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Human Rights in American Foreign Policy*

*Patricia M. Derian***

Reviewing the names of the esteemed lawyers and judges who have preceded me, I am especially honored to participate in Notre Dame's distinguished series of Civil Rights Lectures. Though not a lawyer by profession, I nonetheless like to think I have been actively involved in practicing the international law of human rights.

Characterizing my job that way may surprise some people. Ostensibly, as an Assistant Secretary of State, I practice diplomacy and engage in foreign policy formulation. But in a real sense, diplomats may be said to practice international human rights law, even though they do so by a kind of default. Today, for the most part, one cannot haul a violator of international human rights before a court, try the violation, and seek redress. Instead, the international law of human rights must be applied through a much more complex process, through a wide range of efforts to induce, persuade, and cajole observance—and to make it clear that violations will cost something in relations with other nations. The nations themselves, and to a lesser extent international organizations, control the means to enforce this human rights law and the stronger a nation is, the better its ability to perform this function.

In recent years, the United States has increasingly applied the strength of its international position to the cause of human rights. We have begun to realize that too often in the past, despite our rich heritage of respect for human rights, we either sat on the sidelines, at our worst, ignored human rights completely and cozied up to repressive regimes.

The efforts now being undertaken by the United States and other nations, international bodies, and nongovernmental organizations are not solely a way of applying the law of human rights; they are also a way of creating it. This is not to imply that no standards for international conduct exist and that it is therefore up to the United States to manufacture them. In fact, the opposite is the case. As I will describe later, the international standards are there, and their content is not in serious question. Some have hoped they remain platitudes commanding nothing more than lip service on ceremonial occasions. They need, instead, to be reinforced as law, as an accepted basis for judging the behavior of governments, as norms whose violation leads to concrete consequences? The more they are employed in this way, the closer we move to a full-fledged international law of human rights.

We can see encouraging signs that such standards carry increasing weight on the international scene. More and more, national leaders are coming under

* This article is a revised and updated version of an address given April 24, 1979 at the Notre Dame Law School Civil Rights Lecture. I would like to thank James Gresser, an intern in Notre Dame's Center for the Study of Human Rights, for his contribution to this paper.

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effective pressure—internal and external—to conform their behavior to international human rights standards. Even those who persist in violations increasingly feel the need to explain why their behavior departs from the norm. This development is significant. A standard that commands explanation, even if not observance, counts for more than a standard that can be ignored. In a similar way, a pledge to honor human rights is becoming a common refrain in the maiden speeches of those who have successfully executed a *coup d'état*. Consider the recent overthrows in Nicaragua, Uganda, Equatorial Guinea, and the Central African Empire. The signs are encouraging. But there are still many miles to go on the road from platitudes to law.

Additional questions arise, however, when one discusses human rights work as a legal process: Isn't this "practice" of international human rights law uncomfortably similar to the practice of international politics? And isn't it easy for the application of human rights standards to be clouded by political considerations? The answer to both questions is yes. The untidy political nature of the process cannot be denied, but it simply underlines the need for better procedural mechanisms to enforce accepted international human rights standards. Such mechanisms can be readily envisioned, but establishing them on a sound basis, one that precludes their appropriation for narrow political ends, is at best a distant prospect. Persistent work is needed; the obstacles to be overcome are great.

In the meantime, the fact that politics is often hard to separate from the practice of human rights diplomacy affords no reason to hold back. If international politics afford the best devices we have at present, let us use them skillfully and with eyes open to its limitations.

The International Law of Human Rights

The increasing worldwide consensus on the basic international human rights standards is reflected in a growing body of international human rights treaties. Although important antecedents may be found in the nineteenth and early twentieth centuries—for example, conventions proclaiming the unlawfulness of slavery and acknowledging the right of prisoners of war and other victims of armed conflict to humane treatment¹—the modern international law of human rights began in 1945 with the drafting of the United Nations Charter. Article 1 of the Charter declares one of the purposes of the United Nations to be: "To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"²

Article 55 of the Charter, furthermore, pledges the United Nations to promote: (a) higher standards of living, full employment, and conditions of

1 See, e.g., Geneva Convention on Suppression of Slave Trade and Slavery, September 25, 1926, 46 Stat. 2183, T.S. No. 778, 2 Bevans 607; and the Hague Conventions of 1899 and 1907, collected in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (J. Scott ed. 1915).

2 U.N. CHARTER art. 1, para. 3.

economic and social progress and development; (b) solutions of international economic, social, health, and related problems; . . . and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.³

And in Article 56, the members of the U.N. "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."⁴

The drafters of the Charter had just witnessed not only the horrors of war, but also deliberate repression of the most basic human rights on a massive scale. It was inconceivable that, charged with creating a framework for the future of international cooperation, and with the revelations of forced labor and death camps fresh in their minds, the drafters would succumb to the false notion that a government's treatment of its people is purely an internal matter, not one of international concern. Articles 55 and 56 make clear that human rights are the business of all nations.

In the thirty-four years since the Charter was adopted, progress has been made toward the creation of a substantive and procedural framework for the promotion of human rights. Primarily, this progress has been made by implementing the directives laid down in the Charter. Although the implementing measures are numerous,⁵ the most important can be summarized briefly.

First, the Universal Declaration of Human Rights was adopted as a resolution of the UN General Assembly in December 1948, without dissent, as "a common standard of achievement for all peoples and all nations."⁶ In thirty articles, the Declaration gives authoritative guidance on the scope and meaning of the human rights and fundamental freedoms referred to in the Charter. It declares that everyone has the right, for example, to life, liberty and security of person, to freedom of opinion and expression, to freedom from torture, and

³ U.N. CHARTER art. 55.

⁴ U.N. CHARTER art. 56.

⁵ The full range of human rights treaties are reprinted in a useful U.N. collection, *Human Rights: A Compilation of International Instruments*, U.N. Doc. ST/HR/1/Rev. 1 (1978). Prominent among the treaties collected in that volume, and not discussed in this speech, are the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Elimination of All Forms of Racial Discrimination.

The Genocide Convention was signed by the United States in 1948 and in 1949 President Truman submitted it to the Senate for advice and consent to ratification. In 1970, it was resubmitted and now President Carter has renewed the call for prompt ratification. Address by President Carter to the Permanent Representatives of the United Nations, *reprinted in* Department of State News Release, *Arms, Economic Prosperity, and Human Rights* (March 17, 1977).

The Convention on Racial Discrimination was signed by the United States in 1966 but not submitted to the Senate until 1978, when President Carter submitted it along with the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the American Convention on Human Rights. *See* Four Treaties Pertaining to Human Rights; Message From the President of the United States, Executives C, D, E and F, 95th Cong., 2d Sess. (Senate Print 1978).

The Senate has been inexcusably slow in acting on all these treaties. Last December, President Carter observed:

Eighty-three other nations have ratified the Genocide Convention. The United States—despite the support of every President since 1948—has not. In international meetings at the United Nations and elsewhere, and when I meet with foreign leaders, we are often asked why. We do not have an acceptable answer.

President Carter's remarks at the White House Commemoration of the 30th Anniversary of the Universal Declaration of Human Rights (December 6, 1978).

⁶ Universal Declaration of Human Rights, adopted by G.A. Res. 217A (III), U.N. Doc. A/810 (1949).

the right to have a family, to own property, to work and receive just remuneration, and to receive medical care and a basic education.⁷

Second, there are the Covenant on Civil and Political Rights⁸ and the Covenant on Economic, Social and Cultural Rights,⁹ treaties which incorporate as binding legal obligations many of the human rights recognized in the Universal Declaration. These treaties were opened for signature in 1966 and entered into force ten years later, after ratification by thirty-five nations. The United States signed the Covenants in 1977, and President Carter transmitted them to the Senate in February 1978.¹⁰ Hearings have been scheduled for November 1979, and we hope for ratification in 1980.

Third, there are important regional instruments, including the American Convention on Human Rights,¹¹ the Final Act of the Conference on Security and Cooperation in Europe,¹² and the European Convention on Human Rights.¹³ The Organization of African Unity, at its summit meeting in Monrovia last July, adopted a resolution directing its Secretary-General to convene a group of experts to draft an African charter of "human and people's rights." These measures manifest the ability of nations within a region to develop means for dealing constructively with problems of particular concern to them, and to devise workable procedures.

Some people question the relevance of this history to the establishment of consensus on human rights standards. They argue that the leaders who signed or ratified these treaties never seriously expected that their own behavior would be measured against these standards, or that violators would be called to account in any form. If they really agreed to these standards, the argument goes, they wouldn't behave as they do—and just look at the signatories that commit extensive violations.

There are, however, two separate questions here and they should not be confused: first, what is the accepted standard, and, second, what can be done when actions do not fit the standard? Hypocrisy, it is often said, is the tribute vice pays to virtue. In the company of vocal hypocrites, there is no mistaking what constitutes virtue.

The challenge is to find ways to make that hypocrisy costly, instead of lowering the standard because of distress at the behavior. Placing a high price on hypocrisy will assure that behavior moves in the direction of the stated standard. And once a substantial number of concerned parties become serious about human rights, the very hypocrisy of the others aids in their cause. As Ar-

7 *Id.*

8 International Covenant on Civil and Political Rights, adopted by G.A. RES. 2200 (XXI), 21 U.N. GAOR, SUPP. 16, U.N. Doc. A/6316 (1966).

9 International Covenant on Economic, Social, and Cultural Rights, adopted by G.A. RES. 2200 (XXI), 21 U.N. GAOR, SUPP. 16, U.N. Doc. A/6316 (1966).

10 Four Treaties Pertaining to Human Rights; Message from the President of the United States, *supra* note 5.

11 Signed at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, November 22, 1969. OAS Treaty Series, No. 36, at 1-21 (OAS Official Records, OEA/SER. A/16, English).

12 Conference on Security and Co-operation in Europe: Final Act, August 1, 1975, reprinted in 14 INT'L LEGAL MATERIALS 1292 (1975).

13 European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome, November 4, 1950; entered into force on September 3, 1953. Council of Europe, European Convention on Human Rights: Collected Texts, Section 1, Doc. 1 (7th ed., Strasbourg, 1971).

thur Schlesinger, Jr., has observed, "standards solemnly declared, even if unobserved, live on to supply ammunition to those who thereafter demand observance."¹⁴

Those who have voiced acceptance of the international standards, even if they meant it to be only lip service, have revealed that there is no wide philosophical difference over the basic values that deserve protection. The task now is to translate that consensus into practice.

If we look closely at the rights protected in the international human rights treaties, we can see both tangible progress and increasing signs that there is consensus on the core values that deserve protection. As it is a bit difficult to keep in mind all thirty articles of the Universal Declaration, it is helpful to use a form of shorthand, a three-part formulation often used by my department to describe the basic types of rights that American policy seeks to promote. This summary is drawn directly from the basic human rights instruments described above, and it was first employed in this form in a speech given by Secretary Vance at the University of Georgia Law School in April 1977.¹⁵

First is the right to be free of governmental violation of the integrity of the person. This right is violated by torture, and also by brutal treatment, arbitrary arrest and detention, invasion of the home, and "show" trials not meeting accepted standards of due process. One rarely hears of any effort, however perfunctory, to justify such actions, to claim that they are in accord with the values of a society or region. The most one hears is a mumbled reference to the need for "strong measures" in response to the brutal or terroristic acts of the government's opponents. There is rarely any greater specificity, and those who make such speeches do not subject themselves to cross-examination. Under even minimal scrutiny, torture and brutality can never be squared with any acceptable standards of civilization.

Though there are disheartening exceptions, worldwide agreement in the condemnation of violations of the person is growing. There is tangible evidence. In the last two and a half years, substantial numbers of political prisoners have been released in Bangladesh, Bolivia, Sudan, Indonesia, Nepal, and Paraguay. The Congo, Cuba, Guinea, Mali, Tanzania, and South Korea have also released prisoners. Perhaps more importantly, alleged torturers have been prosecuted in Egypt and the Philippines. These developments may be more important because the United States seeks not only to have bad practices stopped, but to see institutional barriers built against their resumption. Citizens may still be intimidated by a once-brutal government even if it has recently made a point of abstaining from arbitrary arrests and mistreatment, or even has released political prisoners. Citizens will not feel free to speak their minds or act according to their beliefs until they see tangible evidence that there will be no new detentions without trial, no new wave of brutality. A consistent practice of calling abusers to account before the law furnishes the best assurance that the changes will last.

A second major branch in this shorthand summary of internationally

¹⁴ Schlesinger, *Human Rights and the American Tradition*, 57 FOREIGN AFFAIRS 503, 511 (1979).

¹⁵ Address by Secretary of State Cyrus R. Vance, *University of Georgia Law School Law Day ceremony* (April 30, 1977).

recognized human rights is the right to enjoy civil and political liberties. These include freedom of speech and the press, freedom of religion and assembly, the right to take part in government, and the right to move freely within and outside one's own borders. We also attend to whether such rights can be exercised without discrimination based on race, sex, religion, or nationality.

And in this category as well, we can see progress in improved observance of political and civil rights in many nations around the world. Bangladesh, Bolivia, Ghana, Brazil, and Thailand have extended greater freedom to the press, to labor organizations, or to political parties. Countries in many regions have made the transition to civilian rule or more democratic government. Latin America, Brazil, Bolivia, and Ecuador stand as the most recent examples. The successful transfer of power from one party to another in the Dominican Republic in 1978, by means of an open electoral process, is well-known. The United States clearly expressed its concern over developments there at a point when it seemed that the results of the elections might not be honored. In Africa, Nigeria has held to a steady schedule of transition to an elected government, and the military regime left office on October 1, 1979. In Ghana, even a coup by a faction of the military in June 1979 could not displace the momentum for a return to a democratic government. Elections were held on schedule that same month; and although the turnover was delayed by a few months, those elected took office, as promised, on September 24. And there are indications in Thailand and India that a similar democratic trend is developing in Asia.

A third category of basic human rights has been grouped by Secretary Vance under "the right to the fulfillment of such vital needs as food, shelter, health care, and education."¹⁶ These rights differ in one important way from political and civil rights, or from the rights of personal integrity.

A government can immediately stop torturing or censoring. It cannot immediately assure adequate nutrition, housing, or health facilities. This difference is carefully honored in international law. Although the International Covenant on Civil and Political Rights is essentially a collection of prohibitions effective immediately, the International Covenant on Economic, Social, and Cultural Rights expressly states that its provisions are to be achieved progressively.¹⁷

In pursuing a foreign policy committed to these rights, we check to see whether the government is making a serious effort to meet these basic needs within the means it has available. The most flagrant violations of these rights occur when a regime tolerates widespread corruption or diverts resources from meeting the needs of the population into the pockets of the ruling group. The misuse of earthquake relief funds a few years ago by the Somoza regime in Nicaragua furnishes a recent example of such abuse.

Americans who feel comfortable pushing for political and civil rights sometimes grow uneasy when the talk shifts to economic, social and cultural rights. They feel that the former are compatible with Western traditions, but they sometimes conjure images of demands for radical redistribution of wealth

16 *Id.*

17 See International Covenant on Economic, Social, and Cultural Rights art. 2, para. 1, *supra* note 9.

under the banner of the latter. In response, let me re-emphasize the careful formulation of this set of rights employed by Secretary Vance—"the right to fulfillment of such vital needs as food, shelter, health care, and education."¹⁸ We are not Levellers, nor were those who drafted the Covenant on this subject. We do not call upon governments to assure the same allocation of calories and currency to all their citizens. The international standard calls instead for serious attention to fulfillment of basic minimum needs.

In my view, the dichotomy often posed between civil and political rights on the one hand, and economic and social rights on the other, is much overrated. A regime that lines its members' pockets and denies its people their basic needs is almost certain to engage in violation of political and civil rights—and perhaps in torture and brutality—to maintain its grip on power. Progress in insuring political rights cannot be divorced from progress in satisfying basic human needs. Or to look at the question from another angle, we press for observance of political and civil rights because of a basic commitment to the dignity of the individual human being; but that underlying value is just as clearly contradicted when people are seriously malnourished or ill-educated or sick. For these reasons the Carter Administration has made a special effort to assure that rights to fulfillment of basic human needs are given prominent attention in our foreign policy.

Improvement in the observance of these economic and social rights is harder to pinpoint, perhaps because by their nature they are to be progressively realized. But we can point to the basic changes that have been made in American foreign aid. By statutory command, American economic assistance now must be directed toward meeting the basic human needs of the poor in recipient countries.¹⁹

Despite the international documents, and despite the many visible signs that broad agreement exists on the core standards that are to be applied, the charge is continually made that our human rights policy seeks to impose parochial American values on the rest of the world. Certainly, one can quarrel about the contours of the outer limits of certain rights; plainly people can differ over the application of the standards in certain hard cases. But there is a demonstrable consensus on the core values represented in international human rights standards, and we have no right smugly to assume that those values belong only to Americans. In fact, it is a remarkable assertion of American hubris to believe that only Americans value free speech, or safeguards against arbitrary arrest, or the right to take part in government—or to believe that

18 See Address by Secretary Vance, *supra* note 15. Perhaps it is not so familiar in our tradition to speak of these matters in the language of "rights." But the core concept is undeniably part of our tradition, whatever words are used to express it. Providing education to all children at public expense has long been part of American life. And Social Security, public assistance, housing initiatives, and other such measures evidence a basic American commitment to assuring that people's basic needs are met. Cf., Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (due process clause of the fourteenth amendment may require meeting the minimum basic needs of the poor).

19 Foreign Assistance Act of 1961, as amended, §§ 101, 102, 22 U.S.C. §§ 2151, 2151-1 (1979). Sections 101 and 102 of the FAA set forth U.S. development assistance policy with a strong emphasis on programs that meet basic human needs. As stated in § 102 (a): "Bilateral assistance and United States participation in multilateral institutions shall emphasize programs in support of countries which pursue development strategies designed to meet basic human needs and achieve self-sustaining growth with equity."

other peoples are happy to postpone enjoyment of such rights until they reach materialistic parity with the United States. I have never heard any objection about the "imposition" of allegedly American values from the victims of human rights abuses, or their families—and I have met with hundreds from all parts of the world. Abroad, I hear such objection only from government figures who would really rather we not look too closely at what is happening within their borders. It is curious, to say the least, to hear the same refrain from educated Americans.

Implementation

Having described at some length the nature of the human rights we strive to promote, let me next describe how the policy is implemented.

The first tool of implementation is steady, quiet diplomacy. It is more effective than many people realize. Perhaps quiet diplomacy got a bad name in earlier years when officials sometimes claimed to be working for human rights through quiet diplomacy and in reality they were saying virtually nothing to representatives from other governments. Quiet diplomacy is not silent diplomacy. In fact it may seem quite noisy to the government with whom we engage in dialogue. It is quiet only in the sense that it does not reach the public. Another government may then find it easier to make changes in its practices without seeming to be knuckling under to outside pressures. For this reason, quiet diplomacy is our preferred approach. A concern for human rights is now a consistent part of our official contacts with other governments. Human rights issues also find their way into the briefing books and talking points prepared for high level meetings between our government and any other. Other governments know we will keep the matter on the agenda. As Dr. Brzezinski has put it, "there is today not a government in the world that does not know that how it behaves in regard to human rights will affect its relationship with the U.S."²⁰ This awareness inevitably affects government leaders' thinking whenever they are tempted to restrict political rights or crack down on the opposition.

Quiet diplomacy is, however, not always sufficient. We may also use carefully selected public statements, to bring the focus of world opinion to bear on the violating country.

When high U.S. officials visit countries with serious human rights problems, they frequently meet with opposition figures or with the families of victims of government repression. Such visits afford a tangible symbol of American concern for conditions in that country. Not only do they reinforce our message to the government, in some instances they can boost the morale of democratic forces.²¹

There are also efforts that we can undertake in international fora, such as the U.N. Human Rights Commission, the Inter-American Human Rights

²⁰ Remarks of Dr. Zbigniew Brzezinski, Assistant to the President for National Security Affairs, at the White House Commemoration of the 30th Anniversary of the Universal Declaration of Human Rights (December 6, 1978).

²¹ See Hawk, *Human Rights at Half-Time*, *The New Republic*, April 7, 1979, at 22, col. 2: "An often overlooked factor in making progress in human rights is the strength, tenacity, and morale of democratic forces indigenous to violating countries."

Commission, the biennial sessions held under the Helsinki Final Act, or conclaves on particular crises like the Geneva conference on Indochinese refugees held last July. Indeed, new international machinery has been developed in recent years, and this affords promise for long-run observance of human rights. It is not widely known that UNESCO has recently adopted a new complaint procedure under which individuals can file complaints of violations of their rights in the areas under UNESCO's jurisdiction. Governments are then called upon to respond. In addition, a new Inter-American Court of Human Rights is being constituted under the American Convention on Human Rights. And a resolution passed last July by the Organization of African Unity has moved a long way toward setting up a regional human rights commission for Africa. Meanwhile, the U.N. Human Rights Commission has finally become more active than before in pursuing the complaints of gross violations lodged with it. In 1978, inquiries were pressed into gross violations by the governments of Uganda, Cambodia, and Equatorial Guinea. And for the first time, there was consensus to take action under procedures providing for confidential review of complaints alleging systematic violations. Ten countries were affected, spanning the ideological spectrum. We have played an important role in developing some of this machinery and in encouraging its use.

In addition to this role, we also encourage other democratic countries, which may enjoy better standing with a particular government, to join in efforts to foster greater respect for human rights. There are signs that other countries are increasingly willing to undertake such efforts. The United Kingdom's work to settle the Zimbabwe-Rhodesia problem clearly reflects that government's concern for human rights. And this year the French government explicitly cited human rights factors in explaining its decision to cut the aid France provided to the regime of the now-deposed Emperor Bokassa of the Central African Empire. Significantly, this decision was reached after a fact-finding mission documented widespread killings of schoolchildren by Bokassa's forces.

Finally, in this list of available implementation methods, there is the heavy artillery of the diplomatic arsenal: decisions on the level and types of economic and military assistance. Congress has taken a major role in shaping the context for these decisions. During the early 1970's and largely in reaction to inattention by the Executive Branch to human rights values, the Congress passed a number of statutes establishing explicit human rights criteria for decisions on military and economic assistance. Section 502B of the Foreign Assistance Act forbids military assistance or arms sales or the transfer of crime control and police equipment to governments that engage in a consistent pattern of gross violations of internationally recognized human rights, unless "extraordinary circumstances" justify such a step.²² Section 116 of the same Act

²² Foreign Assistance Act of 1961, as amended, § 502B, 22 U.S.C. § 2304 (1979). Section 502B of the FAA establishes human rights criteria for U.S. foreign policy, and security assistance in particular. Section 502B (a)(1) provides that:

(1) The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accor-

forbids economic assistance to such countries, unless the aid will directly benefit needy people.²³ We have also gone beyond the strict requirements of this legislation. Some countries with serious human rights problems might not technically fall within the language "consistent pattern of gross violations." Nevertheless, we have tried to make sure that our assistance levels reflect their

dingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

With regard to security assistance, the President is:

Directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.

Section 502B (a)(2) prohibits security assistance except under specified circumstances "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights." Crime control and detection equipment cannot be exported under the Export Administration Act (see § 4 of the Export Administration Act of 1969, as amended), nor can security assistance to the police or any military education and training assistance be provided to such a country unless the President certifies in writing that extraordinary circumstances exist.

An annual report (which takes into account findings of relevant international organizations) on human rights in any country proposed as a recipient for security assistance is required.

Section 502B (c) authorizes the Congress to request from the Secretary of State during the course of any fiscal year information on human rights within a designated country including *inter alia*:

(A) all the available information about observance of and respect for human rights and fundamental freedom in that country, and a detailed description of practices by the recipient government with respect thereto;

(B) the steps the United States has taken to—

(i) promote respect for and observance of human rights in that country and discourage any practices which are inimical to internationally recognized human rights, and

(ii) publicly or privately call attention to, and disassociate the United States and any security assistance provided for such country from, such practices;

(C) whether, in the opinion of the Secretary of State, notwithstanding any such practices—

(i) extraordinary circumstances exist which necessitate a continuation of security assistance for such country, and, if so, a description of such circumstances and the extent to which such assistance should be continued (subject to such conditions as Congress may impose under this section), and

(ii) on all the facts it is in the national interest of the United States to provide such assistance.

On the basis of such a report, Congress may, by joint resolution, suspend further security assistance to the country concerned.

²³ 22 U.S.C. § 2151n (1979); see also Agriculture and Trade Development and Assistance Act of 1954, as amended, § 112, 7 U.S.C. § 1711 (1979); 22 U.S.C. §§ 262g, 262c note (1979); and 22 U.S.C. § 2347b (3) (1979).

Section 116 of the Foreign Assistance Act of 1961, as amended, (22 U.S.C. 2151n) establishes human rights criteria applicable to assistance provided under Part I of the FAA. It provides, *inter alia*, that:

(a) No assistance may be provided under this part to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.

A yearly report (which takes into account findings of relevant international organizations) on the status of human rights within all countries receiving assistance under Part I of the FAA is required. Under a 1979 amendment to section 116(d), reports must be prepared on all U.N. member nations, whether or not they receive U.S. assistance. Section 116(e) authorizes and encourages the President to use not less than \$1,500,000 for activities to promote increased adherence to civil and political rights as set forth in the Universal Declaration of Human Rights.

Section 112 of the Agricultural Trade Development and Assistance Act of 1954, as amended, (7 U.S.C. § 1711) establishes human rights criteria regarding financing the sale of agricultural commodities under Title I of the ATDA. Section 112(a) provides in relevant part:

(a) No agreement may be entered into under this title to finance the sale of agricultural commodities to the government of any country which engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant

human rights performance. By the same token, we strive to increase assistance to countries with especially good human rights records, such as Botswana or the Dominican Republic.

The State Department is often pressed to describe in detail specific examples where U.S. action has led to human rights improvements in other countries. Such a description is usually not appropriate because of the confidential nature of our contacts with the other government. Moreover, the United States is really not in a position to claim credit for such human rights improvements as do occur. They are not our doing; they result from choices made by the people of the particular country involved. Our role is to encourage progress by creating a climate that may make it easier for the government to improve its observance of internationally recognized human rights, or easier for democratic forces within the country to push successfully for such progress.

In one particular case, however, the Government of Togo recently spoke publicly about the role of United States diplomacy in connection with certain humanitarian steps that government took with regard to a major trial held in that country. Although the events probably could not be described as a major human rights development, they may provide an example in miniature of how careful diplomacy by the United States can have an impact in promoting human rights.

Many months ago, Togolese authorities uncovered a *coup* plot directed against the regime of President Eyadema. The alleged plotters were scheduled to come to trial before a special tribunal in late August of 1979. Some non-governmental observers expressed concern that the tribunal would be biased toward conviction, charging that some of its members had already voiced an opinion on the guilt of the accused. It was also not clear what procedural protections would be available to the defendants.

The U. S. Government naturally took no position on the guilt or innocence of the individuals charged. We did, however, take an active interest in whether internationally accepted standards of due process would be respected

denial of the right to life, liberty, and the security of person, unless such agreement will directly benefit the needy people in such country.

In appropriate cases, a report by the recipient country on how programs directly benefit the needy is required within 6 months of commodity delivery. An annual report to Congress on implementation of the provisions of § 112 is also required.

Title VII of Pub. L. No. 95-118 (22 U.S.C. §§ 262g and 262c note) establishes human rights criteria for U.S. action within the International Financial Institutions *viz.*, International Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Inter-American Development Bank, African Development Fund, and the Asian Development Bank. The U.S. Government, through its representative at each IFI, is directed to:

Seek to channel assistance toward countries other than those whose governments engage in—

- (1) a consistent pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person;

The U.S. Government is also directed to oppose assistance through the IFIs to any country described above unless such assistance serves basic human needs. An annual report on progress under this title is required.

Title VII takes precedence over a previous similar "sense of the Congress" provision—§ 507 of Pub. L. No.95-148, Foreign Assistance and Related Programs Appropriations Act, 1978.

And finally, § 543(3) of the FAA (22 U.S.C. 2347b) requires human rights curriculum in international military education and training courses.

in the course of the trial.²⁴ We made this position known and sent an observer from the American Embassy staff to attend the trial. This action afforded a tangible symbol of our concern over the nature of the proceedings. At the trial, the tribunal took substantial steps to honor the rights of the accused. The

²⁴ Although neither Togo nor the United States has ratified the International Covenant on Civil and Political Rights, we looked to that document, especially Articles 9 and 14, for a general statement of the applicable international standard:

Art. 9 (1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

(4) Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Art. 14 (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

(2) Everyone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

(4) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(5) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

(6) When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

(7) No one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

International Covenant on Civil and Political Rights arts. 9 and 14, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS, 215-18 (I. Brownlie ed. 1971).

defendants were represented by experienced attorneys who were permitted to challenge members of the tribunal for alleged bias. As a result of the questions that were raised, two members of the tribunal stepped aside. Government witnesses were closely cross-examined, and defense counsel provided lengthy closing arguments. After deliberation, the tribunal acquitted two defendants, sentenced three to prison terms, and two to death.

Again, the U. S. Government took no position on the appropriateness of the sentences levied. But we did express to the government our concern that there be adequate time for review of the proceedings and consideration of any appeals for clemency before the sentences were imposed, in accordance with internationally accepted standards.²⁵ On August 30, in a major speech calling for national unity and reconciliation, President Eyadema announced that he was commuting the death sentences. He directly acknowledged the role of the United States and the United Kingdom in achieving this end.

Dilemmas and Opportunities

Looking to the future, I see a number of dilemmas that must be confronted as our human rights work continues. The first involves consistency. When there are two countries with roughly the same human rights conditions, the same tactics are rarely adopted for both. For that reason, the charge might be made that the United States ignores the sins of one regime while taking visible steps against another whose behavior is equivalent.

The choice of tactics, however, rests on three considerations which are basic elements of the policy. First, we do what we can, given the state of our relations with another government, to improve the quality of human rights observance in that country. Sometimes the public is not aware of the strengths or limitations in that relationship that dictate the choice of certain tactics. Second, it must be remembered that human rights is not our only foreign policy priority. We do have other interests: fostering national security, avoiding nuclear war, promoting trade. In every case we weigh the importance of those interests and the effect a particular human rights initiative may have upon them before deciding any course of action. We have consciously determined to give a higher priority to human rights concerns in that process. We have, for the first time, allowed human rights a seat at the table of traditional foreign policy objectives. That seat, however, can be accurately compared to the one occupied by the youngest member of the family at dinner: sometimes when the big decisions are made, the youngest is excused. Third, we look to the historical and cultural differences among nations, as well as a given country's present conditions, in deciding what specific actions to take.

There is no universal grid to be applied automatically to each situation. Even though these elements of our human rights diplomacy may lend themselves to rather economical summary, those formulations describe a policy that is complex and ambitious. It deliberately forsakes simple formulae and single-factor decisions. As a result, the charge of inconsistency will no doubt

²⁵ International Covenant on Civil and Political Rights art. 14(5), *supra* note 24; *see also* art. 6(4): "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence."

persist. I wish it were otherwise. But the fundamental design of the policy, despite its complexity, is sound and must be maintained.

It would be less than candid to suggest that only the public impression of inconsistency constitutes a potential problem. One of the dangers of complexity is that it may be used to mask genuine inconsistency.²⁶ Opponents of vigorous action to promote human rights—and there are some within the Department—can often frame their opposition to sound as if it were premised on the human rights policy itself. The only way to guard against this danger is to examine the arguments against a particular human rights initiative very carefully. The mere possibility of some negative impact on trade or national security is not enough. The risk must be so serious that it truly outweighs the expected human rights improvement. The burden of proof must remain on those who oppose a human rights initiative. If that standard is kept firmly in mind, then the problem becomes one of artful application of a policy that, for all its complexity, is fundamentally sound.

A second dilemma arises in those countries where, because of overriding security interests, the United States must continue to provide military assistance despite serious human rights problems. That assistance strengthens the recipient government and makes it a more effective bulwark against a common adversary. But at the same time, it obviously makes it easier for the regime in power to repress its own people. The dilemma then is this: What can we do, within the constraints placed by our security interests, to pursue our human rights goals effectively? A few things are obvious: we can still make *demarches*, we can still review other forms of assistance, we can still engage in symbolic acts. And I want to emphasize that, even with countries in this category, we do take all available steps to press human rights concerns. It is nevertheless undeniable that in some countries the human rights message risks being drowned out by the size and nature of the military assistance. To this problem there are no easy answers.

A third dilemma involves raising human rights concerns without imposing too great a strain on America's bilateral relations. This seemed especially urgent in the early days of the policy. When our concerns were first voiced, they were often met with a confused, hurt, or irritated reaction. But the record of the past two and a half years shows that our ties with other countries are not so fragile that we must ignore human rights abuses. In particular, the Philippines, Thailand, and Brazil come to mind as instances where the United States raises human rights issues and also pursues other interests. With the Soviets too, after early difficulties, we have been able to pursue serious arms control negotiations and, at the same time, register our concern over the treatment of political dissidents and emigration. We will continue to press for implementa-

26 One observer has perceptively expanded on the problem of inconsistency:

Contacts with other societies take place at countless points, the interaction of innumerable private persons as well as officials. If American businessmen abroad or (to name only one category of officials) members of military missions wink at Washington's concern about human rights, then counterparts in other societies will do so too.

Ullman, *Introduction* to J. DOMINGUEZ, N. RODLEY, B. WOOD, & R. FALK, *ENHANCING GLOBAL HUMAN RIGHTS* 16 (1979).

tion in Eastern Europe of the human rights provisions of the Helsinki Final Act,²⁷ without unduly jeopardizing our pursuit of our other objectives.

I turn now from real dilemmas to a false issue. If a country develops internal instability at any time after we have brought human rights pressure on the governing regime, blame is often laid at the feet of the human rights policy. Critics then charge that our policy weakened security measures, fomented unrest, encouraged violent opposition. Some of this criticism has come recently from very distinguished figures in foreign policy circles.

This criticism is wrong. Our policy is designed to prevent abuses of human dignity, not to foster turmoil. It is applied, as previously emphasized, with a careful awareness of the practical limits the government may be operating under. We are not so naïve as to rush in expecting full implementation of the U.S. Bill of Rights on the next Fourth of July. As the recent history of Spain attests, moving from authoritarian government to genuine respect for human rights is a delicate process demanding skill and statesmanship. But having said that, I should stress that it is no less urgent to start the process and keep it moving—carefully, but meaningfully and persistently.

When our human rights policy is blamed for instability, I would turn this criticism around and point it back at those who make it. In the long run, it is not human rights policy, but the absence of a human rights policy, that poses the greatest risk. Genuine observance of human rights affords the best hope for stability—stability that can be sustained because it rests on mutual respect between government and governed, rather than on a temporary quiet enforced by security police and the torture cell.

Now, what about the opportunities the human rights policy represents? In some sense the goals of the policy are opportunities enough—the opportunity for the United States to play a role in reducing human suffering by careful use of all the diplomatic tools at our command. But there is another fundamental way in which the human rights policy poses a vital opportunity for us. This policy has opened the way to regaining the esteem America lost over the last two decades, the period of Vietnam and Watergate. It helps reestablish our sense as a nation of being true to our own highest ideals.

In a speech last December, President Carter described the importance of this development:

For the most part, other nations are held together by common racial or ethnic ancestry, or by a common creed or religion, or by ancient attachments to the land that go back for centuries in time. Some nations are held together by the forces, actual or implicit, of a tyrannical government.

We are different from all of those, and I believe that we in our country are more fortunate

What unites us—what makes us Americans—is our common belief in peace and a free society, and our common devotion to the liberties enshrined in our Constitution. That belief and that devotion are the sources of our sense

²⁷ Conference on Security and Co-operation in Europe: Final Act, *supra* note 12.

of national community. Uniquely, ours is a nation founded on an idea of human rights. From our own history we know how powerful that idea can be.²⁸

To be sure, that idea has never been fully realized in this country. For nearly a hundred years the institution of slavery stood in stark contradiction to that ideal. For nearly another hundred years, bigotry and prejudice stained our record. I have been deeply involved in civil rights work in this country, and my intention is to stay involved. I know how far we have departed from our ideals in the past, and how far we have yet to go.

But America has made strong efforts domestically to redeem our heritage. And now I believe our actions on the world scene are in closer accord with this internal progress.

When I speak for a foreign policy built on certain fundamental values, it may sound as though I am coming down hard on one side of the old dichotomy pitting pragmatism against principle, *Realpolitik* against moral ideal. I am not. In this instance that stark difference does not hold. What used to be presented to us as *Realpolitik* was too often empty—indistinguishable from infatuation with the *status quo*, bound to a view of the world as a global chessboard whose only players were nations, a conception in which flesh-and-blood people disappeared from view. America became identified as dedicated to little more than military power and economic might.²⁹ And I do not need to tell you that this image of our country has had little magnetism.

In addition, even the central objectives of the old *Realpolitik* were not well served. That approach failed to recognize that identification with repressive regimes undermines us seriously when the inevitable reaction sets in. Our experiences with the Greek *junta* or the Salazar regime in Portugal should be instructive. Crucially, the old *Realpolitik* took too little account of some of the deepest stirrings of our time. The human rights idea is one of these. It has taken on a momentum worldwide that none of us could have predicted two years ago. It has found its way into wall posters in Peking. It has become an obligatory part of the vocabulary of world leaders, even those whose observance in practice is at best grudging. Its importance as an issue with young people in Western Europe and elsewhere has enhanced U.S. standing with those groups, now that we have an active human rights policy.

In ruthlessly pragmatic political terms, then, this nation's leadership in the human rights field means a great deal for our prestige, our domestic support, and ultimately for our long-term strength on the world scene. Here

²⁸ President Carter's remarks at the White House Commemoration of the 30th Anniversary of the Universal Declaration of Human Rights (December 6, 1978).

²⁹ Chief Justice Warren has expressed a similar idea. Writing in *United States v. Robel*, 389 U.S. 258 (1967), he said:

[The] concept of "national defense" cannot be deemed an end in itself, justifying any . . . power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideas which set this Nation apart . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which [make] the defense of the Nation worthwhile. *Id.* at 264.

pragmatism and principle to a large extent coincide.³⁰ That in itself constitutes a tremendously significant opportunity. We must not allow the lingering dilemmas confronting our policy—however knotty—to sap our energy or our dedication, lest this opportunity slip away. We have made a start. We must do more.

30 President Carter concluded his important Notre Dame address on human rights on a similar note: Let me conclude by summarizing: Our policy is based on a historical vision of America's role. Our policy is derived from a larger view of global change. Our policy is rooted in our moral values, which never change. Our policy is reinforced by our material wealth and by our military power. Our policy is designed to serve mankind. And it is a policy that I hope will make you proud to be Americans.

Carter, *The President's Commencement Address at the University of Notre Dame*, 53 NOTRE DAME LAW. 9, 14 (1977).