

International Human Rights Law & the United States Double Standard

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THE UNITED STATES has long been a leader in the development and enforcement of international human rights law. The United States has also long resisted the application of international human rights law to itself. Many commentators have criticized this double standard. This essay offers a modest defense of it.

INTERNATIONAL HUMAN RIGHTS LAW

Before World War II, the content of international law was largely limited to *inter-national* matters such as the rules of war, maritime boundaries, and diplomatic immunity. Under the traditional conception of international law, the way a nation treated its citizens was a purely domestic issue. International law did not regulate human rights.¹

The atrocities of the Holocaust led the international community to change the focus of international law to include governance of the way a nation treats its citizens. One important purpose of the U.N. Charter was to encourage respect for human rights and fundamental freedoms. The U.N. General Assembly's influential 1948 Universal Declaration on Human Rights gave content to this aspiration, listing dozens of rights and freedoms that the nations of the world should strive to promote. But the General Assembly is strictly speaking not a lawmaking body, and thus the Universal Declaration lacked the force of international law.

This obstacle was partially overcome when the aspirations of the Declaration were codified in various multilateral human rights treaties. The first such treaty, the Convention on the Prevention and Punishment of the

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¹ On the pre-World War II antecedents to international human rights law, see Louis Henkin, *INTERNATIONAL LAW: POLITICS AND VALUES* 169-73 (1995).

Crime of Genocide, was a direct response to the Holocaust. The most important human rights treaty is the International Covenant on Civil and Political Rights, which protects the rights to life, liberty, privacy, and travel, freedom of expression, thought, conscience, and religion, basic criminal procedure protections, and much more. Human rights treaties also govern discrimination, children's rights, economic, social, and cultural rights, and torture. Most nations of the world have ratified most of the major human rights treaties. In addition, Europe, the Americas, and Africa have treaty-based regional human rights regimes.

There is also a customary international law of human rights. Customary international law was traditionally limited to *customary practices* that nations followed from a sense of legal obligation. Human rights norms rarely satisfy this definition, for many nations still customarily violate the human rights of their citizens. Accordingly, to the extent that there is any customary international law of human rights, it is based on the broad *written or verbal assent* to human rights norms as reflected in multilateral treaties, General Assembly Resolutions, and domestic enactments. Customary international law so conceived, though controversial, is important to the efficacy of international human rights law, for it purports to impose obligations on nations that have not fully embraced human rights treaties. The customary international law of human rights is thought to include many of the rights in the Universal Declaration, as well as rights like freedom from slavery and torture and the right to democratic government.

THE UNITED STATES DOUBLE STANDARD

It is no accident that the core rights guaranteed by international human rights law resemble the rights protected by the United States Constitution. The United States has been the

world's leading proponent of universal human rights protections based on international law. Franklin Roosevelt's Four Freedoms Speech was a rallying cry for international human rights advocates. The United States played a dominant role in creating foundational international human rights instruments such as the Nuremberg Charter, the United Nations Charter, the Universal Declaration, and the Genocide treaty. Since World War II, and especially in the last twenty-five years, human rights has been a central preoccupation of United States foreign policy. The United States constantly urges nations of the world to embrace international human rights standards. And more than other nations, it uses military and economic leverage to force compliance with these standards.

The problem is that the United States does not embrace the international human rights standards that it urges on others. The United States systematically declines to apply international human rights law to its domestic officials. All three branches of the federal government perpetuate this double standard.

Consider the President. The same President who urges other nations to adopt international human rights law takes steps to ensure that the United States is not subject to this law. A recent example is President Clinton's support for an International Criminal Court on the condition that its jurisdiction be severely limited. A primary reason for this was the fear that U.S. troops and other U.S. government officials might be subject to the Tribunal's jurisdiction. For similar reasons the President has resisted signing the Land Mine Treaty.

When the President is joined by his treaty-making partner, the Senate, the same double standard prevails. The treaty-makers have consistently declined to incorporate international human rights treaties into domestic law. The Genocide Convention is a prominent example. It was the first postwar human rights treaty. Its

internationalization of the crime of genocide on the heels of the Nazi atrocities should have been uncontroversial. Nonetheless, it would be almost forty years after President Truman sent the treaty to the Senate before that body would give its consent, and then only after ensuring that the treaty would have no domestic significance.

The objections raised to the Genocide Convention would become standard responses to all human rights treaties considered by the United States.² One concern was that international standards differ from American ones and thus might threaten traditional American liberties. For example, many worried that the Genocide Convention's prohibition on "incitement to commit genocide" might infringe American conceptions of freedom of speech and press. Another concern was that the Genocide Convention would diminish American sovereignty. For some this was a diffuse worry about international entanglements. For others, the concern was that the legitimacy of the American political system would be subject to legal regimes beyond American control. Finally, many worried that the Genocide Convention posed a threat to the structure of American government. Not only would it delegate U.S. lawmaking power to international institutions. It would also unduly increase the federal lawmaking power of the President at the expense of the House of Representatives and the Senate, and impinge on traditional state prerogatives.

These same objections would resurface during the Bricker Amendment controversy in the 1950s.³ Similar objections explain why the United States has still not ratified such

important human rights treaties as the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. They also explain why the human rights treaties the Senate does consent to – the Genocide Convention in 1986, the Torture Convention in 1991, the Political and Civil Rights Covenant in 1992, and the Convention on the Elimination of All Forms of Racial Discrimination in 1994 – are always conditioned on a set of reservations, understandings, and declarations (RUDs) that ensure that the treaties have no domestic force.

These RUDs reflect five principles of American resistance to international human rights norms.⁴ First, the United States does not undertake an obligation prohibited by its Constitution. For example, it refused to accept the Civil and Political Rights Covenant's prohibitions on "racial hate speech," which might have proscribed protected First Amendment speech. Second, the United States does not assume an international human rights obligation that requires change in domestic practice. For example, it refused to accept the Civil and Political Rights Covenant's prohibition on juvenile capital punishment. Third, the United States declines to submit disputes about human rights treaties to the jurisdiction of the International Court of Justice. Fourth, the United States attaches a "federalism understanding" to human rights treaties "to emphasize that there is no intent to alter the constitutional balance of authority between the State and federal governments or to ... federalize matters now within the competence of the

2 See Natalie Hevener Kaufman, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* (1990).

3 See Duane Tanenbaum, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988).

4 See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 *AM. J. INT'L L.* 341 (1995).

States.⁵ Finally, on the off chance that these strategies do not fully immunize domestic political structures from the force of human rights treaties, the United States additionally declares all such treaties to be "non-self-executing," which ensures that the treaties do not create private causes of action that individuals could invoke in domestic courts.

When the House of Representatives gets into the act, the double standard persists. For example, Congress has recently enacted statutes that make certain aspects of international human rights law enforceable in domestic courts. But Congress has made sure that the federal causes of action in these statutes cannot be invoked against domestic officials. The clearest example is the Torture Victims Protection Act (TVPA), which creates a federal private cause of action for violating the international law prohibitions on torture and extrajudicial killing.⁶ The TVPA applies only to acts committed by an individual acting under color of law of "of any foreign nation."⁷ It thus cannot be invoked against domestic officials. The same limitation to foreign actors can be found in a new federal statute providing for federal civil liability for terrorist acts.⁸ Congress took a different approach with

the Genocide Convention Implementation Act, which prohibits genocide by both domestic and foreign actors.⁹ But even here, Congress made sure the statute did not create a private cause of action, thus guaranteeing that it has no domestic force unless the President decides to initiate a domestic prosecution.¹⁰

Finally, United States courts embrace the human rights double standard. In the last twenty years lower federal courts have revived the 219-year old Alien Tort Statute as a jurisdictional basis to hear novel civil claims by foreign plaintiffs against foreign governmental actors for international human rights violations committed on foreign soil.¹¹ These courts have applied customary international human rights law prohibiting torture, summary execution, arbitrary detention, disappearance, genocide, and cruel and degrading treatment to measure the legitimacy of foreign governmental acts committed abroad.¹² Because these decisions are suits by aliens against aliens, the constitutional basis for jurisdiction is that the cases "arise under" federal law. The federal law under which the cases arise is the customary international law applied on the merits, which (these courts hold) has the status of federal

common law.¹³

But if the customary international law of human rights has the status of federal common law, then it should be federal law governing domestic and foreign governmental activity alike. Indeed, it seems more legitimate for federal courts to apply a federal common law of customary international law to the domestic acts of U.S. officials than to apply this law to foreign governmental acts committed on foreign soil. Nonetheless, U.S. courts do not apply customary human rights law to domestic officials. They defer to congressional statutes that violate customary international human rights law.¹⁴ They do not apply customary international human rights law to limit Presidential action.¹⁵ And although there is a widespread academic consensus that customary international human rights law should trump state law under the supremacy clause,¹⁶ U.S. courts have never applied this law to the states, and show no inclination to do so.¹⁷

In sum, the U.S. government uses the international human rights system to measure the legitimacy of foreign governmental acts, but it systematically declines to hold domestic acts to the same legal scrutiny.

LESSONS

To understand the significance of the double standard, it is first necessary to understand the special enforcement logic and poor enforcement record of international human rights law.

Much of international law is largely self-enforcing because nations receive mutually beneficial gains from compliance. A good example is the law of diplomatic immunity. Whether by treaty or customary law, the immunity of ambassadors has been viewed as a necessary prerequisite to successful diplomatic intercourse since at least the beginning of the nation-state. This law persists because of the mutual advantage it brings. Nations forgo the relatively small benefit of enforcing local laws against foreign diplomats in order to realize the broader benefits that accrue from relations with foreign nations. But unless both nations provide immunity, neither will do so and both will be worse off. The model here is the iterated prisoners' dilemma. Nations involved in indefinite relationships will forgo private, short-term advantage to achieve superior long-term benefits that can only be gained by mutual cooperation.

International human rights law is not self-enforcing in this way. If two nations are not inclined for purely domestic reasons to provide a certain level of individual rights protection to their citizens, they gain nothing from a mutual promise to provide greater protection to their citizens. Assuming for the moment an absence of independent international incentives (such as forgone economic aid, threat of military intervention, or diplomatic ostracization), a nation that violates its citizens' human rights will have no incentive to comply with more restrictive international

5 Committee on Foreign Relations, *International Covenant on Civil and Political Rights*, S. EXEC. REP. NO. 102-23, at 18 (1992).

6 28 U.S.C. § 1350 note, §§ 2, 3.

7 28 U.S.C. § 1350 note, § 1(a) (emphasis added).

8 See Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 519, 28 U.S.C. § 1605 note.

9 18 U.S.C. § 1091.

10 See *id.*, § 1092. The recently enacted War Crimes Act of 1996, 18 U.S.C. § 2441, also creates a criminal prohibition that applies to American officials, and also limits enforcement of this prohibition to the discretion of the Executive Branch.

11 The Alien Tort Statute grants federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The watershed case invoking this statute in the human rights context was *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

12 See Beth Stephens and Michael Reiter, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 65-78 (1996).

13 Curtis Bradley and I have criticized the view that customary international law is federal common law. See Curtis A. Bradley and Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law at Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

14 See, e.g., *Gale-Garcia v. INS*, 86 F.3d 916 (9th Cir. 1996); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453 (11th Cir. 1986).

15 See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655, 666-70 (1992); *Garcia-Mir*, 788 F.2d at 1453.

16 See, e.g., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

17 See, e.g., *State v. Ross*, 886 P.2d 1354, 1358 (Ariz. 1994); cf. *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989) (emphasizing in Eighth Amendment capital punishment case that "it is American conceptions of decency that are dispositive").

human rights norms.¹⁸

For this reason, the efficacy of international human rights law in a nation not otherwise inclined to obey this law depends on the willingness of other nations to sanction non-compliance. The problem is that nations rarely expend the military or economic resources needed to alter the way another nation treats its citizens. Severe public sanctions for violations of human rights are usually limited to two situations in which nations have special enforcement incentives. The first occurs when one nation's human rights violations threaten significant adverse consequences for another nation. This explains the United States' intervention in the former Yugoslavia and Haiti. A second context for likely human rights enforcement is when a government receives domestic political benefits from unilateral enforcement, and the costs of such enforcement – in economic or military terms – are low. Examples of this phenomenon are U.S. economic sanctions against weak and unpopular countries like Cuba and Myanmar. In general, nations will not enforce international human rights law if enforcement is costly and the strategic benefits of enforcement are low or uncertain. This explains the paucity of human rights law enforcement against China and Saudi Arabia.

There are of course more subtle sanctioning methods. Although nations regularly fail to comply with international human rights law, no nation publicly declares a prerogative to commit human rights abuses against its citizens, and every nation takes steps to avoid exposure of, or at least to justify, such abuse. This phenomenon reflects the human rights community's success in making human rights a matter of international concern, as well as more effective communication tools for exposing human rights abuses. Today expo-

sure of a nation's human rights abuses can result in a variety of low-level sanctions. It can, for example, lead to ostracization of elites along the many points of diplomatic and economic interaction. Or it can cause an increase in pressure for broader sanctions by interested groups in other countries. For example, Christian groups are putting enormous pressure on Congress to sanction governments that commit acts of religious persecution, and non-governmental organizations often pressure corporations to alter business practices in countries that abuse human rights. These relatively low-level responses to human rights abuses have varying effects on the behavior of nations that violate human rights. At the margin they must have some effect, for some nations otherwise inclined to violate international standards do take steps to avoid exposure of illegal acts, and often engage in sporadic and nominal acts of compliance (such as releasing a dissident prisoner or announcing new human rights aspirations). But this effect is often indiscernible, and confirms international human rights law's generally poor enforcement record.

Underenforcement of international human rights law feeds noncompliance with that law. The content of human rights treaties is significantly influenced by human rights activists within governments and progressive organizations such as the United Nations General Assembly, Human Rights Watch, and Amnesty International. For this reason among others, the human rights treaties presented for national ratification are invariably more protective of human rights than domestic legal systems. Weak and sporadic enforcement means that a nation can through ratification minimize the stigma of non-ratification at little if any cost to its domestic political ar-

agement. There is even less reason for a nation not to ratify an aspirational human rights treaty if, as many academic commentators believe, customary international law independently imposes on the nation certain human rights obligations regardless of whether it has ratified a treaty in which the obligation might also be found. These factors help explain why the Civil and Political Rights Covenant has been ratified by such human rights champions as Afghanistan, Algeria, Columbia, Croatia, Guatemala, Iraq, North Korea, Libya, Serbia, and Sudan. China, too, recently announced that it would ratify the Covenant.

We can now better understand how and why the United States perpetuates the double standard. The explanation is not subtle. The United States declines to embrace international human rights law because it can. Like other nations, the United States wants the benefits from an international human rights regime with as little disruption as possible to its domestic political order. Unlike most other nations, the United States' paramount economic and military power, combined with its dominance of international institutions, means that it is largely immune from both formal international sanctions and the variety of less formal, lower-level sanctions. General satisfaction with domestic human rights protections, combined with a suspicion of international processes, mean that NGO and foreign government attempts to stigmatize the United States for noncompliance with human rights law fall flat.

This explanation for the double standard does not, of course, speak to its normative attractiveness. Many criticize the standard as hypocritical. This charge, however, is too casually made. Hypocrisy is the act of professing virtues that one does not hold. The United

States does not typically urge substantive standards on other countries that it does not itself abide by. It does not, for example, claim that other countries violate human rights law when they execute minors for capital crimes. The United States tends only to press those human rights norms abroad that its domestic law protects at home.

Moreover, despite its unwillingness to enforce international human rights law against U.S. officials, the United States remains one of the greatest protectors of individual rights in the world by virtue of its domestic constitutional and democratic processes. Many human rights activists contend that the United States nonetheless violates international human rights law with respect to immigration practices, police abuse, custodial treatment and conditions, the death penalty, and discrimination.¹⁹ There is always room for the United States to improve on these and other human rights fronts. But the charge that the United States violates international law in these respects is almost always an exaggeration. This charge is usually based on a non-rigorous understanding of international law that eschews its fundamental grounding in state consent. The many reservations, understandings, and declarations to human rights treaties that these activists complain about are designed to ensure that the United States does not consent to international obligations that it cannot abide by domestically. It is precisely to avoid hypocrisy that the United States resists certain international human rights obligations. The notion that the United States is nonetheless bound by a customary international law of human rights because of an international consensus to which it does not adhere represents a radical and thus far unaccepted conception of international law.

If the United States double standard

18 Cf. Stephen Kravner, *Sovereignty, Regimes, and Human Rights*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 139 (Volker Rittberger ed., 1993).

19 See, e.g., Human Rights Watch World Report 1998; U.N. Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions (Jan. 19, 1998).

evinces hypocrisy, it is because the United States urges other nations to embrace international human rights treaties that the United States itself either does not ratify or does not enforce domestically. Even here the double standard is not necessarily hypocritical. International law's treatment of nations as equals is a fiction. There is much less moral and political justification for imposing human rights obligations on the United States than there is for imposing these obligations on Myanmar or China or Rwanda. International human rights law is primarily designed for nations with domestic institutions that do not hold the promise for generating adequate human rights protections.

But perhaps there is a connection between the United States' failure to embrace international human rights law and the poor compliance records of nations that abuse human rights. Perhaps the United States' failure to subject itself to these international processes undermines its moral authority to enforce human rights. It is not at all clear, however, that the efficacy of international human rights law depends on moral authority in this way. Compliance with human rights law depends on the costs of non-compliance. Effective coercive measures are usually carried out by or with the support of the United States, usually after a careful calculation that the benefits to the United States' strategic position outweigh the costs of enforcement. The efficacy of these measures is not likely to be affected by the extent to which the United States itself engages the international human rights law process. The success of U.S. sanctions in Bosnia, or the United States' ability to bestow (or withhold) status in international organizations, is unaffected by the United States practice of executing juvenile murderers or its failure to ratify the Rights of the Child Convention.

The United States double standard might undermine the effectiveness of international

human rights law in a different way. The international human rights movement presents its aspirational moral and political goals as a form of law. The purposeful space between law and compliance is then used as a basis for pressuring governments (through the various methods discussed above) into ratcheting up their human rights protections. The effectiveness of this pressure might depend on the perceived legitimacy of human rights law. And the U.S. double standard might undermine this legitimacy by revealing the legal system itself to be little more than an exercise in international politics. On this view, the U.S. double standard reduces the gravitational moral pull of human rights law.

There is little evidence that compliance with human rights law depends on the perceived legitimacy of the international legal system, as opposed to the legitimacy of particular moral norms – such as a prohibition on torture – that might or might not be instantiated in an international law binding on a particular nation. China has not yet signed the Civil and Political Rights Convention, and cannot reasonably be viewed as having embraced an international custom of protecting civil and political rights. But it is nonetheless a frequent focus of criticism for violating the civil rights of its citizens, because these acts are viewed as morally wrong independent of their illegality. It is true, of course, that criticism of a country's human rights record is often dressed up in the language of illegality. But this rhetoric rarely depends on careful arguments about legality, and both the content and sources of international human rights law are much too diffuse for illegality to be the criterion of opprobrium it is in domestic legal systems. It is the moral quality of the acts in question, not their illegality, that actually triggers the international community's opprobrium. The successful characterization of an act as "illegal" can of course change perceptions about the moral worth of the act, but it is

moral worth, and not legality, that counts.

Finally, even if the United States double standard does affect the legitimacy of the international human rights law system, it does not follow that, as many believe, the United States should incorporate international human rights law into its domestic system. This demand is unrealistic because of the widespread domestic opposition to international human rights law. It also ignores two other possible responses that are both more realistic and more sensitive to the relative costs of particular institutional arrangements.

One possible response is that international human rights law is too ambitious. This law could, and perhaps should, narrow its legitimacy gap by modifying its universalistic pretensions and lowering its aspirations. Many of the reasons for United States resistance to international human rights law – distrust of international institutions, desire to maintain local cultural and political difference, satisfaction with domestic political systems, preservation of sovereignty and the related benefits of self-government – explain other countries' resistance to this law. It is unclear which regime leads to more effective respect for human rights: One that is extremely ambitious, but suffers a legitimacy deficit because of the inevitable gap between aspiration and compliance; or one that is less ambitious but suffers less of a legitimacy gap. Criticisms of the United States double

standard rarely consider the latter option, but if legitimacy is the goal, modesty might be the most effective option. The point here is something that critics of the double standard tend to ignore: international human rights law inevitably involves a trade-off between ambition and legitimacy.

A second possible response is that the United States should stop enforcing human rights norms against other countries. Such a course would alleviate any hypocrisy that inheres in the double standard. But it would harm the promotion of international human rights. A United States double standard is in this sense preferable to no enforcement at all. This shows that the pertinent question to ask about the double standard is not whether it is good or bad. The pertinent question is whether it is better or worse than the feasible alternatives. Without United States enforcement pressure, international human rights law would be even less efficacious than it already is. And there would be no United States enforcement if the United States were itself subject to the same potential sanctions it imposes on others. The United States double standard is one price the international community pays for the important benefit of United States enforcement. Fortunately, the United States does not need external legal processes or the threat of external sanctions in order to provide its citizens and residents with prodigious human rights protections. *JB*