.

<sup>6</sup> *Id.* at 588.

<sup>7</sup> *Id.* at 590.

<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 34 (clauses I and II).

<sup>11</sup> *Id.* at 80.

an 1858 treaty with Bolivia,<sup>12</sup> there is what might be called an equal protection clause as well as protection against "arbitrary visits or search" of dwellings and warehouses. This sounds as if the Fourth Amendment had moved into international law.

Besides Fourth Amendment rights, the Sixth Amendment right to counsel was included in the 1828 treaty with Brazil.<sup>13</sup> This treaty also assumed equal treatment in the burial of the dead. The Protocol of 1872 to the treaty of 1871 with Germany, specified with respect to the estate of a deceased citizen, "[t]hat, according to the laws and the Constitution of the United States, Article X (of the treaty) applies, not only to persons of the male sex, but also to persons of the female sex."<sup>14</sup>

An interesting corollary to individual rights, is the individual responsibility covered in the 1842 treaty with Colombia. Article XXXV, provides that if "citizens of either party shall infringe any of the articles of this treaty, such citizens shall be held personally responsible for the same, . . . each party engaging in no way to protect the offender, or sanction such violation."<sup>15</sup> Even the phrase "international right" is used in the Colombia treaty of 1846.<sup>16</sup> It is interesting to note that the treaty of 1842 also recognizes the individual responsibility rule which was basic to the Nuremberg judgment more than a century later.<sup>17</sup> A similar provision appears in the 1828 treaty with Brazil<sup>18</sup> and in other treaties.

Under the 1803 treaty with France for the Cession of Louisiana, the United States undertook, in Article III, to incorporate the inhabitants' territory as soon as possible and "in the mean time they shall be maintained in the free enjoyment of their liberty, property and the Religion which they profess."<sup>19</sup> The treaty of 1831

<sup>12</sup> *Id.* at 114 (art. III).

<sup>13</sup> *Id.* at 137 (art. XII).

<sup>14</sup> *Id.* at 553.

<sup>15</sup> *Id.* at 313 (para. 4).

<sup>16</sup> *Id.*

<sup>17</sup> Nuremberg Judgment, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 223 (Nuremberg 1947); 6 F.R.D. 69, 110 (1947). On December 11, 1946, the General Assembly, by resolution (U.N. Doc. A/C 6/69 (1946)) affirmed the principles of the Nuremberg Tribunal and directed that the laws be codified. Subsequently, the International Law Commission adopted the principles of the Charter and Judgment which includes:

Principle I. Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.

. . . .

Principle IV. The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible. II Y.B. INT'L L. COMM. 374, U.N. Doc. A/136 (1950).

<sup>18</sup> W. MALLOY, *supra* note 4, at 143.

<sup>19</sup> *Id.* at 509.

with Mexico, Article XV, guarantees that the citizens of Mexico residing in the United States "shall be allowed the free exercise of their religion, in public or in private."<sup>20</sup>

Although not a party to the Berlin Treaty of July 13, 1878,<sup>21</sup> the United States, in 1902, on the strength of that treaty, asserted the right of diplomatic intervention on behalf of citizens of another country who were asserting their rights within that other country. The Berlin Treaty had provided that no person should be discriminated against because of religious differences. In these instances, the United States was specifically protesting the treatment of Rumanian Jews by the Government of Rumania.<sup>22</sup>

In the 20th century, a similarly wide variety of matters has been deemed proper for treaty ratification by the United States. These include the Convention on Drugs of 1912,<sup>23</sup> the Slavery Convention of 1926,<sup>24</sup> World Health Organization regulations,<sup>25</sup> the Protection and Preservation of Wild Life Convention of 1940,<sup>26</sup> and the Road Traffic Convention of 1949.<sup>27</sup> A classic example is the treaty protecting migratory birds flying over Canada and the United States.<sup>28</sup> The Supreme Court held the subject matter justified the exercise of the treaty-making power and federal legislation thereunder. It is almost ludicrous to assert that lives of migratory birds can be protected by a treaty, but that the lives of human beings cannot, as is contemplated under the Genocide Convention.<sup>29</sup>

As Professor Henkin commented:

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.<sup>30</sup>

<sup>20</sup> *Id.* at 1089.

<sup>21</sup> SOHN & BURGENTHAL at 194.

<sup>22</sup> *Id.* at 199-200.

<sup>23</sup> 38 Stat. 1912, 1937, T.S. No. 612 (1913).

<sup>24</sup> 46 Stat. 2183, T.S. No. 778 (1926).

<sup>25</sup> 7 U.S.T., T.I.A.S. No. 3482 (1948); 18 U.S.T. 3003, T.I.A.S. 6393 (1967); *Hearings on Execs. J, K, and L, before a Subcom. of the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. at 89 (Part 2) (1967).

<sup>26</sup> 56 Stat. 1354, T.S. No. 981 (1940).

<sup>27</sup> 3 U.S.T., 3008, T.I.A.S. No. 2487 (1949); *Hearings on Execs. J, K, and L, before a Subcom. of the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. at 89 (Part 2) (1967).

<sup>28</sup> *Missouri v. Holland*, 252 U.S. 416 (1920).

<sup>29</sup> Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277. The text of the Convention may be found in S. EXEC. DOC. NO. B, 91st Cong., 2d Sess. (1970).

<sup>30</sup> See Henkin, *The Constitution, Treaties, and International Human Rights*, 116 PA. L. REV. 1012, 1014-15 (1968).

In referring to the U.N. Covenants and the Protocol on Human Rights, which have not yet been sent to the U.S. Senate by the President, Professor Brunson MacChesney observes that:

The complex and important issues involved in the decision as to whether the United States should ratify the Covenants and the Protocol in their present form should not be obscured by the interjection of constitutional objections that are lacking in substance. . . . It would not be worthy of our heritage and our responsibilities to abstain on spurious constitutional grounds.<sup>31</sup>

In the light of these brief historical references to United States treaties and the observations of scholars, it is easy to understand the comment of the Clark Committee as to the constitutionality of human rights treaties: "It may seem almost anachronistic that this question continues to be raised."<sup>32</sup>

#### THE CONSTITUTIONAL POWER

The constitutionality of human rights treaties has been the subject of innumerable treatises, law review articles, and books ever since the U.N. Charter came into force on October 24, 1945.<sup>33</sup>

Under the Constitution, the power to enter into treaties and the subject matters that may be covered appear almost unlimited. The Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two-thirds of the Senators present concur."<sup>34</sup> Emphasis is given to the importance of treaties because the Constitution declares that treaties "shall be the supreme Law of the Land,"<sup>35</sup> and Congress is empowered to define and punish "Offenses against the Law of Nations."<sup>36</sup>

As early as 1796, the Supreme Court recognized the Supremacy Clause as it related to the peace treaty with England which prevented a state from eliminating debts due to British subjects.<sup>37</sup>

<sup>31</sup> 62 AM. J. INT'L L. 917 (1968).

<sup>32</sup> PRESIDENT'S COMMISSION FOR THE OBSERVANCE OF HUMAN RIGHTS YEAR, REPORT OF THE COMMISSION (1969) [hereinafter cited as CLARK REPORT].

<sup>33</sup> See, among other treatises, H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950). See also McDougal & Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 14 LAW & CONTEMP. PROB. 490 (1949); Chafce, *Federal and State Powers Under the U.N. Covenant on Human Rights*, 26 WIS. L. REV. 391 (1951); Senate Staff Study on U.N. Charter, S. Doc. No. 164, 83d Cong., 2d Sess., at 303 (1954); *Hearings on Exec. O. before a Subcom. of the Senate Comm. on Foreign Relations*, 81st Cong., 2d Sess., (1950).

<sup>34</sup> U.S. CONST. art. II, § 2.

<sup>35</sup> *Id.* art. VI, § 2.

<sup>36</sup> *Id.* art. I, § 8 (10).

<sup>37</sup> *Ware v. Hylton*, 3 Dall. 199 (1796).

Certainly, no one today would claim the right of states to avoid treaty obligations.

Power to enact a treaty has long been acknowledged by the Supreme Court. In *Geofroy v. Riggs*,<sup>38</sup> the Court said:

It would not be contended that it (the treaty-making power) extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. [Citation omitted] But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching on any matter which is properly the subject of negotiations with a foreign country.<sup>39</sup>

Despite the almost limitless powers envisioned by the *Riggs* decision, the treaty-making power does not rise *above* the Constitution. It is rather a vital element *within* the Constitution.<sup>40</sup>

It is difficult to interpret any of the principal human rights treaties approved by the United Nations, or its specialized agencies, as requiring something to be done which is contrary to the Constitution. For example, treaties declaring mass murder an international crime,<sup>41</sup> or preventing forced labor,<sup>42</sup> or securing the political rights of women,<sup>43</sup> or opposing racial discrimination,<sup>44</sup> or minimizing discrimination in education<sup>45</sup> do not authorize something which the Constitution forbids.

In 1969, a Special Committee of Lawyers of the President's Commission for the Observance of Human Rights Year, of which Justice Tom C. Clark, *retired*, was chairman, issued its report.<sup>46</sup> In his letter of transmittal, Justice Clark said:

I would like to reiterate here, however, our finding, after a thorough review of judicial, Congressional and diplomatic precedents, that human rights are matters of international concern, and the President, with the United States Senate concurring, may, on behalf of the United States, under the treaty power of the Constitution, ratify or adhere to any international human rights convention that does not contravene a specific Constitutional prohibition.<sup>47</sup>

<sup>38</sup> *Geofroy v. Riggs*, 133 U.S. 258 (1889).

<sup>39</sup> *Id.* at 267.

<sup>40</sup> See Henkin, "International Concern" and the Treaty Power of the United States, 63 AM. J. INT'L L. 272 (1969); Henkin, *The Constitution, Treaties, and International Human Rights*, 116 PA. L. REV. 1012 (1968).

<sup>41</sup> 78 U.N.T.S. 1021 (1951).

<sup>42</sup> 320 U.N.T.S. 4648 (1959).

<sup>43</sup> 193 U.N.T.S. 2613 (1954).

<sup>44</sup> G.A. Res. 2106 (1965) contained in Human Rights: A Compilation of International Instruments of the United Nations, U.N. Doc. A/CONF. 32/4 (1967).

<sup>45</sup> 429 U.N.T.S. 6193 (1962).

<sup>46</sup> CLARK REPORT.

<sup>47</sup> *Id.*

## WHY THE UNITED STATES IS CONCERNED INTERNATIONALLY

From its very beginning, the United States has been the great believer in, and advocate of, the rights of the individual. This is expressed in the Declaration of Independence, the Constitution, and the Bill of Rights. Thus, it is natural for the United States to be a leader in the world community in promoting rights so well recognized in this country. Practical reasons for such advocacy are also involved.

Although such conventions (human rights) generally specify standards already observed in the United States, it has an interest in seeing that they are observed by as many states as possible, not merely to protect its own standards, but to promote conditions abroad that will foster economic development and democratic institutions that are conducive to prosperity in the United States, and achievement of its foreign policy objectives. It cannot effectively urge other states to adhere to such conventions without doing so itself.<sup>48</sup>

During the debates before the General Assembly which, in 1948, preceded the adoption of the Genocide Convention, Secretary of State George C. Marshall said:

Governments which systematically disregard the rights of their own people are not likely to respect the rights of other nations and other people, and are likely to seek their objectives by coercion and force in the international field.<sup>49</sup>

President Kennedy summarized the United States position in his address at American University on June 10, 1963: "And is not peace, in the last analysis, basically a matter of human rights."<sup>50</sup>

## POSSIBLE OBJECTIONS TO SPECIFIC PROVISIONS

Particular objections on constitutional grounds to specific provisions of some treaties have been raised from time to time. Occasionally, these go to the phraseology of certain clauses. For example, with respect to the Genocide Convention, it was asserted that the use of the phrase "as such" in referring to the destruction of specifically named groups created an ambiguity. The use of the phrase "in whole or in part" was asserted to be so broad that the killing of only a few members of a religious body would constitute genocide. Two American Bar Association committees considered these and similar objections and found them without substance.<sup>51a</sup>

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<sup>48</sup> RESTATEMENT (SECOND) OF U.S. FOREIGN RELATIONS § 118 at 375 (1965) (Reporter's note).

<sup>49</sup> Dept. of State Publication No. 3643 (1949).

<sup>50</sup> Address by President Kennedy, American University, June 30, 1963.

<sup>51a</sup> See REPORT OF U.S. SENATE FOREIGN RELATIONS COMMITTEE, 92d Cong., 1st Sess. (Exec. Report No. 92-6 1971); *Hearings on Exec. O., 81st Cong. 1st Sess. before*

As one report concluded, they were "not of a dimension sufficient singly or together, to warrant non-ratification."<sup>51b</sup>

The U.N. International Convention on the Elimination of All Forms of Racial Discrimination has also been questioned. Although the United States on September 26, 1966, signed the U.N. International Convention on the Elimination of All Forms of Racial Discrimination, it has not yet been sent to the Senate for its advice and consent. Objections have been made to it including the usual arguments raised against other human rights treaties. One of these relates to the provision for referring disputes over the interpretation or application of the Convention to the International Court of Justice. A similar provision in the Genocide Convention was characterized as "a stock provision not substantially unlike that found in many multipartite instruments."<sup>52</sup>

One of the frequently repeated objections to most human rights treaties is that a subject for a treaty, to be a proper one, must be essentially international and not one that might be dealt with domestically.<sup>53</sup> For example, it is asserted, genocide would not be a proper matter for international agreement because murder is a domestic crime. This attempt to exclude subjects which might be of both international and domestic concern would be contrary to United States history and practice. It would also deny the ruling of *Missouri v. Holland*,<sup>54</sup> upholding an international treaty on a subject which could be dealt with domestically, wherein the Court said:

No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such (migratory) birds, but it does not follow that its authority is exclusive of paramount powers.<sup>55</sup>

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a Subcom. of the Senate Comm. on Foreign Relations, 92d Cong. 1st Sess. at 147, 196 (1971) (Reports of ABA Section of Individual Rights and Responsibilities and the Standing Committee on World Order under Law); Bitker, *Genocide Revisited*, 56 A.B.A.J. 71 (1970) corrected in 56 A.B.A.J. 296 (1970); Goldberg & Gardner, *Time To Act on Genocide Convention*, 58 A.B.A.J. 141 (1972).

<sup>51b</sup> Hearings on Exec. O, 81st Cong. 1st Sess. before a Subcom. of the Senate Comm. on Foreign Relations, 92d Cong. 1st Sess. at 178 (1971).

<sup>52</sup> 11 WHITEMAN, DIGEST OF INTERNATIONAL LAW 857 (1968). See Hearings on Execs. J, K, and L, before a Subcom. of the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. at 50-51 (1967) (letter of M.G. Torbert, Jr., Deputy Asst Sec. of State). For other specific objections see Bitker, *International Treaty against Racial Discrimination*, 53 MARQUETTE L. REV. 68 (1970); Reisman, *Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination*, 1 DENVER J. INT'L L. 29 (1971). For background analysis, see Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 INT'L & COMP. L.Q. 996 (1966).

<sup>53</sup> Hearings on Execs. J, K, and L, before a Subcom. of the Senate Comm. on Foreign Relations, 90th Cong., 1st Sess. at 21, 31, 33, 37 (Part 2) (1967).

<sup>54</sup> 252 U.S. 416 (1920).

<sup>55</sup> *Id.* at 434.

Other domestic and international conflicts are found in the area of descent and distribution of real estate. In *Zschemig v. Miller*,<sup>56</sup> concerning probate law, the Supreme Court declared: "Where these laws conflict with a treaty, they must bow to the superior federal policy."<sup>57</sup> Personal property, protection of creditors' rights, prevention of discrimination on grounds of citizenship in business opportunities, and the right to purchase and hold land are also treaty subjects both of international and of domestic concern.<sup>58</sup>

The latest in the series of treaties covering subjects of domestic concern but also of international interest is the Supplementary Convention of the Abolition of Slavery, etc., ratified by the U.S. in 1967.<sup>59</sup> *Inter alia*, this treaty obligates the U.S. to take measures to abolish debt bondage, serfdom, involuntary marriage or transfer of women for money, and the transfer of widows as inherited property. It requires the parties to the treaty to prescribe, where appropriate, suitable minimum ages of marriage and encourages free consent to marriages. These are matters which have long been thought of as being essentially of domestic concern, but neither the United States President nor the Senate had any trouble in approving the treaty. The American Bar Association also recommended ratification.<sup>60</sup>

The rule is also expressed in the Restatement on the Law of the United States Foreign Relations:

Matters of international concern are not confined to matters exclusively concerned with foreign relations. Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove the matter from international concern.<sup>61</sup>

#### UNDERSTANDINGS AND RESERVATIONS

There can be little doubt of the constitutional power of the United States to enter into human rights treaties. It does not, however, mean that the power "extends so far as to authorize what the Constitution forbids."<sup>62</sup> It is conceivable that a particular treaty may

<sup>56</sup> 389 U.S. 429 (1968).

<sup>57</sup> *Id.* at 441.

<sup>58</sup> *Hearings on Exec. O, before a Subcom. of the Senate Comm. on Foreign Relations*, 81st Cong., 2d Sess., (1950) (testimony of Solicitor General, Philip B. Perlman).

<sup>59</sup> 18 U.S.T. 3201, T.I.A.S No. 6418 (1967).

<sup>60</sup> *Hearings on Execs. J, K, and L, before a Subcom. of the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. at 9 (Part 2) (1967).

<sup>61</sup> RESTATEMENT (SECOND) OF U.S. FOREIGN RELATIONS § 117 (1965) (Comment b).

<sup>62</sup> *Geofroy v. Riggs*, 133 U.S. 258, 267 (1889).

include a provision anathema to constitutional requirements. If so, it is possible to ratify the treaty with a reservation which would exclude or modify the effect of that specific treaty provision.<sup>63</sup> It is also possible to ratify with an understanding which one party to a treaty attaches to a particular provision without changing its legal significance.<sup>64</sup>

A reservation which changes any provision of a treaty may require formal acceptance by other parties to the agreement. Some treaties contain detailed provisions as to reservations.<sup>65</sup> In contrast, an understanding is simply a unilateral statement by one party as to what it believes the treaty to mean. For example, with respect to the Racial Discrimination Convention,<sup>66</sup> a question was raised as to whether Article 4 of that treaty was in contravention to the free speech protection of the U.S. Constitution. Accordingly, when the U.S. Representative to the U.N. signed the Race Convention on September 28, 1966, he stated the understanding of the United States to be that:

The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provision of the Constitution of the United States of America.<sup>67</sup>

In the ratification process by the President and the Senate, such an understanding can be included if necessary.

#### EXISTING UNITED STATES OBLIGATIONS

Again and again the U.N. Charter speaks of human rights. Article 1 of Chapter I asserts that the United Nations is created to promote "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."<sup>68</sup> The General Assembly, under Article 13, is required to assist in the "realization of human rights and fundamental freedoms for all"<sup>69</sup> and by Articles 55 and 56, each member nation is required to pro-

<sup>63</sup> See note 52, *supra*.

<sup>64</sup> *Hearings on Exec. O, 81st Cong. 1st Sess. before a Subcom. of the Senate Comm. on Foreign Relations*, 91st Cong. 2d Sess. at 163 (1970) (letter of then Ass't Att'y General, now Justice, Wm. M. Rehnquist); *Vienna Convention on the Law of Treaties*, 63 AM. J. INT'L L. 875, 881 (1969) (art. 19). See also SENATE FOREIGN RELATIONS COMMITTEE, BACKGROUND INFORMATION 28 (2d rev. ed. 1971).

<sup>65</sup> See U.N. Convention on the Eliminations of all Forms of Racial Discrimination, G.A. Res. 2106A (1965) contained in *Human Rights: A Compilation of International Instruments of the United Nations*, U.N. Doc. A/CONF. 32/4 (1967) (art. 20).

<sup>66</sup> *Id.*

<sup>67</sup> U.S. Mission to the U.N., Press Release No. 4920, Sept. 26, 1966.

<sup>68</sup> U.N. CHARTER art. 1.

<sup>69</sup> *Id.* art. 13.

mote "universal respect for, and observance" of these rights and freedoms.<sup>70</sup> The Economic and Social Council is empowered, under Article 62, to recommend ways and means for the observance of human rights.<sup>71</sup> Under Article 68, the Council is further directed to set up appropriate commissions "for the promotion of human rights."<sup>72</sup> It would be difficult for any member to assert that it is unaware of its obligations as to human rights under the Charter.

Phillip C. Jessup, formerly a member of the International Court of Justice, succinctly stated the existing law:

It is already law for members of the United Nations, that respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which they are parties.<sup>73</sup>

In 1945, the United States Senate, by an overwhelming vote, 89 to 2, gave its advice and consent to ratification of the United Nations' Charter. This clearly indicated the positive recognition which the United States accorded to human rights. It is now late in the game to doubt this country's legal obligations under the Charter.

In a concurring opinion in *Oyama v. California*,<sup>74</sup> Justice Black recognized the U.S. obligations under the U.N. Charter as follows:

There are additional reasons now why that law stands as an obstacle to the free accomplishment of our policy in the international field. One of these reasons is we have recently pledged ourselves to cooperate with the United Nations 'to promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.' How can this nation be faithful to this international pledge if State laws which bar land ownership and occupancy by aliens on account of race are permitted to be enforced?<sup>75</sup>

Obligations of the United States and all members of the United Nations respecting Charter provisions on human rights, are also recognized in the recent Advisory Opinion of the International Court of Justice in the Namibia (South West Africa) case, rendered June 21, 1971. The Court said:

Under the Charter of the United Nations, the former Mandatory had pledged itself to observe and respect, in a Territory having an international status, human rights and fundamental freedoms for all without distinction as to race. To establish instead, and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a

<sup>70</sup> *Id.* arts. 55-56.

<sup>71</sup> *Id.* art. 62.

<sup>72</sup> *Id.* art. 68. See also Survey of International Law by Secretary General, U.N. Doc. No. A/CN 4/245, at 195-204 (April 23, 1971).

<sup>73</sup> P. JESSUP, A MODERN LAW OF NATIONS 91 (1952).

<sup>74</sup> 332 U.S. 633, 649-50 (1947).

<sup>75</sup> *Id.* at 649-50.

denial of fundamental human rights is a flagrant violation of the purposes and the principles of the Charter.<sup>76</sup>

Although the Advisory Opinion dealt with "a territory having an international status," it is clear that the pledge (meaning Charter Articles 55 and 56) referred to by the Court covers human rights and fundamental freedoms for all. As Professor Egon Schwelb concludes in analyzing the Advisory Opinion:

What is a flagrant violation of the purposes and principles of the Charter when committed in Namibia, is also such a violation when committed in South Africa proper or, for that matter, in any other sovereign Member State or in a Non-Self-Governing or Trust Territory.<sup>77</sup>

One of the universally recognized scholars in this field, H. Lauterpacht, put it this way:

The Charter of the United Nations is a legal document; its language is the language of law, or international law. In affirming repeatedly the fundamental human rights of the individual it must of necessity be deemed to refer to legal rights—to legal rights recognized by international law and independent of the law of the state. Moreover, irrespective of the question of enforcement, there ought to be no doubt that the provisions of the Charter in the matter of human rights impose upon the members of the United Nations the legal duty to respect them. In particular, it is clear that a Member of the United Nations who is guilty of a violation of these rights commits a breach of the Charter.<sup>78</sup>

#### THE POLICY OF THE UNITED STATES

United States policy toward international human rights has not been wholly consistent. From the time of the drafting of the U.N. Charter and throughout the preparation of various pertinent treaties adopted by the U.N., the United States has taken a leading part in the drafting of instruments protecting human rights. Although Americans sometimes take more credit than seems warranted, it is fair to say that the United States was frequently the moving spirit in the favorable action on these documents. The opening session of the U.N. International Conference on Human Rights in Tehran in 1968, was dominated by the memory of Mrs. Eleanor Roosevelt in advancing international recognition of human rights.<sup>79</sup>

Unhappily, however, the United States has been one of the

<sup>76</sup> [1971] I.C.J. at para. 131.

<sup>77</sup> Schwelb, *The International Court of Justice and Human Rights Clauses*, 66 AM. J. INT'L L. 337, 349 (1972).

<sup>78</sup> H. LAUTERPACHT INTERNATIONAL LAW AND HUMAN RIGHTS 34 (1950).

<sup>79</sup> Bitker, *International Conference on Human Rights*, Dept. of State Bull. 255 (Sept. 3, 1968).

laggards in ratifying the very treaties which it supported in the U.N.<sup>80a</sup> At this writing, except for the favorable Report of the Senate Committee on Foreign Relations on the Genocide Convention,<sup>80b</sup> no changes have occurred since Justice Earl Warren's statement of December 4, 1968:

How far have we come in developing this international law of human rights? Over 20 major human rights conventions have been adopted by the United Nations, the International Labor Organization, and UNESCO. A few of them are in force among the parties which have acceded to them. Unfortunately, the United States is a party to only two of them, and this status has been reached only in the last year. We are still not a party to such major conventions as the Convention on the Abolition of Forced Labor, the Convention on the Political Rights of Women, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Convention on the Elimination of all Forms of Racial Discrimination. Nor have we as yet even signed, no less ratified, the two conventions on Civil and Political Rights and Economic, Social, and Cultural Rights, which grew directly out of the Universal Declaration.<sup>81</sup>

Undoubtedly, the attitude of the organized bar has had its effect on the failure of the United States Senate to act. Many state and local bar associations as well as individual lawyers have taken public positions supporting those human rights treaties on which the U.S. Senate has held hearings.<sup>82</sup> The attitude of the American Bar Association, however, has generally been negative. In 1949, the ABA opposed the Genocide Convention<sup>83</sup> and in 1970, by a close vote of 130 to 126, declined to reverse its original opposition.<sup>84</sup>

The Association at its annual meeting in August, 1967, declared that "it supports fully, promotion by the United States, through the United Nations, of 'universal respect for, and observance of, human rights and fundamental freedoms,' for all people within all countries." At the same time, however, it declined to take action with regard to the Convention on Abolition of Forced Labor and it opposed accession to the treaty on the Political Rights of Women. Nevertheless, in the same resolution, it favored ratification of the

<sup>80a</sup> See Bitker, *Some Remarks on U.S. Policy on the Ratification of the International Human Rights Conventions*, 11 HUMAN RIGHTS JOURNAL 653 (1969).

<sup>80b</sup> REPORT OF U.S. SENATE FOREIGN RELATIONS COMMITTEE ON GENOCIDE, 92d Cong., 1st Sess. (1971) (Exec. Report No. 92-6 on Exec. O).

<sup>81</sup> E. Warren, Conference on Continuing Action for Human Rights, Dept. of State Publication No. 8463 (1968).

<sup>82</sup> See *Hearings on Exec. O, 81st Cong. 1st Sess. before a Subcom. of the Senate Comm. on Foreign Relations*, 91st Cong. 2d Sess. (1970); *Hearings on Execs. J, K, and L, before a Subcom. of the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess. (1967); *Hearings on Exec. O, before a Subcom. of the Senate Comm. on Foreign Relations*, 81st Cong., 2d Sess., (1950).

<sup>83</sup> 74 A.B.A. REP. 146 (1949).

<sup>84</sup> *Hearings on Exec. O, 81st Cong. 1st Sess. before a Subcom. of the Senate Comm. on Foreign Relations*, 92d Cong. 1st Sess. at 16 (1971).

Supplementary Slavery Convention.<sup>85</sup> The latter covers some matters usually deemed wholly domestic, such as the right of a woman to refuse to be given in marriage for a consideration. The Senate approved ratification of this treaty, but has not yet acted on Forced Labor or on Women's Political Rights.<sup>86</sup>

Attorney General Mitchell on January 26, 1970, stated his support of the constitutionality of the Genocide Convention.<sup>87</sup> Two subsequent statements of U.S. official organs, indicated the desirability of ratifying such treaties. The Report of the President's Commission for the Observance of the 25th Anniversary of the UN commented that:

The United States would be in a far stronger position to play its historic role as champion of individual rights and to take a leading part in consideration of alleged violations of international standards if it ratified the instruments it has helped to develop.<sup>88</sup>

In a similar vein, the House of Representatives Sub-Committee on Foreign Affairs, in its report on the 25th anniversary of the U.N., stated that:

We would like to see the United Nations use the occasion of its 25th anniversary to begin a new chapter in the history of the civilized community's concern with the protection of basic human rights. To this end we recommend . . . that the United States at long last move to adhere to the major pending human rights conventions.<sup>89</sup>

### CONCLUSION

It is long past the time for the United States to carry forward its own pronounced principles in support of human rights. There are no valid, basic constitutional objections to ratification of human rights treaties. If there are specific provisions of particular treaties which need explanation through understandings, or require reservations, then understandings or reservations can be made a condition of ratification.

The need is for the United States to be true to its own ideals and to join with other nations in recognizing and protecting individual rights. In the national interest as well as in the interest of men everywhere, the United States should act promptly in ratifying

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<sup>85</sup> See note 60, *supra*.

<sup>86</sup> S. Comm. on Foreign Relations, Legislative Calendar 7 (April 11, 1968).

<sup>87</sup> *Hearings on Exec. O., 81st Cong. 1st Sess. before a Subcom. of the Senate Comm. on Foreign Relations*, 91st Cong. 2d Sess. at 165 (1970).

<sup>88</sup> PRESIDENT'S COMMISSION FOR THE OBSERVANCE OF THE 25TH ANNIVERSARY OF THE UNITED NATIONS, REPORT OF COMMISSION 23 (1971) (U.S. Gov't Printing Office, Doc. No. 4000-0261).

<sup>89</sup> HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON FOREIGN AFFAIRS, REPORT ON THE 25TH U.N. ANNIVERSARY 8 (1970).

those human rights treaties which it has supported in the United Nations and its affiliated agencies. The problem of how much the United States can in fact do to protect human rights through international agreements requires at least that we become a party to them. We thereby not only add impetus to what other countries do, but we are in a stronger position to exert our influence in promoting goals of the human rights conventions in the world community.