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Civil Rights and Human Rights: A Call for Closer Collaboration

By *Douglass Cassel*

[Editor's note: This article is adapted from the author's remarks on July 19, 2000, before the annual meeting of the Chicago Lawyers' Committee for Civil Rights Under Law Inc.]

If rights are to enjoy effective protection, experience worldwide teaches that, more than the laws on the books, what counts is affordable access by victims to capable lawyers committed to enforcing their rights. Human rights would be far more secure if we could clone the Chicago Lawyers' Committee in, say, ten strategically located cities around the globe.

Those of you who may be familiar with my commentaries know that my usual topics are mass murderers overseas or U.S. foreign policy toward them. Today, however, I would like to focus on something closer to home—the history of and prospects for fruitful collaboration between the civil rights movement and the international human rights movement. My purpose is to encourage dialogue between civil rights and human rights lawyers. As a sometime civil rights lawyer myself, I am convinced that such a dialogue could be productive.

We might start by distinguishing human rights from civil rights. In customary American usage, the difference is simple enough: human rights are for other countries; civil rights are for us.

Jurisprudentially, of course, the difference is more profound. Civil rights are granted to members of a society by its laws. They can expand or contract with congressional majorities. In contrast, human rights do not derive from positive law and are not limited to the members of a polity. They are inherent in the human person; we are all born with them. Laws and governments can neither grant nor take them away but can only recognize them—or fail to do so. Civil rights may vary with national laws, but human rights are universal.

If that sounds like a theory of natural rights, it is. Natural rights are controversial. Who is to say what they are? On what authority, by what methodology?

Personally I am not haunted by such questions. My gut tells me that some rights are so innate that no law can take them away. Even if Hitler had decreed the Final Solution through all the forms of law, that would not have made it legal in my book.

In practice, fortunately, we need not be diverted by such theoretical debates. Nowadays human rights are recognized almost everywhere in positive law—specifically in a dozen major global and regional treaties developed in the last half century and now ratified by most countries. Collectively they constitute the basic content of contemporary international human rights law.

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Broad international legal recognition of human rights is surprisingly recent. Almost none of it existed before my first daughter was born 22 years ago. In law school some 30 years ago, I studied civil rights, but not human rights. Circa 1970 I thought human rights were more the province of divinity schools than law schools, and at the time I was right.

But even then, some people could see a different day dawning. I have never forgotten a job interview I had in 1972 with Jack Greenberg of the National Association for the Advancement of Colored People Legal Defense Fund. As you may know, Greenberg had participated in practically every major U.S. Supreme Court civil rights case since *Brown v. Board*.¹ I asked him, If he had it to do all over again, would he do anything different? "Yes," he answered to my astonishment, "I'd go into international human rights law."

By that time the international human rights movement had already been dawning for about 30 years. At its beginning Americans were in the forefront. One key harbinger was a 1941 congressional address, widely publicized around the world, by Franklin Delano Roosevelt. "We look forward," said Roosevelt, "to a world founded upon four essential human freedoms[:] . . . freedom of speech and expression . . . freedom of every person to worship God in his own way . . . freedom from want . . . [and] freedom from fear . . ."

Three years later, in his 1944 message to Congress, Roosevelt expanded on these thoughts. "True individual freedom," he declared, "cannot exist without economic security and independence. 'Necessitous men are not freemen.' People who are hungry and out of a job are the stuff of which dictatorships are made."

This was no casual philosophizing. FDR's generation saw the economic chaos of the Weimar Republic descend into the political psychosis of the Third Reich. In our own time the linkage between economic and political rights is evident again in countries from Venezuela to Algeria to Russia.

In his 1944 message FDR called for a "Second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race or creed." He advocated, among others, the right to a useful and remunerative job; the right to earn enough to provide adequate food and clothing and recreation; the right of every family to a decent home; the right to adequate medical care; the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; and the right to a good education.

The following year, at the founding conference of the United Nations in San Francisco, calls were made for an international bill of rights, one that would entitle all people everywhere both to the kinds of rights in the original American Bill of Rights and to those in Roosevelt's Second Bill of Rights.

Among the leading agitators for human rights in San Francisco were leaders of groups like the NAACP, the American Federation of Labor, the American Jewish Committee, the National Catholic Welfare Conference, and the American Association of University Women, among many others. For such groups—who were or would become important members of the incipient civil rights movement—the unity of interest between international human rights and domestic civil rights required no explanation.

They did not immediately succeed. The U.N. Charter did not contain a bill of rights. But it did commit the United Nations to work for "human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion; . . ." When one recalls that the world of 1945 consisted largely of colonialism and communism abroad, and Jim Crow at home, this was a revolutionary proposition.

In closing the San Francisco conference, President Harry Truman called for building on this statement of principle by adopting an international bill of rights as one of the first orders of business of the United Nations. It was not long in coming. In 1946 Eleanor Roosevelt became

¹ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

the first chair of the newly established U.N. Human Rights Commission. After two years of drafting by her commission and lengthy debate in the General Assembly, the United Nations in 1948 adopted the world's first Universal Declaration of Human Rights.²

The Universal Declaration would have made FDR proud; it proclaims nearly every right both in the original American Bill of Rights and in his Second Bill of Rights. But it does not purport to create them, merely to recognize them as preexisting. The very first article of the Universal Declaration proclaims, "All human beings are born free and equal in dignity and rights."

Nor does it proclaim a narrow or selfish vision of rights divorced from responsibility. Article I continues: "They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."

By 1948, however, American support for international human rights was already in jeopardy. The American Bar Association, for example, asked for a delay in the adoption of the Universal Declaration; the American Bar Association president issued dire warnings of the threats it allegedly posed to the sovereign rights of states. The State Department instructed Mrs. Roosevelt to tell the U.N. General Assembly that the United States did not consider the Universal Declaration to be legally binding but merely an aspirational statement.

What happened to put on the brakes in Washington?

One factor was race. After all 1948 was still six years before the Supreme

Court's decision in *Brown v. Board*.³ In 1947, under the leadership of Dr. W.E.B. Dubois, the NAACP filed with the United Nations a lengthy petition challenging racial discrimination against the Negro people of the United States as a violation of the U.N. Charter. In *Oyama v. California* in early 1948 four justices of the U.S. Supreme Court suggested that California land laws, discriminating against persons of Japanese ancestry, violated not only the U.S. Constitution but also the U.N. Charter, a treaty to which the United States is a party, and which is part of the supreme law of the land under Article VI of the Constitution.⁴

The specter of U.N. interference with American racial law and policy provoked opposition not only by racists but also among their allies who believed that such matters were for Americans, not foreigners, to decide. The historical strands of isolationism in our polity were thus a second source of American resistance to international human rights. For "America Firsters," the very concept of human rights is, well, un-American.

A third source of opposition was the cold war. The Soviet Union and its allies were members of the United Nations. Their delegates sat on the U.N. Human Rights Commission.⁵ Their judges sat on the United Nations' judicial organ, the International Court of Justice, or World Court.⁶ Might they not use these posts to embarrass the United States by condemning our racial discrimination as violations of human rights?

All this led by the early 1950s to a proposed constitutional amendment whose lead sponsor was Ohio Senator John

² Universal Declaration of Human Rights, G.A. Res. 217(A)(III), U.N. Doc. A/810 at 71 (1948).

³ See *Brown*, 347 U.S. at 483.

⁴ *Oyama v. California*, 332 U.S. 633 (1948); Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, entered into force, Oct. 24, 1945; U.S. CONST. art. VI: "[A]ll treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the contrary notwithstanding."

⁵ The U.N. Human Rights Commission, may be reached at OHCHR-UNOG, 8-14 Avenue de la Paix, 1211 Geneva 10, Switzerland. Extensive information is available on the U.N. High Commission for Human Rights' Web site, www.unhchr.ch.

⁶ International Court of Justice, Peace Palace, 2517 KJ, The Hague, Netherlands; see the Court's Web site, www.icj-cij.org.

Bricker. The Bricker amendment would have severely hampered American ability to participate in treaties.⁷ For example, it would have turned the Supremacy Clause upside down, so that states' rights under the Tenth Amendment would have trumped the federal government's authority under treaties. In order to defeat it, President Dwight D. Eisenhower had Secretary of State John Foster Dulles promise the Senate not to worry—the United States simply would not join any international human rights treaties.

There matters rested for a quarter of a century. American racial segregation would be challenged successfully but only as a violation of civil rights, not human rights. The legal engines of racial progress in America were to be reinterpreted of the Constitution and the passage of new civil rights laws, not appeals to the United Nations or to treaties. Civil rights laws and their constituency became functionally disconnected from international human rights.

By the time Jimmy Carter became the "human rights president," issues of legalized race discrimination in America had diminished. But not even he could break through the cold war ice. Carter signed several human rights treaties but could not get the Senate to consent to their ratification.⁸ Worse yet, in his failing effort to secure Senate approval, he adopted three approaches which were self-destructive of American participation in human rights treaties and which have now set an unfortunate precedent.

First, he agreed to ratify human rights treaties only to the extent that they were consistent with preexisting American law. Consider what would happen if every country took such an approach. There would be no international human rights law, only a patchwork of different national versions.

Second, he ruled out effective international enforcement. America would ratify treaties but would not accept individual complaint procedures before U.N. human rights monitoring committees, much less submit to the jurisdiction of international courts in human rights cases.

And, third, Carter also ruled out domestic enforcement by declaring that the treaties were not "self-executing," that is, they could not serve as the basis for a cause of action in American courts.

With such constraints, asked the Lawyers Committee for Human Rights in New York, why bother? Imagine how we would react if the Chinese or Fidel Castro purported to ratify human rights treaties subject to such restrictions. We would not be deceived by their cynical gestures. Now reflect on how the rest of the world reacted when they learned of Carter's proposals.

Yet Carter's proposals are now the law of the land. Under Presidents Ronald Reagan, George Bush, and Carter the United States ratified four major human rights treaties.⁹ Reagan first got the United States to ratify the Convention Against Genocide in 1988—only 40 years after it had been adopted by the United Nations.

⁷ Sen. John Bricker actually introduced a series of similar proposed amendments over a period of years. See generally Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309 (1988).

⁸ Pres. Jimmy Carter signed and sent to the Senate the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the American Convention on Human Rights; and the International Convention on the Elimination of all Forms of Racial Discrimination. *Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights*, Senate exhibits C-F, 95th Congress, 2d Sess. (Feb. 23, 1978).

⁹ Convention Against Genocide in 1988, Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force*, Dec. 9, 1948; the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316(1966), 999 U.N.T.S. 171, *entered into force*, March 23, 1976; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51(1984), *entered into force*, June 26 1987; and the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, *entered into force*, Jan. 4, 1969.

Next came Bush in 1992 with the single most comprehensive treaty, the International Covenant on Civil and Political Rights.¹⁰ But Bush saddled U.S. ratification of the Covenant with Carter's three hobbling restrictions.

In 1994 the Clinton administration secured ratification of U.N. treaties against torture and against race discrimination.¹¹ But still the United States was held back by the legacy of American hostility to international human rights standards

human rights cases, as nearly all other democracies in the world had already done. The cold war was over; no longer were communist countries represented on the World Court. Racial discrimination was now illegal in the United States, too.

But, after extended debate, the group decided to reject World Court jurisdiction over U.S. race discrimination. The group was worried about racial disparities in the imposition of the death penalty. The Supreme Court had declined to find disparate impact, without proof of discriminatory intent, to be unconstitutional. But how might the World Court interpret the treaty?

One can understand and even share their concerns over the political impact of an adverse international court ruling on a sensitive domestic political issue. But Britain, France, Germany, Italy, and Argentina, to name only a few, have all accepted international jurisdiction and survived adverse rulings in sensitive cases. What makes the United States so special?

Moreover, what message does the American boycott send to the rest of the world? Does it not provide cover for Peru's Alberto Fujimori and Zimbabwe's Robert Mugabe and other authoritarian rulers who are delighted to cite the home of the free as precedent for not submitting to international human rights law?¹³

That 1993 meeting came during Clinton's first term, the high point of U.S. rapprochement with human rights treaties. In 1994 the Senate went Republican, and Jesse Helms became chair of the Foreign Relations Committee. Since then the Convention on Discrimination Against Women has been frozen in committee. We remain one of only two countries on the planet that have not joined the U.N. Convention on the Rights of the Child. The other is Somalia, which has no government.

From the point of view of American civil rights, one might ask whether this

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(except for *other* countries) and by the wedge driven between the civil rights and human rights movements.

One example of this emerged in a 1993 meeting between officials of the Justice and State Departments. Presiding was the new chief of the Civil Rights Division of the Justice Department—a highly respected civil rights lawyer. The administration was prepared to ratify the International Convention on the Elimination of All Forms of Racial Discrimination.¹² The issue was whether we would accept the treaty's dispute resolution provision, by which disputes between State parties regarding the interpretation or application of the treaty could be referred to the International Court of Justice.

There was some reason to hope that the United States might at long last submit to the international rule of law in

¹⁰ Covenant on Civil and Political Rights, *supra* note 9.

¹¹ *Id.*

¹² Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

¹³ As of this writing, Alberto Fujimori is president of Peru and Robert Mugabe is president of Zimbabwe.

matters. After all, domestic American law is more protective of rights than international law, is it not?

Not always. For example, international law places greater restrictions on the death penalty. Unlike the U.S. Supreme Court, international law prohibits capital punishment for those aged 16 or 17 at the time of the crime. It arguably requires higher standards of death penalty defense counsel and is less prone to waive rights based on procedural default. In some circumstances international law prohibits the more extreme and prolonged forms of the "death row phenomenon." It may well prohibit extreme racial disparities in the imposition of the death penalty, even without proof of discriminatory intent.

International law may also be more protective of prisoners' rights than is American law. Whereas we prohibit only punishment that is cruel and unusual, and some Supreme Court jurisprudence suggests that these requirements may be conjunctive, international law prohibits punishments or treatment that are cruel, inhuman, or degrading. Sexual harassment of prisoners that does not cause serious physical injury, for example, may not always violate American rights, but it violates international rights. Invasions of prisoner privacy—for example, male guards observing female prisoners shower—may not violate American law, but it violates international law.

Gay rights are another example. The Burger Court ruled in *Bowers v. Hardwick* that state sodomy laws, criminalizing private, consenting relations between adults, are constitutional.¹⁴ Recently a Louisiana court reached a similar result.¹⁵ By contrast, at almost the same time as *Bowers*, the European Court of Human Rights ruled that such laws violated the human right to privacy.¹⁶ The U.N. Human Rights

Committee has since found them to be discriminatory as well.¹⁷

Juvenile rights are a further example. International law requires that juvenile offenders be segregated from adults and be accorded treatment appropriate to their age and legal status.¹⁸ Is that standard presently met in Cook County?

I could go on with further examples, but one might ask, so what? If the United States declares human rights treaties to be non-self-executing, are they not unenforceable in our courts?

Not necessarily. There may be a variety of ways to get mileage from human rights treaties even if they do not directly provide a cause of action. Statutes may be adopted to implement them. One may argue that they are "laws" for purposes of section 1983 civil rights suits or the general federal jurisdictional statute. They may be used to assist in interpretation of U.S. law. Since the Supreme Court's decision in *The Charming Betsy* in 1804, U.S. jurisprudence has provided that whenever a law of the United States can be interpreted in a manner consistent with the law of nations, it must be so interpreted.¹⁹

International human rights law can also be used in the advocacy of public policy and in legislative drafting. It can be incorporated in administrative regulations as, for example, some U.S. prison systems incorporate the U.N. minimum prison standards.

The opportunities are there. Pursuing them will be no easier, and no more likely to yield immediate victories, than was the civil rights litigation strategy devised long ago by Thurgood Marshall. But, in the long run, reconciling civil rights with human rights may not only strengthen rights protection here at home but also enable this democracy to play a more credible and constructive role in protecting rights in other countries.

¹⁴ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁵ *Louisiana v. Smith*, 766 So. 2d 501 (La. Sup. Ct. 2000).

¹⁶ *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (Ser. A), 4 E.H.H. R. 149 (1981).

¹⁷ *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (Human Rights Comm'n 1994).

¹⁸ E.g., articles 10.2(b) and 10.3 of the International Covenant on Civil and Political Rights, *supra* note 9.

¹⁹ *The Charming Betsy*, 6 U.S. (2 Cranch) 34, 67, 2 L. Ed. 208 (1804) (opinion for the Court by Chief Justice Marshall).