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THE INDIVISIBLE FRAMEWORK OF INTERNATIONAL HUMAN RIGHTS: A SOURCE OF SOCIAL JUSTICE IN THE U.S.

Rhonda Copelon†

The year 1998 marked the 50th anniversary of the Universal Declaration of Human Rights¹ (UDHR), which was drafted when the capitalist world was constrained by the Soviet Union, and when want and war and the industrialized hatred of the Nazi Holocaust were recent memories. The UDHR was designed to elaborate the commitment, inaugurated in the United Nations Charter, to promote human rights as indispensable to international as well as domestic peace and security. As a “common standard of achievement for all peoples and all nations,”² the UDHR prohibits all forms of discrimination and is the foundation of an indivisible concept of rights. In contrast to the negative approach of the United States Bill of Rights, it recognizes as inseparable and interdependent—indivisible—political and civil rights and social, economic, and cultural rights.

In other words, the promise of the UDHR cannot be met by simply protecting liberty or simply providing food. These rights are inseparable and interdependent in that the opportunity to exercise liberty will influence the production and distribution of food, at the same time as hunger is antithetical to the enjoyment of liberty and full participation in society. Threatening to resign over U.S. opposition to the economic and social rights aspect of indivisi-

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¹ Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, Resolutions, at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

² *Id.* at preamble.

bility, Eleanor Roosevelt, who chaired the Human Rights Commission from 1946 to 1952 and was instrumental in negotiating the UDHR, put it succinctly: "You can't talk civil rights to people who are hungry."³

Notwithstanding Eleanor Roosevelt's contribution and the broad acceptance of the UDHR among nations today, its indivisible platform has been consistently undercut rather than embraced by the United States in both foreign and domestic policy. As the cold war deepened, advocating for the implementation of human rights in the United States was as suspect as "communist." In the United Nations, the plan to embody the UDHR in one treaty was abandoned in favor of two treaties approved in 1966: the International Covenant on Civil and Political Rights⁴ (ICCPR), dubbed first-generation rights, and the International Covenant on Economic, Social, and Cultural Rights⁵ (ICESCR), dubbed second-generation rights. The hostility of U.S. policy makers to economic and social rights as true rights continues to this day.⁶

Although the UDHR has been the cornerstone of human rights movements in many parts of the world, it is virtually unknown in the United States to social justice activists and attorneys as well as to the legal establishment and the general public. The same is true of the six major widely ratified human rights treaties, including the two 1966 covenants, which established interpretative and monitoring committees. It is also true of numerous U.N. dec-

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³ Blanche Wiesen Cook, *Eleanor Roosevelt and Human Rights: The Battle for Peace and Planetary Decency*, in *WOMEN AND AMERICAN FOREIGN POLICY: LOBBYISTS, CRITICS & INSIDERS* 113 (Edward P. Crapol ed., 1987).

⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316, *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

⁵ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6313, *entered into force* Jan. 3, 1976 [hereinafter ICESCR].

⁶ See, e.g., Irving Kristol, *Human Rights: The Hidden Agenda*, in *THE HUMAN RIGHTS READER* 393-94 (Walter Laqueur & Barry Rubin eds., 1990). Paradoxically, although civil rights groups were often branded as "communist" in the 1950s, the Eisenhower administration supported the desegregation cases in the Supreme Court, culminating in *Brown v. Board of Education*, 347 U.S. 483 (1954). This was based on foreign policy grounds in order to deflect the Soviet Union's and international critiques of U.S. democracy. See, e.g., GERALD HORNE, *BLACK AND RED: W. E. B. DUBOIS AND THE AFRO-AMERICAN RESPONSE TO THE COLD WAR 1944-1963* (1986); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *STAN. L. REV.* 61 (1988). Notably, the naming of the generations occurred in reverse order to the chronology of their approval by the U.N. See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social, and Cultural Rights: The Need for an Entirely New Strategy*, 84 *AM. J. INT'L L.* 365 (1990); Dorothy Q. Thomas, *Advancing Rights Protection in the United States: An Internationalized Advocacy Strategy*, 9 *HARV. HUM. RTS. J.* 15 (1996).

larations, resolutions, and conference agreements that have elaborated the UDHR's broad human rights program.⁷ Even the U.S. ratification of three of these treaties, which came after 1991 with many limitations, received minimal attention.⁸

The need to overcome this ignorance in the United States is particularly compelling today. The commitment to civil rights, including the legitimacy of affirmative action, is under siege. Balancing the budget and devolution of power to the states, or the "race to the bottom," is undoing already inadequate public commitments to social welfare and a safety net for the poor. Women, particularly women of color, bear disproportionately the brunt of poverty and privatization. Fundamentalist movements continue their attack on reproductive and sexual rights while gender violence and discrimination against women and sexual minorities continue largely unabated. And, except for the highly skilled, the labor force outside the home is being devalued, downsized, and demoralized.

Conditions endured by poor and working people, women, and minorities in South American and African countries are distinct but inseparable from conditions in the United States as well as from the influence of U.S. policy. Controlled by the highly industrialized donor nations, the international financial institutions along with multinational corporations are transforming mixed economies into ruthless market economies. By conditioning debt relief and the promise of new loans on a country's acceptance of structural adjustment policies, they strip away or privatize essential public services. Pressure to relinquish trade barriers without effective countervailing protection subjects impoverished workers to un-

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⁷ Six human rights treaties establish treaty committees to provide ongoing monitoring of state adherence through state reporting and in some cases through individual petition procedures. These include the ICCPR and ICESCR, *supra* notes 4, 5; Convention Against Torture, Dec. 10, 1984, G.A. Res. 39/46, annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51, *entered into force* June 26, 1987 [hereinafter CAT]; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969 [hereinafter Race Convention]; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981 [hereinafter Women's Convention]; Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/RES/44/49, *entered into force* Sept. 2, 1990. There are also many other norm-setting multilateral human rights treaties on genocide, slavery-like practices, and labor standards. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (1996) [hereinafter *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*].

⁸ The ICCPR was ratified on June 8, 1992; the Race Convention was ratified on Oct. 21, 1994; and the CAT was ratified on Oct. 21, 1994.

mitigated exploitation. A resurgence of the arms race among both Northern Hemisphere manufacturers and Southern Hemisphere buyers diverts resources from social needs and retools the repressive, violent capacity of states. Fundamentalist movements, which thrive in desperate times, are also being stoked by tacit and active support from Northern governments, particularly when they promise openness to the global market.⁹

It may seem ironic or naive even to suggest that something so fragile or abstract as international human rights could be a counterweight to these local and global trends. Human rights "law" bears little resemblance to the formalities that we associate with law. The International Court of Justice entertains only the cases brought by states, which only occasionally involve human rights, and has no mandatory enforcement capacity. The proposed permanent International Criminal Court may be similarly limited and will deal only with gross violence or persecution, not with everyday human rights violations.¹⁰ Human rights "enforcement" is dispersed among political commissions, treaty committees, and special rapporteurs or working groups who investigate violations. For the most part, enforcement depends on states' voluntary responses to public scrutiny and shaming. Indeed, the insight that law is inseparable from politics is nowhere more fitting than in the sphere of human rights. Nor does the universality of human rights make them less indeterminate or susceptible to manipulation than domestic rights. The substance and potential of international human rights depends ultimately on the courage, persistence, and vision of human rights movements.

A sense of both individual and collective entitlement—embodying a vision of a better society and world—is thus a cornerstone of popular resistance and the source of human rights norms and accountability. Representing norms and claims of universal and fun-

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⁹ For discussion of the impact of global economic policies, see *Report on the Fourth World Conference on Women*, Fourth World Conference on Women, Platform for Action and Beijing Declaration and Platform for Action U.N. Doc. A/CONF. 177/20 (1995), at pt. 2, ch. 4(a), DPI/1766/Wom-95-39642 (1996) [hereinafter *Beijing Platform for Action*]. Regarding Northern encouragement of extremist religious movements, see GRAHAM E. FULLER, *ALGERIA: THE NEXT FUNDAMENTALIST STATE* (1996).

¹⁰ Since this symposium was held, the Rome Statute of the International Criminal Court was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998, by a vote of 120-7. *Rome Statute of the International Criminal Court*, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court A/CONF.183/9 (1998) [hereinafter *ICC*]. To date, only Senegal has ratified the treaty. The "core crimes" of genocide, crimes against humanity, war crimes and aggression fall within the jurisdiction of the ICC.

damental dimension, international human rights acquire impact through popular organizing and demand. Building a human rights movement and culture in the United States, within the law and the society generally, offers not only an alternative vision of social organization and justice on our soil; it could also affect the manner in which the United States exercises its power in the international arena.

To do this, we must confront the myth that the U.S. Constitution is the best in the world. Domestically, the myth obscures the fact that the Constitution was drawn to protect the interests of white, male, propertied men and that the legitimization of slavery was at its heart and remains today its unredressed legacy. Internationally, the United States perpetuated this myth as an instrument of the Cold War, at the same time as it worked to narrow, distort, and obfuscate the indivisible international framework of human rights. The myth is under challenge today as many countries have adhered, at least formally, to the international framework. The new South African Constitution, for example, entrenches the indivisibility principle and puts ours to shame.

While the media stokes notions of superiority here by giving increasing attention to human rights violations abroad, the systemic failure to apply the human rights lens at home continues. Recently, I mentioned to a high school teacher that my work involves international women's human rights. Immediately, she said, "Oh yes, all my kids are really upset about female genital mutilation." "What about wife battering or health care here?" I asked.

THE BASIC ELEMENTS OF THE HUMAN RIGHTS FRAMEWORK

Negative is a word that aptly describes the U.S. framework of civil rights and civil liberties in a number of ways: rights are limited to constraints on government; they do not reach private conduct, they do not include the most basic social and economic needs, and since about 1980, even the most limited conception of state responsibility has been essentially dismantled. For example, the current Supreme Court emphasizes that the liberty protected by the Fourteenth Amendment does not require the government to take even minimal measures to protect that liberty from private violations, to enable its exercise, or even to insulate it from purposeful state suppression and discrimination. As Chief Justice Rehnquist pronounced in the infamous *DeShaney* decision, which stripped abused children of any claim to state or constitutional protection: "[Nothing] in the language of the Due Process Clause itself requires the

State to protect life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of minimal levels of safety and security."¹¹

The international human rights system contains both negative and positive rights and imposes upon states both negative and positive obligations. The provision of basic needs—rather than, as here, accompanied by accusations of individual moral fault or the practical deficiencies of the poor—is recognized internationally as a human right and a sovereign responsibility. The ICESCR, so widely ratified as to be binding customary international law, protects the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”¹² This involves the provision of not only preventative and curative health care but also the protection of healthful environmental, social, and occupational conditions. The ICESCR also recognizes “the right of everyone to an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions.”¹³ Work for all—including participation in trade unions, fair terms, equality, safety, and leisure—is a human right. Social security, insurance, and assistance for families are human rights. Education, including free compulsory primary education as well as access to affordable higher education, is a human right. Participation in cultural life and enjoyment of the benefits of scientific progress are human rights.¹⁴

Some aspects of these rights, such as primary education, are immediate obligations, and some, such as equitable distribution of sufficient food, require international cooperation. In general, the state's obligation is to “take steps, individually and through international assistance and cooperation . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the[se] rights by all appropriate means.”¹⁵ The U.N. Committee on Economic, Social, and Cultural Rights, along with international jurists, have identified the concept of a “minimum core” that must be guaranteed to all. While the extent of progressive implementation depends on resources, there is no excuse in a highly industrialized country such as the United States not to ap-

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¹¹ *DeShaney v. Winnebago County Dep't of Soc. Services*, 489 U.S. 189 (1989) *see also* *Harris v. McRae*, 448 U.S. 297 (1980).

¹² *See* ICESCR, *supra* note 5, art. 12(1).

¹³ *See* ICESCR, *supra* note 5, art. 11(1).

¹⁴ *See* ICESCR, *supra* note 5, arts. 6-15.

¹⁵ *See* ICESCR, *supra* note 5, arts. 2, 14, 11(2).

proach maximal realization. At the least, retrogression is forbidden. Cutbacks on social welfare programs and privatization of basic services are presumptively a violation of these human rights whether they be demanded by the international monetary institutions of Southern Hemisphere countries through structural adjustment policies (SAPS) or are imposed domestically through devolution to the states, slashing of welfare programs, or privatization of public sector services. Privatization of public service institutions, whether of health care or water, is a violation unless the state retains control so as to fulfill its obligation to ensure both minimal and progressive access to needed services on a nondiscriminatory basis. Furthermore, the ICESCR permits only developing countries to limit the equal enjoyment of these rights to non-nationals.¹⁶

Moreover, international political and civil rights—the closest parallel to the negative rights approach of the U.S. Constitution—transcend our own. In terms of the scope of substantive rights, the right to life contained in the ICCPR clearly envisages progressive abolition of the death penalty as a goal and explicitly forbids execution of juveniles, a prohibition nonetheless approved by the U.S. Supreme Court. The right to be free from torture is explicit; and the protection extended to cruel, inhuman, and degrading “*treatment or punishment*” is not simply a post-conviction remedy, as is the Eighth Amendment. Freedom of speech is protected, but “propaganda for war . . . [and] advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited.”¹⁷ Linguistic minorities cannot be denied “the right, in community with the other members of their group. . . to use their own language.”¹⁸ Non-refoulement—sending immigrants back to danger—is prohibited.¹⁹

The ICCPR binds states not only to “respect” but also to “ensure” the enjoyment of these rights. It specifically requires that they “adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant” and to “ensure that any person whose rights or freedoms . . . are vio-

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¹⁶ See General Comments adopted by the U.N. Committee on Economic, Social, and Cultural Rights, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/Gen/1/Rev. 2 (Mar. 29, 1996) [hereinafter *Compilation*]; see also Asbjørn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L.J. 35 (1989); ICESCR, art. 2(3).

¹⁷ ICCPR, *supra* note 4, art. 20.

¹⁸ ICCPR, *supra* note 4, art. 27.

¹⁹ See ICCPR, *supra* note 4, arts. 6, 7, 20, 27; CAT, *supra* note 7, art. 3; *Sanford v. Kentucky*, 492 U.S. 361 (1989); *Estelle v. Gamble*, 429 U.S. 97 (1976).

lated shall have an effective remedy.”²⁰ This is an important springboard for the obligation to take positive steps to implement social and economic rights in order to protect political and civil rights.²¹

There are a number of dimensions to this positive obligation. The right to be free from torture, for example, requires that states institute systemic preventive measures against official misconduct—training, monitoring, and sanctions, for example. The positive obligation also requires states to protect human rights against private deprivation. Life, liberty, and security of person, for example, must be protected against privately inflicted harm through investigation, punishment, and preventive measures. Thus, the right to life entails an obligation to prevent and punish political assassination and kidnapping by paramilitary operations, as well as murder, gender violence, and child abuse by private individuals.²²

Moreover, the positive obligations transcend the use of criminal penalties or judicial remedies. The U.N. Human Rights Committee has recognized the need for affirmative health and social welfare initiatives to avert infant malnutrition and epidemics and abortion-related mortality. In the European human rights system, the right to privacy and family life has been interpreted to require provision of legal counsel necessary to its protection.²³ The same principle should require Medicaid funding of abortion for poor women given that abortion is legal or recognized as protected.

In sum, in the international system, even political and civil rights involve state responsibility to ensure them positively. This is in sharp contrast to the U.S. approach, which views positive measures as an optional matter for legislation. Indeed, it is striking that

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²⁰ ICCPR, *supra* note 4, arts. 2(2), 3(b).

²¹ See CAT, *supra* note 7, art. 2; see also Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOOD HALL L.J. 769 (1989).

²² See CAT, *supra* note 7, art. 3; Velasquez Rodriguez Case, 28 I.L.M. 294 (1989); Brief Amicus Curiae by International Women's Human Rights Law Clinic (IWHRL) and Center for Constitutional Rights (CCR), *Doe v. Doe* (2d Cir. 1996) (No. 96-6224) (arguing that treaty and customary international law regarding gender violence justify congressional enactment of positive measures in the Violence Against Women Act, specifically, the federal cause of action to redress gender-based violence) (on file with N.Y. City L. Rev.), *appeal from* 929 F. Supp. 608 (D. Conn. 1996), *appeal withdrawn*; Hum. Rts. Comm., *Comment 6 (5)*, in *Compilation, supra* note 16, at 7.

²³ See Hum. Rts. Comm., *Comment 6 (5)*, in *Compilation, supra* note 16, at 7; see also *Comment 2, id.* at 4; *Comment 20 (8-11)* (torture and ill-treatment), *id.* at 31-32; Concluding Observations of the Hum. Rts. Comm.: Peru, 4 International Human Rights Reporter 481 para. 15 (1997); *Airey Case*, 2 Eur. Ct. H.R. (ser. A) at 305 (1979). *But see* *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981).

in the United States we rarely speak of state responsibility in regard to rights. By contrast, in the international system the concept of state responsibility is fundamental, and in every human rights treaty the scope of state responsibility is articulated explicitly. State responsibility—whether it be to respect, ensure, protect, or fulfill the human right at issue—is one of the cornerstones of the human rights frameworks. How to implement and measure these responsibilities is increasingly a focus of human rights bodies and jurists.²⁴

International antidiscrimination principles also depart significantly from the U.S. model. The scope of protected classes is much broader, including “discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” While discrimination on the basis of sexual orientation has not yet been squarely recognized as an “other status,” the Human Rights Committee has recently recognized sexual orientation discrimination as sex discrimination and, in its comments on the U.S. report under the ICCPR, criticized the U.S. Supreme Court’s decision in *Bowers v. Hardwick*²⁵ as inconsistent with the Covenant.

Moreover, state responsibility under international law to eliminate discrimination explicitly extends to the private sphere and covers disproportionate impact as well as intentional discrimination. In slightly different language, the Race and Women’s Conventions define discrimination as including distinctions that impair or nullify the equal enjoyment of rights “in the political, economic, social, cultural, civil or any other field.”²⁶ Both conventions also emphasize the need to address the cultural foundations of racial and gender hierarchy, stereotypes, and discrimination. Given the particular significance of private sphere discrimination to the status of women, the Women’s Convention contains specific articles requiring that states foster equality in the private sphere affecting

²⁴ See *Compilation*, *supra* note 16, at 49-87; Asbjorn Eide, *supra* note 16, at 35.

²⁵ 478 U.S. 186 (1986). Cf. *Baehr v. Lewin*, 52 P.2d 44 (Haw. 1993); *Baehr v. Mike*, 910 P.2d 112 (Haw. 1996). See UDHR, *supra* note 1, art. 2; ICCPR, *supra* note 4, arts. 2(1), 26; ICESCR, *supra* note 5, art. 2(2) (emphasis added).

The covenants also separately state the obligation of states to ensure the equality of men and women in respect to the covenants’ rights. See ICCPR, *supra* note 4, art. 3; ICESCR, *supra* note 5, art. 3; *Toonen v. Tasmania*, reprinted in U.N. GAOR, Hum. Rts. Comm., 15th Sess., Case No. 448/1992 (1994); *Concluding Observations of the Human Rights Committee: U.S.A.*, 53rd Sess., 1413th mtg., U.N. Doc. CCPR/C/79/Add. 50 (1995), para. 28 [hereinafter *Concluding Observations: U.S.A.*]; see also Beijing Platform for Action, *supra* note 9, para. 96; Laurence Helfer and Alice Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61 (1996).

²⁶ See Race Convention, *supra* note 7, art. 1(1).

work, family relations, and access to goods and services.²⁷

Both Conventions also call for temporary affirmative action measures where needed to secure the "full and equal enjoyment and exercise of human rights and fundamental freedoms" and accelerate de facto equality. In the Women's Convention, positive measures to provide assistance and prevent discrimination based on pregnancy are accepted explicitly.²⁸

Finally, the Supreme Court's proliferation of barriers to the justiciability of rights claims is also out of line with international standards. Most of the international instruments emphasize the right to an accessible and effective judicial remedy for violations. And, like many national systems, their complaint procedures do not condition the ability to challenge violations on narrow concepts of injury or standing; rather, the risk of injury or the impact of disadvantage, such as stigma, are recognized forms of injury.²⁹

The U.S. Bill of Rights and the current interpretation of it by the Supreme Court—far from the beacon imagined and proclaimed in the United States—amount to a mere shadow of the universal version.

THE POLITICAL CONSTRUCTION OF IGNORANCE

The apparent acceptance by the United States government of the broad, indivisible concept of human rights contained in the UDHR was hard won and short lived. As the U.S. representative to the U.N. Human Rights Commission during the Truman administration, Eleanor Roosevelt—deeply affected by the Great Depression and World War II and convinced that economic and social rights were essential to lasting security and peace in the world—pressed the United States into accepting the UDHR. Ultimately, however, the U.S. vote to approve the UDHR had more to do with

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²⁷ See Race Convention, *supra* note 7, arts. 1, 4, 7, 11, 16; Women's Convention, *supra* note 7, arts. 1-5. But see THE POLITICS OF LAW 279-356 (David Kairys ed., 3d ed. 1998) (discusses the Supreme Court's decisions in detail).

²⁸ See Race Convention, *supra* note 7, arts. 10, 2(2); see also Women's Convention, *supra* note 7, art. 4. Both conventions provide that affirmative action is not to be considered discrimination so long as it does not maintain unequal or separate standards or outlast the point when "the objectives of equality of opportunity and treatment have been achieved." Women's Convention, *supra* note 7, art. 4.

²⁹ Compare *Toonen v. Tasmania*, *supra* note 25, (stigma resulting from criminalization of same-sex sodomy is part of injury) with *Allen v. Wright*, 468 U.S. 737 (1984), (stigma resulting from government's tax exemption to racially discriminatory private schools is not a cognizable injury). See also Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990).

the desire to show up the Soviet Union, which was among the abstainers, than with a commitment to the Declaration's principles.³⁰ The prospect of international scrutiny of U.S. domestic policy would not be part of the bargain, nor would the international framework be recognized as a touchstone for domestic policy.

From the outset, however, the civil rights movement understood the potential of the human rights system to encourage domestic change. In 1947 and 1951, petitions were filed with the United Nations documenting and challenging *de jure* racial segregation, racial violence, and the status of African-Americans in the United States. While these initiatives contributed to the formal repudiation of school segregation by the Eisenhower administration and the Supreme Court, the Cold War and Southern opposition to racial equality produced a right-wing backlash against international accountability that continues to the present.³¹

The Bricker Amendment to the UDHR sought to preclude ratification of human rights treaties. Although never formally approved by Congress, its substance was adopted as policy by the Eisenhower administration.³² The State Department openly used human rights as a selective tool of foreign policy—selective in the sense of focusing on violations of political and civil rights abroad committed by the Soviet Union and its allies. Advocates of international accountability of the United States were branded as disloyal.³³ This selectivity played a significant role in shaping opinion in the United States.

Attention to egregious human rights violations occurring abroad but not at home generates a convenient and false sense of security and superiority in the United States. Torture and inhu-

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³⁰ See Cook, *supra* note 3.

³¹ See CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE HISTORIC PETITION TO THE UNITED NATIONS FOR RELIEF FROM A CRIME OF THE UNITED STATES GOVERNMENT AGAINST THE NEGRO PEOPLE 3 (2d ed., 1970); Brief for the United States as Amicus Curiae at 6, *Brown v. Board of Education*, 347 U.S. 483 (1954).

³² See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); *Hearings on S.J. Res. 1 and S.J. Res. 43 Before a Subcomm. of the Senate Comm. on the Judiciary*, 83d Cong., 1st Sess. 825 (1953) (statement of Secretary of State John Foster Dulles).

³³ See Thomas, *supra* note 6, at 20. "Treaties should be designed to promote United States interests by securing action by foreign governments in a way deemed advantageous to the United States. *Treaties are not to be used as a device for the purpose of effecting internal social changes*, or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern." Thomas, *supra* note 6, at 20, *citing to* U.S. RATIFICATION OF THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS 13, (Hurst Hannum & Dana D. Fischer eds., 1993); *see also* Kristol, *supra* note 6, at 396.

man treatment, for example, among the most frequently condemned international obligations, appear as a characteristic of the jails of dictators, not democracies. Even those in the United States who suffer inhuman treatment—in the form of police brutality or physical and psychological debilitation in custody, including rape and sexual harassment—rarely name it as such. The Constitution does not explicitly protect against torture or inhuman treatment. Despite recent ratification of the Convention Against Torture, Congress restricted its scope and excluded U.S. officials from the purview of the civil damage remedy enacted to implement it. Thus, torture and inhuman treatment in the United States—whether committed by state officials or as a result of state tolerance of private abuse such as marital rape or other forms of severe domestic violence—have been obscured.³⁴

Inattention to the international framework of human rights as a measure of domestic policy is also bolstered by the myth that the U.S. Constitution, particularly the Bill of Rights, is the best and most effective guarantor of human rights in the world. This bias is further ensured by the lack of human rights education as part of educational curricula at all levels. Neither international law nor human rights are required courses in most law schools, let alone in other contexts. Accordingly, today there is little popular sense of entitlement to the full range of human rights or knowledge of the principle of governmental responsibility. The United States has also used the myth of constitutional superiority to hold itself above international scrutiny and continues to do so today in its refusal to ratify the ICESCR and the Women's and Child Rights Conventions and in the limits it imposes when it does ratify human rights treaties.

In the international arena, the United States has consistently deprecated social and economic rights—the second-generation rights—as simply aspirations: they are not real rights to which states could be held accountable, and they involve too much intrusion into domestic policy. While the issues of definition and stan-

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³⁴ See Human Rights Watch/Women's Rights Project, *Sexual Abuse of Women in U.S. State Prisons* (1996). The Torture Victims Protection Act, 28 U.S.C. § 1350n provides a civil damage action implementing the Convention Against Torture and excluding U.S. officials from its scope; *Concluding Observations: U.S.A.*, *supra* note 25, at paras. 279, 281-282, 285-286; see also Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994); *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences* (Coomaraswamy) [hereinafter *Special Rapporteur: Domestic Violence*], ESCOR U.N. Doc. E/CN.4/1996/53 (Feb. 5, 1996), paras. 42-50, at 12-13.

dard setting are indeed challenging, this deference to sovereignty or self-determination in regard to economic and social rights ironically evaporates when U.S. foreign aid or the assistance of the World Bank or International Monetary Fund are at issue. There, for example, extensive economic restructuring is demanded in return for debt relief and continuing international assistance.³⁵

U.S. hostility to social and economic rights as mandated entitlements together with the myth of constitutional superiority has hindered popular knowledge as well as advocacy in the United States of the UDHR's indivisible framework. On the domestic level, neither the welfare rights movement of the 1960s nor its legal advocates made the UDHR or the ICESCR a theme or used them as a normative frame of reference. Major U.S.-based international human rights groups traditionally have excluded economic and social rights from their purview, although this is under review today. And significantly, grass roots movements have begun explicitly campaigning for human rights, including economic rights.³⁶

Until recently, it may have seemed that the New Deal social welfare programs of the 1930s and the civil rights legislation of the mid-1960s were a permanent part of the legal landscape, albeit not by constitutional compulsion. Thus, just over a decade ago, a leading U.S. human rights scholar argued that the United States had become a welfare state and that "[t]he welfare system and other rights granted by legislation (for example, laws against racial discrimination) are so deeply imbedded as to have near constitutional sturdiness."³⁷ Given the recent stripping away of social welfare entitlements, the need for attention to the international framework as a normative basis for social and economic rights in the Constitution is pressing.

The indivisible human rights framework survived the Cold War despite U.S. machinations to truncate it in the international arena. The framework is there to shatter the myth of the superior-

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³⁵ See Henry J. Steiner & Philip Alston, *Comment on Objections to Economic and Social Rights*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, *supra* note 7, at 267-68; Alston, *supra* note 6; ROBERTA CLARK & JOAN FRENCH, *Issues in the Enforceability of Human Rights: A Caribbean Perspective*, in *FROM BASIC NEEDS TO BASIC RIGHTS* 103 (Margaret A. Schuler ed., 1995).

³⁶ See ARYEH NEIER, *Human Rights*, in *THE OXFORD COMPANION TO POLITICS OF THE WORLD* 403 (J. Krieger ed., 1993). Human Rights Watch, for example, has begun to examine social and economic rights where linked with violations of civil and political rights. Conversation with Alison Collins, Human Rights Watch (Oct. 6, 1997). See *infra* note 52 for grass roots initiatives.

³⁷ Louis Henkin, *International Human Rights and Rights in the United States*, in *INTERNATIONAL HUMAN RIGHTS IN CONTEXT*, *supra* note 7, at 272.

ity of the U.S. version of rights, to rebuild popular expectations, and to help develop a culture and jurisprudence of indivisible human rights. Indeed, in the face of systemic inequality and crushing poverty, violence by official and private actors, globalization of the market economy, and military and environmental depredation, the human rights framework is gaining new force and new dimensions. It is being broadened today by the movements of people in different parts of the world, particularly in the Southern Hemisphere and significantly of women, who understand the protection of human rights as a matter of individual and collective human survival and betterment. Also emerging is a notion of third-generation rights, encompassing collective rights that cannot be solved on a state-by-state basis and that call for new mechanisms of accountability, particularly affecting Northern countries. The emerging rights include human-centered sustainable development, environmental protection, peace, and security.³⁸ Given the poverty and inequality in the United States as well as our role in the world, it is imperative that we bring the human rights framework to bear on both domestic and foreign policy.

TOWARD AN INDIVISIBLE HUMAN RIGHTS STRATEGY: ADVANCES AND CHALLENGES IN WOMEN'S HUMAN RIGHTS ADVOCACY

Recent advances by women's human rights movements should provide inspiration, strategic insight, and some hope for U.S. domestic activists. Although the UDHR prohibited sex discrimination, and the covenants reiterated and expanded this prohibition, and despite the Women's Convention, which became effective in 1981, violence and discrimination against women were largely invisible in the human rights arena until 1993.³⁹ Subsequent to the 1985 World Conference on Women in Nairobi, women, particularly in the Southern Hemisphere, began to organize using human rights as a framework and vision. The initial focus was on violence against women because of the near universality of its occurrence, the gravity of its effects, and its centrality to the classic human rights paradigm.

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³⁸ See Stephen Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435 (1981). See, e.g., U.N. Declaration on the Right to Development, GA Res. 41/128, Annex, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986); Beijing Platform for Action, *supra* note 9.

³⁹ See UDHR, *supra* note 1, arts. 2, 26; ICCPR, *supra* note 4, arts. 2(1), 3, 40, 26; ICESCR, *supra* note 5, arts. 2(2), 3. Article 3 of both Covenants added a discrete provision that all the rights therein be ensured equally to women and men. See Johannes Morsink, *Women's Rights in the Universal Declaration*, 13 HUM. RTS. Q. 299 (1991).

There were significant obstacles. International non-governmental organizations (NGOs) contended that women's claims would dilute existing human rights; that gender violence was merely a common crime; and that the state-centered human rights framework could not reach gender violence. At base, the view that violence and other violations of women's human rights are not important or are adequately encompassed by "neutral" rules was and remains a great obstacle to effective protection.

However, a global campaign for human rights and the 1993 World Conference on Human Rights in Vienna broke the gender sound barrier. The recognition of violence against women as a human rights violation and of the responsibility of governments to integrate gender into all human rights and related programs were the major innovations of the Vienna Conference. The following year, the General Assembly approved the Declaration on the Elimination of Violence Against Women, which for the first time recognized gender violence as a human rights violation and delineated state responsibility to prevent, punish, and eliminate official, community, and intimate violence. While in the early 1990's most in the human rights field questioned whether rape was a war crime. Today the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda have charged rape as the war crime of torture and enslavement,⁴⁰ and the International Criminal Court negotiations have accepted sexual violence as among the gravest war crimes.⁴¹ As a result of domestic pressure, increased occasions for international review, and an increasing political recognition of the costs of gender violence, nations are beginning to pass laws against domestic violence.⁴²

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⁴⁰ Since this article was prepared, the International Criminal Tribunal for Rwanda held in *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, that rape was a tool of genocide, (Judgement Sept. 2, 1998, ¶ 731-34) as well as a crime against humanity. ¶ 685-688. The *Akayesu* Judgment also found that forced nudity is a form of sexual violence, and falls within the jurisdiction of the Tribunal under "other humane acts" (crimes against humanity, Article 3(i)), "outrages upon personal dignity" (violations of article 3 common to the Geneva Conventions and of Additional Protocol II, Article 4(e)) and "serious bodily or mental harm" (genocide, Article 2 (2)(b) ¶ 688). The International Criminal Tribunal for the former Yugoslavia held that rape is torture in the *Prosecutor v. Celebici*, Case No. IT-96-21-T (Judgement Nov. 16, 1998, ¶¶ 943, 965) and that rape is a war crime and a form of torture in the *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T (Judgement Dec. 10, 1998, ¶¶ 275, 269).

⁴¹ The Statute for the ICC gives the court jurisdiction over the crimes of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

⁴² For a history of the global human rights campaign and UN negotiations through the 1995 Beijing Conference, see FELICE GAER, *Never the Twain Shall Meet?*, in AMERICAN BAR ASSOCIATION, *INSTRUMENTS OF CHANGE* (1998). See CHARLOTTE BUNCH

These advances are the product of continuing mobilization, but rhetoric does not transform into action by magic. While feminist scholars provided a theoretical basis for challenging the exclusion of women and asserting state responsibility for systemic private conduct, the most important factor was that women, organized with a sense of entitlement and a powerful vision, were a force that could not be stopped.⁴³ Ironically, these historical advances occurred less because of the salience of the issue of women's rights to the delegates than because of its seeming insignificance in a conference that nearly did not take place because of the intensity of the international tension over universality and sovereignty issues.

At the same time, the campaign to have gender violence recognized as a vehicle for bringing women into the human rights arena confronts the distinction between first-and second-generation rights. It has been difficult to focus attention and resources on the economic and social underpinnings of gender violence. Thus, when the Inter-American Convention on the Prevention, Punishment, and Elimination of Violence Against Women was being negotiated, the positive obligations to take social and economic measures to eliminate violence were watered down and excluded from the petition procedure before the Inter-American Commission on Human Rights.⁴⁴ The danger of this development is not unfamiliar to U.S. activists. As implementation of the norm against gender violence draws more and more activists to violence-specific remedies—prosecution, heightened penalties, incarceration, protective orders, and training of police and judicial personnel, for

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& NIAMH RIELLY, DEMANDING ACCOUNTABILITY: THE GLOBAL CAMPAIGN AND VIENNA TRIBUNAL FOR WOMEN'S HUMAN RIGHTS (1994); NIAMH RIELLY, WITHOUT RESERVATION: THE BEIJING TRIBUNAL ON ACCOUNTABILITY FOR WOMEN'S HUMAN RIGHTS (1996); United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, adopted June 25, 1993, *reprinted in* 32 I.L.M. 1661 (1993), 14 HUM. RTS. L.J. 325 (1993); U.N. Declaration on the Elimination of Violence Against Women, U.N. Doc. A/48/104 (1994).

⁴³ See, e.g., Alda Facio, *El Sexismo en el Derecho de los Derechos Humanos* (1988), in LA MUJER AUSENTE (1991); Charlotte Bunch, *Women's Rights as Human Rights: Towards a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486 (1990); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Rebecca J. Cook, *Women's International Human Rights Law: The Way Forward*, 15 HUM. RTS. Q. 230 (1993); Berta Esperanza Hernandez-Truyol, *Concluding Remarks Making Women Visible: Setting an Agenda for the Twenty-First Century*, 69 ST. JOHN'S L. REV. 231 (1994); Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993); Copelon, *supra* note 34.

⁴⁴ See Inter-American Convention on the Prevention, Punishment, and Elimination of Violence Against Women, 3 INT'L HUM. RTS. REP. 232 (1994); Berta Esperanza Hernandez-Truyol, *Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605 (1996).

example—the economic, social, political, and cultural underpinnings of violence are pushed to the margins of human rights concerns.

At the 1994 International Conference on Population and Development (ICPD), women took the next step despite tremendous opposition to the human rights perspective. There, a convergence of women's movements concerned with women's health and human rights accomplished another amazing, albeit partial, paradigm shift. The ICPD Programme of Action articulated the foundation for transforming targeted fertility reduction programs into a concrete and a more indivisible women-centered human rights program.⁴⁵ It recognized sexual and reproductive health and reproductive rights as human rights, emphasizing decision making free of violence, coercion, and discrimination, as well as the responsibility of states to ensure broad health care services, education, gender equality, and empowerment and participation by women's NGOs in policy making and implementation. While religious fundamentalists led by the Vatican were able to limit women's autonomy rights by excluding sexual rights and eliminating the call to consider the decriminalization of abortion, these defects were partially remedied at the Fourth World Conference on Women.⁴⁶

It is significant that the ICPD Program framed its detailed positive program for health, education, and women's empowerment as human rights. The force of the women's lobby and its explicit reliance on human rights principles in Cairo in 1994, together with the acknowledged lack of utility of the population control approach and cost of women's subordination, laid the foundation for this success. The U.S. delegation strongly supported the recognition of reproductive decision-making rights and the need for pro-

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⁴⁵ See *ICPD Program of Action, Report of the International Conference on Population and Development*, A/CONF.171/13 (Oct. 18, 1994) [hereinafter *ICPD POA*].

⁴⁶ See ADRIENNE GERMAIN & RACHEL KYTE, *THE CAIRO CONSENSUS* (1995). For an excellent statement of a truly indivisible program developed by the women's NGOs, see *Reproductive Health and Justice: International Women's Health Conference for Cairo '94, January 24-28, 1994, Rio de Janeiro* (1994) [hereinafter *Rio Statement*]. In the Beijing Platform for Action, women's sexual rights – "to have control and make decisions over . . . their sexuality" – as well as the obligation of states to consider the decriminalization of abortion were written into U.N. consensus documents for the first time, at paragraphs 96 and 106k, respectively; see Beijing Platform for Action, *supra* note 9. For a fuller discussion of the background, political tensions, and decisions of the ICPD along with its implications for human rights, see Rhonda Copelon & Rosalind Petchesky, *Toward an Interdependent Approach to Reproductive and Sexual Rights as Human Rights: Reflections on the ICPD and Beyond*, in *FROM BASIC NEEDS TO BASIC RIGHTS*, *supra* note 35, at 343-68.

gress on the abortion issue against a fundamentalist coalition led by the Vatican. It also ultimately supported the indivisible framework in Cairo. Otherwise, it would have been isolated among countries and appeared inconsistent with the Clinton administration's domestic focus, which, at that time, was to improve health care coverage. Women were also able to qualify the potential privatization of reproductive health care by a recognition that states are ultimately responsible for the quality and accessibility of the necessary care.⁴⁷ However, the strength of the indivisible framework in the ICPD Programme is in part connected to the fact that reproductive health care serves not only women but also those whose goal is fertility control.

Nevertheless, the ICPD Program revealed another layer of resistance to implementing the full indivisible framework. Some called it "What happened to the 'D' in ICPD?" There was a concerted women's lobby on the development issues, which challenged the problem of unsustainable development, overproduction, and over-consumption in the Northern Hemisphere and among Southern Hemisphere elites. The lobbyists also called for an end to SAPS and for increased dedication of both international or foreign aid and domestic resources to social welfare funding. These issues are merely mentioned but not developed in the Cairo Program.⁴⁸

Worldwide development issues—specifically poverty, enabling economic environments, and social integration—were the focus of the World Summit on Social Development, which preceded the Beijing Women's Conference in 1995. At that conference, a caucus of women's human rights NGOs participated alongside a broad range of women's economic and social policy NGOs. The historic tension between social and economic *goals* and social and economic *rights* was reflected in a reluctance of the summit to incorporate the human rights framework consistently. Nevertheless, as a result primarily of the work of the women's human rights NGOs, the summit plan does begin with a commitment to the realization of the full range of human rights, including economic, social, and cultural rights and the right to development.⁴⁹

The Beijing Platform for Action, whose subject is the lives and needs of women, was the product of an extraordinary synergy be-

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⁴⁷ See *ICPD POA*, *supra* note 45, para. 15.13.

⁴⁸ See *Rio Statement*, *supra* note 46; Copelon & Petchesky, *supra* note 46.

⁴⁹ See *Report of the World Summit for Social Development*, A/CONF.166/9 (Apr. 19, 1995); see also GAER, *supra* note 42.

tween women delegates and a broad, seasoned NGO lobby. The human rights perspective is pervasive. Most of the chapters, for example, armed conflict, power and decision making, health, education, children, the economy, incorporate an explicit human rights perspective. The Beijing Platform also took a step toward greater concreteness with regard to mitigating (but not undoing) macroeconomic policies and their effect on women's poverty. It also directed the restructuring, but not the stripping away, of safety nets and supportive programs addressed to poor women. These were to be strengthened as basic entitlements.⁵⁰

In the aftermath of these conferences, women are faced with ignorance of or resistance to the new women-centered indivisible rights frameworks as well as the draining away of resources necessary to implement the core economic and social programs. Recognizing the gap between rhetoric and accomplishment, the Vienna and ICPD Programs, the Summit Report, and the Beijing Platform are nevertheless being used by women in many parts of the world to define and legitimate their demands for both human rights and social change.⁵¹ In the United States, the Clinton administration established an Inter-Agency Council on Women to pursue the implementation of the Beijing Platform. While this gives women a limited route to influence government policy, particularly in the State Department, the potential of the Beijing Platform is not felt because many U.S. women are unaware of its provisions, and many who are aware do not use it as a platform for action or an instrument of accountability.

BRINGING THE INTERNATIONAL FRAMEWORK HOME

The uses of international legal norms and commitments in shaping domestic policy, vision, and jurisprudence are many. Human rights implementation in the international arena relies primarily on publicity and shaming rather than on mandatory enforcement mechanisms. The same could be true domestically. Moreover, the ability to use domestic courts, legislatures, and other institutions to enforce and entrench human rights is essential to giving them force. This requires integration of the international frameworks and agreements into popular education, social justice

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⁵⁰ See Beijing Platform for Action, *supra* note 9, paras. 58-60.

⁵¹ See, e.g., Women's Environment and Development Organization, *Promise Kept, Promise Broken? A Survey of Governments on National Action Plans to Implement the Beijing Platform* (1997); South African Ministry for Welfare and Population Development, *A Green Paper for Public Discussion: Population Policy for South Africa?* (Pretoria, 1995).

advocacy and legal strategies to build a culture that accepts and demands human rights as the basis of a decent social order. This process has begun anew.⁵²

Under the Constitution, treaties are part of the law of the land. Unless inconsistent with a later federal statute or the Constitution, domestic law should be construed to facilitate the implementation of treaty obligations.⁵³ Thus, the recent U.S. ratification of three treaties—the Political and Civil Covenant, the Race Convention, and the Torture Convention—provides a concrete legal foundation for domestic human rights advocacy. These ratifications, however, are subject to a plethora of reservations, declarations, and understandings—too numerous to discuss here but designed, like the Bricker Amendment, to negate most of the aspects of international human rights that are more protective than constitutional standards.⁵⁴

But these limitations are also subject to challenge and circumvention; they are not written in stone. For example, the United States has declared that all these treaties are “non-self-executing,” meaning that Congress must provide implementing legislation before they can be the basis of a legal claim. While the validity of this limitation will be adjudicated by the federal courts, U.S. offi-

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⁵² For U.S. based organizations that have begun to integrate international human rights into domestic program. See Thomas, *supra* note 6, at nn. 40-48. Additional initiatives include Human Rights, USA, a community organizing project in four cities (Atlanta, Minneapolis, San Antonio, and St. Louis) and national resource center jointly sponsored by the Center for Human Rights Education in Atlanta; University of Minnesota Human Rights Center; Street Law, Incorporated (Georgetown Law School); Human Rights Educators Network of Amnesty International; Kensington Welfare Rights Union in Philadelphia; Workers Center for Human Rights in Oxford, Miss.; and Ella Baker Center for Human Rights in Oakland (police brutality). Groups who have sought to implement international human rights in domestic courts in the United States include Center for Constitutional Rights, International Human Rights Law Group, ACLU Southern California, Center for Public Justice and the International Women's Human Rights Law Clinic, City University of New York School of Law.

⁵³ See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁵⁴ See Henkin, *supra* note 37 (having signed the ICESCR, and the Women's and Child Conventions, the United States is also bound to take no action inconsistent with the rights they protect). For reservations, declarations, and understandings regarding the ICCPR, see U.S. Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, *reprinted in* 31 I.L.M. 645 (1992). These involve notably the death penalty, the definition and applicability of torture, and the standard of discrimination. Regarding ratification of the Race Convention, the “Helms Proviso” intends to nullify the obligation to conform U.S. law to the Convention. 140 CONG. REC. S7634 (Daily ed. June 24, 1994) (statement of Sen. Pell). *But see, Concluding Observations: U.S.A.*, *supra* note 25, at para. 295 (calling upon U.S. to address prejudice against minority groups and women, including “where appropriate, the adoption of affirmative action” and also to conform its laws to the ICCPR). See *also* para. 303.

cials concede that the norms guaranteed still must be observed by all state and federal officials, including judges.⁵⁵ It is also notable that the United States neglected to limit the positive obligation in the ICCPR to "ensure" the enjoyment of rights.

Once ratified, treaties provide periodic formal opportunities for domestic educational work and shaming at the international level. NGOs can participate in developing and disseminating critiques of the compliance reports that the United States is required to provide quadrennially to the responsible treaty committee. The critiques of the Human Rights Committee on U.S. compliance with the ICCPR should be widely used. The U.S. reports to the Committee Against Torture and the Committee to End Racial Discrimination are overdue. While the United States has refused to accept the individual complaints procedures established by the treaties and administered by these committees, it is, by virtue of its approval of the OAS Charter and the American Declaration on the Rights and Duties of Man [*sic*], subject to the petition procedure of the Inter-American Commission on Human Rights (IACHR), which can consider the same range of issues.⁵⁶

Treaties are not the only source of legal obligation. Customary international norms that reflect the consensus of nations are, on the same basis as treaties, binding on all officials. Because of the U.S. focus on political and civil rights and its disproportionate influence in the human rights system, many treaty norms—for example, torture and inhuman treatment, prolonged arbitrary detention, racial discrimination, and aspects of gender discrimination—are considered customary by U.S. authorities today. The near-universal ratification of the ICESCR also renders it an expression of customary norms. The list of customary norms is also expanding to encompass weapons of mass destruction of human life and dangers to the environment. Customary norms are both self-executing and

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⁵⁵ See U.N. Human Rights Committee Press Releases Concerning the Review of the First Report of the United States under the ICCPR, U.N. GAOR, Hum. Rts. Comm., 1401st mtg. at 33, U.N. Doc. HR/CT.400 (Mar. 29-30, 1995) [hereinafter Human Rights Committee Press Releases]; *Concluding Observations: U.S.A.*, *supra* note 25, at para. 276.

⁵⁶ See Human Rights Committee Press Releases, *supra* note 55 (comments on the U.S. report to the ICCPR); see also Ann Fagan Ginger, *The Energizing Effect of Enforcing a Human Rights Treaty* 42 DEPAUL L. REV. 1341 (1993). The IACHR hears complaints of violations of the American Declaration as well as complaints arising under other treaties or instruments to which the United States is bound. See "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights), Advisory Opinion OC-1/82 of Sept. 24, 1982, Inter-Am.C.H.R. Ser. A, No. 1 (1982).

justiciable as laws of the United States and therefore provide a basis for individual legal claims, interpretation of domestic law, and the development and implementation of new legislation.⁵⁷

Other agreements, such as UN General Assembly resolutions and the consensus programs and platforms of thematic international conferences, could be integrated into policy-oriented advocacy at all levels and in all branches of government. Though often described as non-binding commitments, they contain declarations and commitments that, because of their consensus nature, build customary norms and identify priorities for concrete implementation by governments and intergovernmental organizations. Their potential as a tool in domestic advocacy in the United States is as yet unrealized.

Ultimately, the most significant source of evolving human rights norms and implementation are the human rights movements themselves. If law can ever be said to be autonomous—a questionable proposition at best—it is least so in the field of human rights, which explicitly depends on political will, rather than force. The evolution and efficacy of human rights law is inseparable from the processes by which individuals, activists, and NGOs begin to conceptualize, as human rights concerns, the abuses they suffer, the unmet needs they have, and the better societies they envision.

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⁵⁷ See Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, entered into force Oct. 24, 1945 art. 38(1); see also *The Paquete Habana*, 175 U.S. 677 (1900); *Filartiga v. Pena*, 630 F.2d 876 (2d Cir. 1980); *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 95 (July 8), at para. 73.