12

Enforcement by States against Violator States

Chapter 11 represents the promise or ideal. States will take the necessary measures to assure internal compliance with international human rights. They will adopt constitutions implementing the international norms and internalize those norms directly. When they do not, when they are violators, we have seen the efforts of intergovernmental organizations and organs, universal and regional, to secure compliance. Their modes of enforcement are then *vertical*, in the sense that pressures are exerted and perhaps sanctions applied by international organs 'above' the state. From the perspective of international law, those organs exercise authority over all member states in accordance with the terms of the treaty.

Here, in Chapter 12, we consider *horizontal* modes of enforcement of human rights. Acting singly or as part of a consortium, states themselves may apply pressures against a violator state that are shy of the military force proscribed (without the authorization of the Security Council) by the UN Charter. Such forms of pressure include boycotts or embargoes. They also include conditioning bilateral or multilateral security assistance, development aid, or trade advantages such as a most-favored-nation clause, on the recipient or trading state's compliance with basic human rights norms. Within such a 'horizontal' (state-to-state) application of sanctions and pressures, the state imposing conditions ('conditionality') becomes part of a multi-layered system of enforcement of international human rights.

The debate within the United States about the relevance of human rights to foreign policy—including policy on security or development assistance and on trade—has been active and contentious since Congress started in the 1970s to write types of conditionality (imposing human rights conditions on aid or trade) into law. The contexts in which these issues have been argued include the central crises of American foreign policy since the early 1970s—for example, U.S. security aid to (or to opponents of) or trade with regimes in El Salvador, Nicaragua, Chile and South Africa. The economic importance of aid and trade has involved major sectors of the U.S. economy in the politics of conditionality—defense industries anxious to export their products, manufacturing and service-oriented firms fearful of losing foreign markets in retaliation for elimination by the U.S. of other states' advantages

in trade, consumer groups fearful of losing cheaper imported products, and so on.

The chapter starts with a general discussion of the 'national interest' in relation to human rights enforcement, continues with general analyses of the U.S. experience in aid conditionality, and concludes with a case study of a contemporary issue: whether most-favored-nation treatment for imports into the United States from the People's Republic of China should be conditioned on that country's compliance with stated human rights norms.

A. NATIONAL INTEREST AND HUMAN RIGHTS

The clash of positions in the debates over conditionality evokes similar clashes throughout American history about the actual or necessary or desired character of foreign policy. The clash can be defined in various ways, including such broad notions as: idealism vs. realism, altruism vs. self-interest, moral ideals vs. national interest, principles vs. power.

The first term (the more 'interventionist') in each of these pairs could be characterized in most instances as tending to favor forms of conditionality in U.S. aid and trade legislation. The second term could be understood as tending to oppose human rights conditions, for they frustrate aid or trade policies that are believed to be in the national interest. Often the debate has had a more ambiguous and contextual character, in which questions like the effectiveness of aid–trade sanctions as compared with alternative paths to achieve human rights goals have been dominant.

Why indeed should a country like the United States take human rights considerations into account in its bilateral relations with other states? If it is in the 'national interest' to provide a given country with security (military) assistance or with development aid, does not making such aid dependent on the recipient's compliance with human rights norms impair that 'interest'? Is not the United States (or any other country following similar policies) surrendering its practical and ideological concerns in order to act as a global policeman, to enforce human rights norms at a cost to its own interests? Is not a purpose of the human rights movement to lift the problem of enforcement from the level of states to that of international organizations in which many states participate?

These are the issues debated in the following introductory readings.

HANS MORGENTHAU, HUMAN RIGHTS AND FOREIGN POLICY

- reprinted in Kenneth Thompson (ed.), Moral Dimensions of American Foreign Policy 341 (1984), at 344.

. . .

That consideration brings me to the popular issue with which the problem of morality in foreign policy presents us today, and that is the issue of what is now called human rights. That is to say, to what extent is a nation entitled and obligated to impose its moral principles upon other nations? To what extent is it both morally just and intellectually tenable to apply principles we hold dear to other nations that, for a number of reasons, are impervious to them? It is obvious that the attempt to impose so-called human rights upon others or to punish others for not observing human rights assumes that human rights are of universal validity—that, in other words, all nations or all peoples living in different nations would embrace human rights if they knew they existed and that in any event they are as inalienable in their character as the Declaration of Independence declares them to be.

I'm not here entering into a discussion of the theological or strictly philosophic nature of human rights. I only want to make the point that whatever one's conception of that theological or philosophical nature, those human rights are filtered through the intermediary of historic and social circumstances, which will lead to different results in different times and under different circumstances. One need only look at the unique character of the American polity and at these very special, nowhere-else-to-be-found characteristics of our protection of human rights within the confines of America. You have only to look at the complete lack of respect for human rights in many nations . . . to realize how daring—or how ignorant if you will, which can also be daring—an attempt it is to impose upon the rest of the world the respect for human rights or in particular to punish other nations for not showing respect for human rights. What we are seeing here is an abstract principle we happen to hold dear, which we happen to have put to a considerable extent into practice, presented to the rest of mankind not for imitation but for acceptance.

It is quite wrong to assume that this has been the American tradition. It has not been the American tradition at all. Quite the contrary. I think it was John Quincy Adams who made the point forcefully that it was not for the United States to impose its own principles of government upon the rest of mankind. but, rather, to attract the rest of mankind through the example of the United States. And this has indeed been the persisting principle the United States has followed. . . . This has been the great difference between the early conception of America and its relations to the rest of the world on the one hand and what you might call the Wilsonian conception on the other.

For Wilson wanted to make the world safe for democracy. He wanted to transform the world through the will of the United States. The Founding Fathers wanted to present to the nations of the world an example of what man can do and called upon them to do it. So there is here a fundamental difference; both philosophic and political, between the present agitation in favor of human rights as a universal principle to be brought by the United States to the rest of the world and the dedication to human rights as an example to be offered to other nations—which is, I think, a better example of the American tradition than the Wilsonian one.

There are two other objections that must be made against the Wilsonian conception. One is the impossibility of enforcing the universal application of human rights. We can tell the Soviet Union, and we should from time to time tell the Soviet Union, that its treatment of minorities is incompatible with our conception of human rights. But once we have said this we will find that there is very little we can do to put this statement into practice. . . . There are other examples where private pressure—for example, the shaming of public high officials in the Soviet Union by private pressure—has had an obvious result. But it is inconceivable I would say on general grounds, and more particularly in view of the experiences we have had, to expect that the Soviet Union will yield to public pressure when public pressure becomes an instrument of foreign policy and will thereby admit its own weakness in this particular field and the priority of the other side as well. . . .

There is a second weakness of this approach, which is that the United States is a great power with manifold interests throughout the world, of which human rights is only one and not the most important one, and the United States is incapable of consistently following the path of the defense of human rights without maneuvering itself into a Quixotic position. This is obvious already in our discriminating treatment of, let me say, South Korea on the one hand and the Soviet Union on the other. Or you could mention mainland China on the one hand and the Soviet Union on the other. We dare to criticize and affront the Soviet Union because our relations in spite of being called détente, are not particularly friendly. We have a great interest in continuing the normalization of our relations with mainland China, and for this reason we are not going to hurt her feelings. On the other hand South Korea is an ally of the United States, it is attributed a considerable military importance, and so we are not going to do anything to harm those relations.

In other words, the principle of the defense of human rights cannot be consistently applied in foreign policy because it can and it must come in conflict with other interests that may be more important than the defense of human rights in a particular instance. And to say—as the undersecretary of state said the other day—that the defense of human rights must be woven into the fabric of American foreign policy is, of course, an attempt to conceal the actual impossibility of consistently pursuing the defense of human rights. And once you fail to defend human rights in a particular instance, you have given up the defense of human rights and you have accepted another principle to guide

your actions. And this is indeed what has happened and is bound to happen if you are not a Don Quixote who foolishly but consistently follows a disastrous path of action.

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SAMUEL HUNTINGTON, AMERICAN IDEALS VERSUS AMERICAN INSTITUTIONS

in G. John Ikenberry (ed.), American Foreign Policy 223 (1989), at 239.

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In the eyes of most Americans not only should their foreign-policy institutions be structured and function so as to reflect liberal values, but American foreign policy should also be substantively directed to the promotion of those values in the external environment. This gives a distinctive cast to the American role in the world. In a famous phrase Viscount Palmerston once said that Britain did not have permanent friends or enemies, it only had permanent interests. Like Britain and other countries, the United States also has interests, defined in terms of power, wealth, and security, some of which are sufficiently enduring as to be thought of as permanent. As a founded society, however, the United States also has distinctive political principles and values that define its national identity. These principles provide a second set of goals and a second set of standards—in addition to those of national interest—by which to shape the goals and judge the success of American foreign policy.

This heritage, this transposition of the ideals-versus-institutions gap into foreign policy, again distinguishes the United States from other societies. Western European states clearly do not reject the relevance of morality and political ideology to the conduct of foreign policy. They do, however, see the goal of foreign policy as the advancement of the major and continuing security and economic interests of their state. Political principles provide limits and parameters to foreign policy but not to its goals. As a result European public debate over morality versus power in foreign policy has except in rare instances not played the role that it has in the United States.

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The effort to use American foreign policy to promote American values abroad raises a central issue. There is a clear difference between political action to make American political practices conform to American political values and political action to make *foreign* political practices conform to American values. Americans can legitimately attempt to reduce the gap between American institutions and American values, but can they legitimately attempt to reduce the gap between other people's institutions and American values? The answer is not self-evident.

The argument for a negative response to this question can be made on at least four grounds. First, it is morally wrong for the United States to attempt to shape the institutions of other societies. Those institutions should reflect the values and behavior of the people in those societies. To intrude from outside is either imperialism or colonialism, each of which also violates American values. Second, it is difficult practically and in most cases impossible for the United States to influence significantly the institutional development of other societies. The task is simply beyond American knowledge, skill, and resources. To attempt to do so will often be counterproductive. Third, any effort to shape the domestic institutions of other societies needlessly irritates and antagonizes other governments and hence will complicate and often endanger the achievement of other more important foreign-policy goals, particularly in the areas of national security and economic well-being. Fourth, to influence the political development of other societies would require an enormous expansion of the military power and economic resources of the American government. This in turn would pose dangers to the operation of democratic government within the United States.

A yes answer to this question can, on the other hand, also be justified on four grounds. First, if other people's institutions pose direct threats to the viability of American institutions and values in the United States, an American effort to change those institutions would be justifiable in terms of self-defense. Whether or not foreign institutions do pose such a direct threat in any given circumstance is, however, not easily determined. Even in the case of Nazi Germany in 1940 there were widely differing opinions in the United States. After World War II opinion was also divided on whether Soviet institutions, as distinct from Soviet policies, threatened the United States.

Second, the direct-threat argument can be generalized to the proposition that authoritarian regimes in any form and on any continent pose a potential threat to the viability of liberal institutions and values in the United States. A liberal democratic system, it can be argued, can only be secure in a world system of similarly constituted states. In the past this argument did not play a central role because of the extent to which the United States was geographically isolated from differently constituted states. The world is, however, becoming smaller. Given the increasing interactions among societies and the emergence of transnational institutions operating in many societies, the pressures toward convergence among political systems are likely to become more intense. Interdependence may be incompatible with coexistence. In this case the world, like the United States in the nineteenth century or Western Europe in the twentieth century, will not be able to exist half-slave and half-free. Hence the survival of democratic institutions and values at home will depend upon their adoption abroad.

Third, American efforts to make other people's institutions conform to American values would be justified to the extent that the other people supported those values. Such support has historically been much more prevalent in Western Europe and Latin America than it has in Asia and Africa, but

some support undoubtedly exists in almost every society for liberty, equality, democracy, and the rights of the individual. Americans could well feel justified in supporting and helping those individuals, groups, and institutions in other societies who share their belief in these values. At the same time it would also be appropriate for them to be aware that those values could be realized in other societies through institutions significantly different from those that exist in the United States.

Fourth, American efforts to make other people's institutions conform to American values could be justified on the grounds that those values are universally valid and universally applicable, whether or not most people in other societies believe in them. For Americans not to believe in the universal validity of American values could indeed lead to a moral relativism: liberty and democracy are not inherently better than any other political values; they just happen to be those that for historical and cultural reasons prevail in the United States. This relativistic position runs counter to the strong elements of moral absolutism and messianism that are part of American history and culture, and hence the argument for moral relativism may not wash in the United States for relativistic reasons. In addition the argument can be made that some element of belief in the universal validity of a set of political ideals is necessary to arouse the energy, support, and passion to defend those ideals and the institutions modeled on them in American society.

Historically Americans have generally believed in the universal validity of their values. At the end of World War II, when Americans forced Germany and Japan to be free, they did not stop to ask if liberty and democracy were what the German and Japanese people wanted. Americans implicitly assumed that their values were valid and applicable and that they would at the very least be morally negligent if they did not insist that Germany and Japan adopt political institutions reflecting those values. Belief in the universal validity of those values obviously reinforces and reflects those hypocritical elements of the American tradition that stress the United States's role as a redeemer nation and lead it to attempt to impose its values and often its institutions on other societies. . . .

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QUESTIONS

1. The article by Morgenthau was written before the growth of the human rights movement. What changes in these excerpts, if any, would a half century of that movement require?

2. What criticism could be made of Huntington's discussion of 'American values' and of values that are 'universally valid and universally applicable,' as applied to notions of democracy and individual rights?

B. HUMAN RIGHTS CONDITIONALITY FOR U.S. SECURITY AND DEVELOPMENT ASSISTANCE

LOUIS HENKIN, THE AGE OF RIGHTS (1990), at 66.

Ch. 5. Human Rights and United States Foreign Policy

. . .

What is the human rights policy of the United States and what is the place of human rights in United States foreign policy generally? I suggest that the confusion of United States policy reflects not only, or principally, different policies at different times by different administrations, but, rather, more than one policy at any time—a Congressional policy and a different executive policy; one policy in respect of international human rights in some countries and another policy for other countries; one policy abroad and another at home.

EXECUTIVE AMBIVALENCE

. . .

Human rights in other countries was the particular preoccupation of 'liberal,' 'idealistic' elements which had come into the 'foreign policy establishment' during the war, and remained when the war was over. . . .

. . . [L]eading members of the traditional foreign policy establishment, notably the career foreign service, tended to find the new international human rights movement 'unsophisticated,' and at best a nuisance. They were inclined to consider human rights conditions in any other country that country's business, and active concern with those conditions by the United States, or by international institutions, to be meddlesome, officious, unprofessional, disturbing of 'friendly relations' and disruptive of sound diplomacy. During war, they had seen no reason to resist rhetorical declarations that served the needs of morale and psychological warfare, but they looked with growing concern when the wartime spirit and the influence of its amateur supporters continued in the postwar years. They were skeptical of international institutions generally, and resisted particularly their involvement in the internal affairs of states, such as human rights.

'Idealists' and 'realists' served the United States side-by-side, but they looked in different directions and saw United States interests differently. As the glow of victory and the 'spirit of the United Nations' waned, the influence of the human rights contingent receded and traditional diplomats again dominated. They concerned themselves with other important things: security,

alignments, military bases, trade. But the human rights movement continued to command wide support from church and other 'do-good' bodies, and from particular ethnic constituencies, and therefore some support in Congress and even in the White House. It was a continuing activity of international organizations and therefore of those who represented the United States in those bodies, principally part-time citizen-diplomats at periodic meetings, and of the newfangled bureaus of the State Department. On the United Nations sidetrack, the United States joined and often led the human rights bandwagon. 'Realists' in the State Department remained skeptical but were not disposed to challenge that program as long as it remained on the plane of rhetoric and was not allowed to disturb the sensibilities of particular states or roil relations with them. . . .

. . . For the most part, however, Congress did not attend seriously to the condition of human rights in other countries during the first twenty-five years of the postwar era and generally acquiesced in what the executive branch did. Congress had little occasion for formal involvement in the development of United States human rights policy. . . . The Senate, whose advice and consent is constitutionally required to human rights treaties as to others, had few occasions to consider agreements that aimed at the condition of rights in other countries. . . .

An independent Congressional initiative to shape United States human rights policy developed in the early 1970s. Under influence of concerned liberal members of the House of Representatives, and responding to inadequacies in United Nations and other multilateral responses to human rights violations, Congress enacted a series of statutes declaring the promotion of respect for human rights to be a principal goal of United States foreign policy, and denying foreign aid, military assistance, and the sale of agricultural commodities to states guilty of gross violations of internationally recognized human rights. In addition, United States representatives were directed to act in international financial institutions so as to prevent or discourage loans to governments guilty of such violations. Congress also established a human rights bureau in the Department of State, and directed the department to report annually on the condition of human rights in every country in the world.

The Congressional program, it should be clear, was directed not at deviations from democratic governance as practiced by the United States (and by its European allies) but against 'consistent patterns of gross violations of internationally recognized human rights,' those that nations publicly decried and that none claimed the right to do or admitted doing. Congress specified clearly the violations at which it aimed—'torture or cruel, inhuman or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty or the security of person.' Also, it should be clear, this general legislation was not aimed at Communism and the Communist states since they received neither arms nor

aid from the United States, but at the non-Communist Third World. In addition, Congress addressed human rights in particular countries, e.g., denying various aid to Chile, Argentina, South Africa, Uganda and others, when the condition of human rights in those countries was particularly egregious. Later, Congress imposed various human rights conditions on assistance to particular countries in Central America. In 1986, Congress enacted the Comprehensive Anti-Apartheid Act.

The Congressional program was never popular with the executive branch (regardless of political party), particularly with those who reflected the dominant, traditional attitudes in the Department of State. That program limited executive autonomy in the conduct of foreign policy. It required embassies to collect information often critical of the countries in which they 'lived'; it required the Department of State to publish information often critical of countries with which the United States had friendly relations. It injected into foreign policy elements that foreign governments, and many in the State Department, thought not to be United States business. It sometimes disturbed alliances and alignments, base agreements or trade arrangements, and friendly relations generally.

Congress made some concessions to executive branch resistance. It gave the Aid Administrator authority to disregard the statutory limitation when assistance 'will directly benefit the needy people in such country.' It authorized security assistance to a country guilty of gross violations if the President certified that 'extraordinary circumstances exist warranting provision of such assistance,' or if the President finds that 'such a significant improvement in its human rights record has occurred as to warrant lifting the prohibition on furnishing such assistance in the national interest of the United States.' . . .

In the main, the tension between Congress and the executive branch reflected not partisan or political differences, but the different positions and perspectives of the two branches. Congress was closer to popular sentiment in the United States, which was responsive to the human condition in other countries, and wished to do something about it or at least to dissociate the United States from repressive regimes in general or in particular countries. The executive branch, more removed from constituent influence in the United States, was closer to official sentiment in other countries with which it had to deal; it was not indifferent to, but less swayed by, moral concerns, more attuned to international political and diplomatic needs and mores. . . .

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I have described tensions within the executive branch and differences between the two branches. There have also been differences between Presidents and between presidential administrations, reflecting some partisan or ideological differences and some personal differences.

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In sum, human rights legislation in the United States does not govern as other law does. Although gross violations of human rights are rampant in many countries, including some that are important beneficiaries of United States aid and arms trade, there have been virtually no cases in which military assistance or foreign aid was in fact cut off on human rights grounds. But the law is hardly a dead letter and Congress is not a toothless tiger. The existence of the law, the constitutional posture of Congress and President, establish a political context and generate a process that have important human rights consequences. Sometimes they deter Presidents from asking for aid for blatant violators, as in Guatemala. Sometimes they compel the President to press would-be beneficiary governments to act to improve the human rights condition in these countries, so that the President could certify to Congress at least significant improvement. Law and process also cause human rights policy to respond to political events, to United States relations with particular countries, to degrees of human rights violations. By a kind of *pas de deux* of President and Congress, by a combination of promise and threat, United States human rights policy has achieved a spectrum of influence on the condition of human rights around the world.

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PROSPECT

The human rights policy of the United States is part of a larger foreign policy in the national interest broadly conceived. National interest is not a simple, single concern, and United States foreign policy has often struggled with competing national interests. But the ambiguities, ambivalences, and contradictions of United States human rights policy have been particularly glaring. . . . There are few voices now to insist that human rights elsewhere are not the business of the United States. President Carter proclaimed and made it so, and in different ways and with different emphasis, the Reagan administration confirmed that it is, originally only where Communism is or threatens, later elsewhere—in South Africa, and through pressures for democracy in Guatemala, Haiti, the Philippines.

No one in the United States suggests that the United States should end human rights violations in other countries by war and conquest; that would be a violation of international law and would bring more human suffering than it would cure. Some favor economic sanctions such as boycotts but most knowledgeable Americans recognize that such measures are generally ineffective and might damage other United States interests, though it may sometimes be necessary to make a political-moral statement as Congress did in enacting the Comprehensive Anti-Apartheid Act of 1986. But human rights advocates insist that the United States is fully entitled to withhold its foreign aid and deny arms to regimes that are guilty of consistent patterns of gross violations of human rights, as it has denied them to Communist countries. . . .

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UNITED STATES LEGISLATION ON MILITARY AND ECONOMIC AID: HUMAN RIGHTS PROVISIONS

Human Rights and Security Assistance
Sec. 502B of the Foreign Assistance Act of 1961, as amended, 22 U.S.C.A. §2304.

(a) Observance of human rights as principal goal of foreign policy; Implementation requirements

(1) The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

(2) Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. Security assistance may not be provided to the police, domestic intelligence, or similar law enforcement forces of a country . . . the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing . . . that extraordinary circumstances exist warranting provision of such assistance. . . .

(3) In furtherance of paragraphs (1) and (2), the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.

(b) Report by Secretary of State on practices of proposed recipient countries; considerations

The Secretary of State shall transmit to the Congress, as part of the presentation materials for security assistance programs proposed for each fiscal year, a full and complete report, prepared with the assistance of the Assistant Secretary of State for Democracy, Human Rights, and Labor, with respect to practices regarding the observance of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance. Wherever applicable, such report shall include information on practices regarding coercion in population control, including coerced abortion and involuntary sterilization. In determining whether a government falls within the

provisions of subsection (a)(3) of this section and in the preparation of any report or statement required under this section, consideration shall be given to—

(1) the relevant findings of appropriate international organizations, including nongovernmental organizations, such as the International Committee of the Red Cross; and

(2) the extent of cooperation by such government in permitting an unimpeded investigation by any such organization of alleged violations of internationally recognized human rights.

(c) Congressional request for information; information required; 30-day period; failure to supply information; termination or restriction of assistance.

(1) Upon the request of the Senate or the House of Representatives by resolution of either such House, or upon the request of the Committee on Foreign Relations of the Senate or the Committee on Foreign Affairs of the House of Representatives, the Secretary of State shall, within thirty days after receipt of such request, transmit to both such committees a statement, prepared with the assistance of the Assistant Secretary of State for Democracy, Human Rights, and Labor, with respect to the country designated in such request, setting forth—

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

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

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

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

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

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

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

(D) such other information as such committee or such House may request.

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(3) In the event a statement with respect to a country is requested pursuant to paragraph (1) of this subsection but is not transmitted in accordance therewith within thirty days after receipt of such request, no security assistance shall be delivered to such country except as may thereafter be specifically authorized by law from such country unless and until such statement is transmitted.

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(d) Definitions

For the purposes of this section—

(1) the term 'gross violations of internationally recognized human rights' includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person. . . .

. . .

(e) Removal of prohibition on assistance

Notwithstanding any other provision of law, funds authorized to be appropriated under subchapter I of this chapter may be made available for the furnishing of assistance to any country with respect to which the President finds that such a significant improvement in its human rights record has occurred as to warrant lifting the prohibition on furnishing such assistance in the national interest of the United States.

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* * * * *

Human Rights and Development Assistance

Sec. 116 of the Foreign Assistance Act of 1961, as amended 22 U.S.C.A. §2151n.

(a) Violations barring assistance; assistance for needy people

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

(b) Protection of children from exploitation

No assistance may be provided to any government failing to take appropriate and adequate measures, within their means, to protect children from exploitation, abuse or forced conscription into military or paramilitary services.

[Eds. This statute as amended contains two subsections '(b)'.]

(b) Information to Congressional committees for realization of assistance for needy people; concurrent resolution terminating assistance

In determining whether this standard is being met with regard to funds allocated under subchapter I of this chapter, the Committee on Foreign Relations of the Senate or the Committee on Foreign Affairs of the House of Representatives may require the Administrator primarily responsible for administering subchapter I of this chapter to submit in writing information demonstrating that such assistance will directly benefit the needy people in such country, together with a detailed explanation of the assistance to be provided (including the dollar amounts of such assistance) and an explanation of how such assistance will directly benefit the needy people in such country. . . .

(c) Factors considered

In determining whether or not a government falls within the provisions of subsection (a) of this section and in formulating development assistance programs under subchapter I of this chapter, the Administrator shall consider, in consultation with the Assistant Secretary for Democracy, Human Rights, and Labor—

(1) the extent of cooperation of such government in permitting an unimpeded investigation of alleged violations of internationally recognized human rights by appropriate international organizations, including the International Committee of the Red Cross, or groups or persons acting under the authority of the United Nations or of the Organization of American States; and

(2) specific actions which have been taken by the President or the Congress relating to multilateral or security assistance to a less developed country because of the human rights practices or policies of such country.

(d) Report to Speaker of House and Committee on Foreign Relations of the Senate

The Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, by January 31 of each year, a full and complete report regarding—

(1) the status of internationally recognized human rights, within the meaning of subsection (a) of this section—

(A) in countries that receive assistance under subchapter I of this chapter, and

(B) in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this chapter;

(2) wherever applicable, practices regarding coercion in population control, including coerced abortion and involuntary sterilization. . .

. . .

QUESTIONS

1. 'The U.S. legislation imposing human rights conditions on security and development aid is too restricted, selective. It arbitrarily carves out from the human rights corpus certain types of violations and ignores other vital ones. There seems to be no justification in the human rights movement for making these distinctions.'

a. What kinds of human rights violations are included in the statutory definitions? Is there any unity among them?

b. Would a bare reference to 'gross violations of internationally recognized human rights' have been preferable? If a selective list is preferable, do you agree with the present inclusions/exclusions?

2. 'I fail to see what long-run purposes this legislation serves. A country is asked to stop a given practice, like arbitrary detentions. It does so. All bad structures—military control, repression of speech and association, economic control by a small elite, and so on—stay in place. As soon as the practice is relaxed, as soon as it's on a downward curve, aid can be resumed. Of course the practice itself will be reinstated in its prior vigor when politically necessary. What has been accomplished?' Comment.

SECRETARY OF STATE CYRUS VANCE, SPEECH ON HUMAN RIGHTS AND FOREIGN POLICY

76 Dep't of State Bull. 505 (1977).

. . . Let me define what we mean by 'human rights.'

First, there is the right to be free from governmental violation of the integrity of the person. Such violations include torture; cruel, inhuman, or degrading treatment or punishment; and arbitrary arrest or imprisonment. And they include denial of fair public trial and invasion of the home.

Second, there is the right to the fulfillment of such vital needs as food, shelter, health care, and education. We recognize that the fulfillment of this right will depend, in part, upon the stage of a nation's economic development. But we also know that this right can be violated by a government's action or inaction—for example, through corrupt official processes which divert resources to an elite at the expense of the needy or through indifference to the plight of the poor.

Third, there is the right to enjoy civil and political liberties: freedom of thought, of religion, of assembly; freedom of speech; freedom of the press; freedom of movement both within and outside one's own country; freedom to take part in government.

Our policy is to promote all these rights. They are all recognized in the Universal Declaration of Human Rights, a basic document which the United States helped fashion and which the United Nations approved in 1948. There may be disagreement on the priorities these rights deserve. But I believe that, with work, all of these rights can become complementary and mutually reinforcing.

. . .

In pursuing a human rights policy, we must always keep in mind the limits of our power and of our wisdom. A sure formula for defeat of our goals would be a rigid, hubristic attempt to impose our values on others. A doctrinaire plan of action would be as damaging as indifference.

We must be realistic. Our country can only achieve our objectives if we shape what we do to the case at hand. . . .

. . .

A second set of questions concerns the prospects for effective action:

Will our action be useful in promoting the overall cause of human rights?

Will it actually improve the specific conditions at hand? Or will it be likely to make things worse instead?

Is the country involved receptive to our interest and efforts?

Will others work with us, including official and private international organizations dedicated to furthering human rights?

Finally, does our sense of values and decency demand that we speak out or take action anyway, even though there is only a remote chance of making our influence felt?

3. We will ask a third set of questions in order to maintain a sense of perspective:

Have we steered away from the self-righteous and strident, remembering that our own record is not unblemished?

Have we been sensitive to genuine security interests, realizing that outbreak

of armed conflict or terrorism could in itself pose a serious threat to human rights?

Have we considered *all* the rights at stake? If, for instance, we reduce aid to a government which violates the political rights of its citizens, do we not risk penalizing the hungry and poor, who bear no responsibility for the abuses of their government?

If we are determined to act, the means available range from quiet diplomacy in its many forms, through public pronouncements, to withholding of assistance. Whenever possible, we will use positive steps of encouragement and inducement. Our strong support will go to countries that are working to improve the human condition. We will always try to act in concert with other countries, through international bodies.

. . .

Our policy is to be applied within our own society as well as abroad. We welcome constructive criticism at the same time as we offer it.

No one should suppose that we are working in a vacuum. We place great weight on joining with others in the cause of human rights.

The U.N. system is central to this cooperative endeavor. . . .

. . .

What results can we expect from all these efforts?

We may justifiably seek a rapid end to such gross violations as those cited in our law: 'torture or cruel, inhuman, or degrading treatment or punishment, (or) prolonged detention without charges. . . .'

. . .

The promotion of other human rights is a broader challenge. The results may be slower in coming but are no less worth pursuing. And we intend to let other countries know where we stand.

We recognize that many nations of the world are organized on authoritarian rather than democratic principles—some large and powerful, others struggling to raise the lives of their people above bare subsistence levels. We can nourish no illusions that a call to the banner of human rights will bring sudden transformations in authoritarian societies.

. . .

We seek these goals because they are right—and because we, too, will benefit. Our own well-being, and even our security, are enhanced in a world that shares common freedoms and in which prosperity and economic justice create the conditions for peace. And let us remember that we always risk paying a serious price when we become identified with repression.

Nations, like individuals, limit their potential when they limit their goals. The American people understand this. I am confident they will support for-

eign policies that reflect our traditional values. To offer less is to define America in ways we should not accept.

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U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994

(1995), at xi.

Preface

This report is submitted to the Congress by the Department of State in compliance with sections 116(d) and 502(b) of the Foreign Assistance Act of 1961 (FAA), as amended, and section 505(c) of the Trade Act of 1974, as amended.

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In August 1993, the Secretary of State moved to strengthen further the human rights efforts of our embassies. All sections in each embassy were asked to contribute information and to corroborate reports of human rights violations, and new efforts were made to link mission programming to the advancement of human rights and democracy. This year, the Bureau of Human Rights and Humanitarian Affairs was reorganized and renamed as the Bureau of Democracy, Human Rights, and Labor, reflecting both a broader sweep and a more focused approach to the interlocking issues of human rights, worker rights, and democracy. The 1994 human rights reports reflect a year of dedicated effort by hundreds of State Department, Foreign Service, and other U.S. Government employees.

Our embassies, which prepared the initial drafts of the reports, gathered information throughout the year from a variety of sources across the political spectrum, including government officials, jurists, military sources, journalists, human rights monitors, academics, and labor activists. This information-gathering can be hazardous, and U.S. Foreign Service Officers regularly go to great lengths, under trying and sometimes dangerous conditions, to investigate reports of human rights abuse, monitor elections, and come to the aid of individuals at risk, such as political dissidents and human rights defenders whose rights are threatened by their governments.

After the embassies completed their drafts, the texts were sent to Washington for careful review by the Bureau of Democracy, Human Rights, and Labor, in cooperation with other State Department offices. . . . The guiding principle was to ensure that all relevant information was assessed as objectively, thoroughly, and fairly as possible.

The reports in this volume will be used as a resource for shaping policy, conducting diplomacy, and making assistance, training, and other resource allocations. They will also serve as a basis for the U.S. Government's

cooperation with private groups to promote the observance of internationally recognized human rights.

NOTE

An article entitled *Tidings of Abuse Fall on Deaf Ears*, in the *New York Times*, Feb. 5, 1995, Sec. 4, p. 4, refers to a report by Amnesty International (AI) on human rights violations committed during the civil war in Afghanistan: rape of young girls, vicious treatment of prisoners, a 'human rights catastrophe' of 'appalling proportions.' Yet, notes AI, 'governments around the world are ignoring the tragedy.' The U.S. was no exception; reports distributed by AI to members of Congress were disregarded. 'There was no interest.' The article questions what impact NGO or other reports on human rights violations have. 'Has the public become inured' to the horrors of Rwanda, Chechnya, China and so on?

> With America turning inward, with foreign aid making up only one percent of the Federal budget and with the United States and Western Europe reluctant to intervene in Bosnia . . . is it possible that human rights reports have become a dead end?
>
> Even if no one else is paying attention to human rights reports, the accused governments are. Their efforts to soften a report before it is published, or failing that, to criticize it after it is published indicate how seriously such reports are taken.

STEPHEN COHEN, CONDITIONING U.S. SECURITY ASSISTANCE ON HUMAN RIGHTS PRACTICES

76 Am. J. Int. L. 246 (1982).

. . .

The international law of human rights imposes obligations on governments in the exercise of their domestic sovereignty. Under the Universal Declaration, the United Nations Covenants, the European and Inter-American Conventions, and the Helsinki accords, states have defined and agreed to respect certain basic freedoms of persons within their jurisdiction. These obligations suggest a corresponding duty of one government not to support another engaged in serious violations of internationally recognized human rights. In the world of states, the enforcement of international obligations depends on the recognition and implementation of such a duty. While its contours have yet to be articulated under international law, this duty has already been the subject of domestic American statutes that set forth rules for the Executive's conduct of foreign relations with repressive governments. . . .

Congress believed this legislation to be required by American self-interest, as well as supported by principles of international law. The gift of aid and the sale of arms, it is true, can promote important national security objectives of the United States. In addition to enhancing the defense capability of friendly countries, military ties give the United States influence with and access to other governments. Yet governments to which the United States sends military aid and arms are viewed, by their own people and by the world community, as in part sustained and even approved by us. When the government in question is repressive, the perception of American support for it can impose considerable costs for American interests. The government may be overthrown and the supply of American aid and arms deeply resented by its successors. The support of repressive governments also conflicts with traditional American values and damages the international reputation of the United States because of the appearance of complicity in repugnant practices.

The principal (although not exclusive) legislative enactment on human rights and military ties has been section 502B of the Foreign Assistance Act of 1961. . . .

. . .

In 1974, when Congress originally enacted section 502B, it also began to pass legislation to limit military aid and arms sales to designated countries. The country-specific legislation was contained in bills authorizing or appropriating funds for military aid, and it named, at various times, Argentina, Brazil, Chile, El Salvador, Guatemala, Paraguay, the Philippines, South Korea, Uruguay, and Zaire. The legislation usually mentioned only military aid and was effective for a single year, although in two cases it expressly prohibited arms sales as well and was of indefinite duration.

Congress has successfully attached country-specific legislation to bills authorizing or appropriating military aid for every fiscal year since 1975. For example, Chile was prohibited from receiving any military aid in fiscal 1975 and the amount requested for South Korea was substantially reduced. . . .

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The opposition of the Foreign Service to section 502B was a logical consequence of its conception of its special role or of (what one student of the bureaucracy has labeled) its 'organizational essence.' The Foreign Service views its primary role or essence as the maintenance of smooth and cordial relations with other governments. It believes that military aid and arms sales are an indispensable means to achieving this goal. . . .

Keeping other governments happy becomes an end in itself. This phenomenon is often referred to as 'clientism' because the Foreign Service views other governments as 'clients' with whose interests it identifies, rather than as parties to be dealt with at arm's length according to the national interest of the United States.

. . .

Furthermore, costs are typically excluded from the calculation. The time horizon of the career bureaucracy is short and the possible long-run disadvantage of aiding repressive governments seems alien to its thinking. Ever after the examples of Iran and Nicaragua, there is rarely consideration that a particular regime may be overthrown and United States support for it resented by those who follow. Nor is the damage to U.S. standing in the world, or the conflict with both international legal obligations and traditional American values, weighed in the balance. In effect, the career bureaucracy develops its position by reckoning the national interest in terms of pleasing its 'clients,' the governments with which it conducts diplomatic relations.

The phenomenon of 'clientism' has a number of causes. A Foreign Service officer is typically required to develop personal relations and spend substantial periods of time with high officials of other governments. He tends, therefore, to sympathize and identify with their point of view. If the other government is accused of human rights abuses, he deals with officials who either deny the accusations or explain the excesses as regrettable, but necessary to stem 'terrorism' and avoid social chaos. He is much less likely to encounter the victims of repression and hear their point of view.

. . .

. . . [T]he career bureaucracy attempted to distort information about human rights conditions in particular countries. The extent of abusive practices was consistently underreported. For example, the Bureau for East Asia persisted in arguing that reports of Indonesian abuses in East Timor were grossly exaggerated and that few abuses had been committed by the Indonesian Army against the Timorese. In fact, an accumulation of reports from reputable sources indicates that a hundred thousand or more Timorese may have died at the hands of the Indonesian military. In the case of Argentina, the Latin American Bureau argued that, at most, hundreds of individuals had been summarily executed by security forces. As the evidence became incontrovertible that the number was actually 6,500 or more, the bureau shifted gears and argued that only Marxist terrorists were the victims. When it was documented that most of the victims were neither Marxists nor terrorists, the bureau maintained that the abuses were the work of local military commanders whom the ruling junta was struggling to control.

As it minimized or concealed negative aspects of a 'client's' human rights practices, the career bureaucracy exaggerated positive signs. Improvements were said to have occurred on the basis of insubstantial evidence or self-serving declarations of the government in power. . . .

. . . [T]he regional bureaus overstated the extent of U.S. interests at stake in particular cases and the damage that could possibly result from failure to approve proposed security assistance. The Latin American Bureau, for example, insisted (albeit unsuccessfully) that failure to provide military aid to Paraguay would seriously undermine a relationship with the

Stroessner Government that was important to fighting communism in Latin America.

. . .

Given the resistance of the career bureaucracy, concentrated in the regional bureaus, implementation of section 502B during the Carter administration depended on the newly created Bureau of Human Rights, headed by an outsider who was personally committed to the policy of the statute and staffed, to a significant degree, by persons from outside the career bureaucracy. The new bureau began to serve as a counterweight to the 'clientism' of the regional bureaus. . . .

. . .

Perhaps the most remarkable evidence of the Carter administration's conservative approach to section 502B was its policy never to determine formally, even in a classified decision, that a particular government was engaged in gross abuses. The primary reason for this policy was the belief that such a determination, even if classified, would inevitably be leaked to the press and become generally known. It was feared that each country named would then consider itself publicly insulted, with consequent damage to our bilateral relationship. In addition, there was concern that once such a finding was revealed, the freedom to alter it might be severely constrained by public political pressures. . . .

In practice, the Secretary of State had to resist pressures both from Congress and within his own Department to make such findings. Administration representatives repeatedly refused congressional requests for a list of governments considered to be engaged in gross abuses, stating that it was administration policy not to draw up such a list. Within the Department, the Secretary of State sought to avoid explaining the reason for decisions on security assistance either in writing or even informally. When he resolved a dispute, he often communicated simply whether the request was approved or disapproved and little more. Particularly in cases of disapproval, the Secretary strenuously avoided ever stating that it was required to section 502B since such a statement would have meant that the government in question was considered to be engaged 'in a consistent pattern of gross violations of human rights.'

. . .

. . . After the initial period, however, when a body of precedents was created, the amount of 'litigation' began to decrease as contesting bureaus inferred by the pattern of outcomes how the Secretary of State was interpreting section 502B. The major issues of interpretation are discussed below. The three key questions were:

(1) When was a foreign government considered to be engaged 'in a consistent pattern of gross violations of internationally recognized human rights'?

(2) What U.S. interests constituted 'extraordinary circumstances'?
(3) What was encompassed by the category 'security assistance'?

1. Gross Violations. The threshold issue under section 502B is whether a particular government 'engages in a consistent pattern of gross violations of internationally recognized human rights.' At the outset, it is necessary to explain that the issue never arose with respect to many governments that appear to have practiced gross abuses. The question whether section 502B might apply to them was never raised because they were never seriously considered for security assistance for a variety of reasons other than human rights. . . .

After these countries were eliminated, approximately 70 remained that were seriously considered for military aid and arms sales. A narrow reading of the 'gross violations' language was adopted, so that, in the end, only about 12 of the 70 were thought to fall within it. While in some respects the narrow reading was consistent with the congressional purpose, in others it appeared to subvert the intended meaning of the statute. The narrow reading was derived from the way that the four basic elements of the category were interpreted. First, there must be violations of 'internationally recognized human rights.' Second, the violations must be 'gross.' Third, the frequency of violations must result in a 'consistent pattern.' Fourth, the government itself must be engaged, which is to say, responsible for the violations.

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The Carter administration followed Fraser's interpretation. In its decisions on security assistance, it was careful to go no further than required by the abuses specifically listed in subsection (d)(1). A government was considered to fall within it only when it practiced arbitrary imprisonment, torture, or summary execution of relatively large numbers of its own people. That a government was authoritarian, denied basic civil and political liberties, or failed to promote basic economic and social rights was not, by itself, enough to invoke the statutory prohibition on military ties.

The second element, that the violations must be 'gross,' was read to mean that they must be significant in their impact. For example, although arbitrary imprisonment is one of the listed violations, detention without charges for several days was not considered 'gross' because of the relatively brief period of confinement.

Third, the element of a 'consistent pattern' was held to mean that abuses had to be significant in number and recurrent. Isolated instances of torture or summary execution, while certainly gross abuses, would not trigger termination of security assistance under section 502B. For example, the reported imprisonment and torture of several dozen labor leaders in Tunisia was considered not to be sufficient by itself to constitute a 'consistent pattern.' . . .

. . .

2. Extraordinary Circumstances. The Carter administration always gave considerable weight to arguments that other U.S. interests might require con-

tinuation of security assistance, even when the government in question was thought to be a 'gross violator.' Thus, the charge that its pursuit of human rights was 'single-minded' and to the exclusion of other interests was far wide of the mark. If anything, the administration gave excessive credence to claims that some specific foreign policy objective would and could be promoted only if security assistance were provided, and often failed to subject such claims to rigorous analysis.

. . .

. . . In the end, human rights concerns resulted in the termination of security assistance to only eight countries, all in Latin America: Argentina, Bolivia, El Salvador, Guatemala, Haiti, Nicaragua, Paraguay, and Uruguay.

Extraordinary circumstances were found for all of the other countries considered to be gross violators. Thus, Indonesia (although technically not on the list) was a key member of ASEAN (the pro-Western association of Southeast Asian countries) and important to countering Soviet and Vietnamese influence in the region. Iran was judged critical because it shared a long border with the Soviet Union, was a major supplier of oil to the West, and defended our strategic interests in the Persian Gulf. Military ties with South Korea were deemed essential to deterring the threat of an invasion from the north. Military bases in the Philippines were judged critical to the United States and a security assistance relationship essential to keeping the bases. Finally, Zaire, the third largest country by area in Africa, was the source of nearly all the West's cobalt, a material crucial to the performance of high-performance jet engines.

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IV. CONCLUSIONS

What are the lessons to be drawn for implementation by the Executive when Congress attempts to legislate foreign policy? The history of section 502B is a case study of executive frustration of congressionally mandated foreign policy and underlines the need, particularly with this kind of legislation, for clearer directives, less discretion, and more assiduous congressional oversight. While these observations emerge from experience in the human rights area, they are relevant to other congressional attempts to influence the Executive's conduct of foreign policy. They are especially apt when congressional objectives may require decisions that displease particular governments and that will therefore be resisted by the Foreign Service bureaucracy whose paramount interest is maintaining cordial relations. For example, conclusions about the effectiveness of legislation conditioning security assistance on human rights practices are likely to be highly relevant to legislation conditioning nuclear exports on practices with respect to nuclear proliferation.

Congress has the most decisive impact when its directives allow the Executive no discretion at all, as in the country-specific legislation stating

precisely which governments are to be denied military aid and arms sales on human rights grounds. On the other hand, whenever the statute permits any exercise of discretion at all, the career Foreign Service is likely to use it to attempt to thwart congressional objectives.

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There are, perhaps, some drawbacks to statutes that deny all discretion, such as the country-specific legislation. Once such a provision is enacted, the Executive lacks the flexibility to respond quickly to changed conditions. While Congress has a legitimate role to play in setting basic foreign policy goals, it may be less well equipped to make day-to-day decisions about how best to fulfill those goals in specific cases. Its members, by and large, are not specialists in foreign affairs, and they generally lack the detailed knowledge and expertise required to make careful assessments of human rights practices and United States interests or to balance the benefits and costs of providing military aid or selling arms to a particular government.

For these reasons, a general rule that sets forth basic goals may be preferable to country-specific legislation. Yet the history of section 502B suggests that the creation or tightening of a general rule will produce, by itself, little change in executive behavior. . . .

. . .

This examination of attempts by Congress to require the Executive to withhold military aid and arms sales on human rights grounds suggests another important issue: whether withholding is an effective instrument for enforcing adherence to international human rights law. A definitive answer to this question is far from easy to obtain. It may be difficult to determine whether a government has taken positive steps to improve human rights conditions. Changes that are merely 'cosmetic' must be distinguished from those which indicate real improvement. When positive changes do occur, it may be difficult to say whether U.S. actions or other factors were decisive. But the fact that positive changes are lacking does not mean that U.S. actions have been ineffective. Although a targeted government may not have altered current practices, it may be deterred from worse violations. Moreover, regimes other than the immediate target may be influenced by the risk of being denied United States security assistance if they engage in repression. While the impact of withholding security assistance on human rights practices is beyond the scope of this article, it is the logical next question for scholars interested in international human rights.

LAWYERS COMMITTEE FOR HUMAN RIGHTS, LINKING SECURITY ASSISTANCE AND HUMAN RIGHTS

1989.

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That Section 502B [of the Foreign Assistance Act of 1961, as amended] has never been applied formally does not mean, however, that it has been useless or insignificant. The statute retains both symbolic and practical importance, and has given Congress political leverage to pressure the executive branch to support human rights.

Section 502B(c) has been used—although not frequently, and less often in recent years—by members of Congress (often responding to concerns raised by private human rights groups) to force an administration to file detailed reports justifying the provision of security assistance to certain countries. This mechanism may not have effected any specific changes in U.S. foreign policy, but it at least has forced successive administrations to confront human rights issues. The general Country Reports prepared pursuant to Section 502B(b) serve a similar function, and may have discouraged executive branch requests for security assistance to countries receiving unfavorable reports. Indeed, the sensitivity of certain governments to the reports has sometimes made further action unnecessary. Thus, in 1977 El Salvador, Guatemala, Brazil, and Uruguay responded to unfavorable Country Reports by refusing to accept any security assistance predicated on human rights conditions.

The statute has also been used to 'set the stage for follow up congressional action pertaining to specific countries. Congress can convene hearings and initiate inquiries to examine Section 502B implementation; these in turn highlight congressional interest in human rights, and can have a significant impact within the country in question. Section 502B thus provides a foundation on which subsequent human rights inquiries or legislation can build.

On a symbolic level, Section 502B remains important as the first legislation linking security assistance to human rights. Many have stressed that Section 502B should not be viewed simply as a traditional statute, but rather as a mechanism to heighten sensitivity and force an administration to consider human rights issues. As such, the statute lends 'legal and moral authority to the arguments of human rights proponents' and broadcasts the United States' interest in the protection of international human rights. This message is diluted when an administration publicly opposes the implementation of human rights measures or applies the law inconsistently. Nevertheless, Section 502B makes an administration politically accountable for its human rights policies by focusing public and congressional attention on the executive branch's treatment of human rights concerns.

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Country-specific legislation has proven more effective than Section 502B because the legislative conditions can be tailored to the varying circumstances and capabilities of the target country, enabling members of Congress to address human rights issues on a measured, case-by-case basis.

A further advantage of country-specific legislation is that it may be structured to reward human rights progress by providing security assistance, rather than merely punish a country for violations by withholding already-appropriated aid. Although the characterization of country-specific legislation as a 'carrot' and Section 502B as a 'stick' is untenable—after all, country-specific legislation also may penalize human rights violators by withholding aid—the former *can* be structured as an incentive intended to reward and foster improved country practices.

. . .

One example of country-specific legislation is Section 728 of the International Security and Development Cooperation Act of 1981 (ISDCA), which applied to El Salvador. This provision required the President to certify within 30 days of its enactment, and every 180 days thereafter, that the Salvadoran Government had met four conditions: that it (1) make a 'concerted and significant effort to comply with internationally recognized human rights;' (2) achieve 'substantial control' over its armed forces to prevent serious human rights abuses; (3) continue economic and political reforms and (4) resolve the country's civil war through free elections.

Despite published reports that the Salvadoran security forces had killed thousands of civilians in 1981, President Reagan found, in a certification filed within 30 days of the legislation, that the four conditions had been met. The certification focused on the 'beleaguered government' and the violations of human rights by the 'insurgents,' and cited the disbanding of the paramilitary group *Orden*, decreasing violence (according to U.S. Embassy statistics), and a new code of conduct drafted for the military. These assertions were met with considerable skepticism in Congress.

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. . . The final certification, in July 1983, was undoubtedly the most critical, as it acknowledged a rise in civilian deaths at the hands of security forces. Still, it stated that 'change is occurring,' whatever 'our disappointment' at its pace, and, according to human rights groups, understated the extent of political violence.

By the time of this final certification, both Congress and the Administration were dissatisfied with the certification process, although for very different reasons. Many in Congress shared the view of one member that 'the certification process has become more and more of a joke.' The Reagan Administration, meanwhile, felt that certification left it with an 'unacceptable choice' between abandoning an important strategic ally by denying it assistance, or exaggerating the extent of actual human rights progress. . . .

. . .

Two of the aforementioned recommendations for improving the certification process—cutting only a portion of the security assistance and requiring concrete conditions to be met—are drawn from what has been called 'action-specific' legislation. Action-specific legislation 'avoids the vagueness of the certification process and provides Congress with a wider range of conditioning options than simply cutting off all military aid.'

The most prominent example of action-specific legislation is the Specter Amendment, enacted in November 1983. Dissatisfied with El Salvador's response to the conditions of Section 728 of the ISDCA, as discussed above, which included a provision requiring the government's 'good faith efforts' to investigate the December 1980 murders of four American church workers, Congress withheld thirty percent of $65 million of appropriated military assistance pending a verdict in the trial of National Guardsmen charged in the murders. The aid was delayed for six months until a verdict was obtained in May 1984. The condition was concrete, and did not involve the entire aid package. Although yielding a relatively small victory for human rights, the Specter Amendment proved more useful than had the general certification process.

While the Specter Amendment may have achieved its objective, it remains open to some criticism. First, it did not require the achievement of due process standards; thus, the Salvadoran Government had an incentive to find a scapegoat whose conviction would enable the resumption of $20 million in aid. Second, the condition did not 'extend accountability further up the military chain of command.' Third, contrary to the objectives of Section 502B, it did not promote human rights on a broad scale.

Similar criticisms apply to other examples of 'action-specific' legislation, such as the condition that Chile extradite two officials charged with the 1976 Washington D.C. slayings of Orlando Letelier and Ronni Moffitt, or the law withholding $5 million of aid authorized for FY 1985 until El Salvador took specific measures to investigate the January 1981 killings of two American labor advisers.

On balance, however, 'action-specific' legislation does appear to facilitate human rights improvements, without interfering drastically with the executive branch's ability to maintain the bilateral relationship. . . .

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MAKAU MUTUA AND PETER ROSENBLUM, ZAIRE: REPRESSION AS POLICY

(1990), at 187.

United States Human Rights Policy Towards Zaire

The United States has been closely involved in Zairian politics since its independence. In 1960, the United States actively opposed the country's first

elected leader, Patrice Lumumba. It supported the rise of Mobutu to the Presidency in 1965; and intervened with military support to protect the Mobutu government during the second invasion of Shaba in 1978. When the government of Zaire has been threatened with economic crisis and internal insurgency, the United States has stepped in to support it.

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Throughout the last 25 years, the United States has provided significant bilateral economic and military assistance to Zaire. It has supported Zaire in international lending institutions such as the World Bank, the International Monetary Fund (IMF) and the African Development Bank. . . .

The United States is perceived by many Zairians as being responsible, at least in part, for Mr. Mobutu's continuation in power. Robert Remole, a former Political Counselor at the U.S. Embassy in Kinshasa and a retired 28-year veteran of the State Department, testified before the Subcommittee on Africa on this subject in 1980. 'I have heard this innumerable times,' he said, 'from educated Zairians, members of the Legislative Council, lawyers, other people who will be of importance when the Mobutu regime does finally collapse. 'Mr. Remole emphasized that blaming the United States was 'of course irrational, unreasonable,' but he argued that the policy of U.S. support for and identification with the government of Zaire 'bears great risk.' 'The risk,' he testified, 'is one that has been alluded to obliquely; that is, another Iran.'

U.S. support for the government of Zaire has created considerable resentment among Zairians. As one American-educated Zairian told the Lawyers Committee, 'When Mobutu goes, and he is going to go one day, the United States may find it extremely difficult to make friends in this country, because of its support for Mobutu.' He perceived the risk as very personal because he has agreed to work for an American-funded agency. 'Individuals like myself,' he told the Lawyers Committee, 'are targets of this anger.'

Nevertheless, though fully informed about President Mobutu's tactics and unpopularity, Congress and the Administration have repeatedly accepted the same justification for support to his government, namely, Zaire's strategic importance and its support for U.S. policies in the region. Professor Nzongola-Ntalaja, a Zairian academic living in the United States has observed that despite Zaire's dismal human rights record, it has earned the 'steadfast support' of the United States by faithfully promoting Western interests in Africa, especially in Angola and Chad.

In 1980, Lannon Walker, the Deputy Assistant Secretary of State for African Affairs during the Carter Administration, testified about Zaire. After noting its size and importance, he emphasized:

> And it is a fact that Zaire's moderate foreign policy orientation and close relations with the West stand in marked contrast to several countries in the area who favor more radical policies and have turned to the USSR, East Germany and Cuba for military and economic support.

Four years later, Elliot Abrams, Assistant Secretary of State for Human Rights and Humanitarian Affairs under the Reagan Administration, articulated a similar justification for U.S. support for the government of Zaire:

> As you are well aware, Zaire has long been a friend and key regional partner of the United States and the West. It has consistently worked with us . . . . Zairian minerals, notably copper and cobalt, are important to the West. Zaire's strategic relevance, which is due to its large size and population as well as its common borders with nine African countries, has never been more important than now, as we work towards political solutions in southern Africa.

In his testimony, Mr. Abrams claimed that 'Human rights conditions in Zaire had improved over the past 20 years,' and that 'progress has been made' in this area.

. . .

In 1982, as criticism of Zaire's human rights record mounted, the United States Congress reduced assistance to Zaire from $70 million to $20 million. In response, President Mobutu announced in May 1982 that he would no longer accept U.S. aid. The following month UN Ambassador Jeanne Kirkpatrick travelled to Kinshasa, in an effort to mend fences with President Mobutu. Following her visit, aid was delivered.

Two years later, President Mobutu was treated as an honored guest by the President of the United States. In an August 1984 visit to the White House, he received a 'warm welcome' from President Reagan. Mr. Reagan praised President Mobutu as 'a faithful friend for some 20 years.' He expressed admiration for Mr. Mobutu's courage in sending troops to Chad. Mr. Reagan did not comment on Zaire's dismal human rights record. In 1986, President Reagan renewed his praise for President Mobutu as 'a voice of good sense and goodwill' and an important U.S. ally in Africa.

President Mobutu has effectively used Ambassador Kirkpatrick's visit, his meetings with U.S. presidents and other symbolic gestures of support to sustain the perception that the United States condones his conduct, and will stand by his government.

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Despite the continued intransigence of the government of Zaire, and the ongoing pattern of human rights abuses, the Bush Administration continues to press for continued U.S. aid to that country. The Administration is using virtually the same language it has in the past to justify its request for $56 million in military and economic aid for FY 1991. In its budget request for FY 1991, the State Department says:

> Zaire has been a staunch supporter of U.S. and Western policies for over two decades . . . . More recently, Zaire is playing a key role in mediating

a ceasefire in Angola. Zaire's size, population, economic importance, resources and location make it a focus of U.S. interests in the region. The U.S. has an interest in Zaire in having a stable and responsible government which influences the stability, as well as the foreign and domestic policies, of its nine bordering states.

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JANET FLEISCHMAN, THE LIBERIAN TRAGEDY

2 Reconstruction 47 (1992).

The Liberian civil war—which killed twenty to thirty thousand people, turned one-third of the population into refugees, and destroyed the country's infrastructure—was a predictable explosion. By the late 1980s, the vicious and corrupt policies of Samuel Doe had brutalized his people, ignited ethnic conflict, and ruined the economy, bringing the country to the brink of violent eruption. Meanwhile, during most of the decade, the United States spent half a billion dollars in foreign aid for Liberia, making it the largest recipient of U.S. aid in sub-Saharan Africa. The U.S. propped up the Doe regime despite overwhelming evidence that he was cruel, unreliable and had no intention of keeping his promises to institute democracy. Liberia now lies tragically in ruins—a situation caused in large part by the U.S. refusal to condition aid on respect for human rights.

Africa's first republic and the only country on the continent never to have been colonized or attached to an empire, Liberia has had a 'special relationship' with the U.S. since 1847, when it was founded by freed African slaves. The new republic was immediately controlled by the settlers, who came to be know as Americo-Liberians. Liberia is the closest that the U.S. ever came to having a colony in Africa. U.S. influence has always been strong and apparent: the Liberian flag imitates that of the U.S., the U.S. dollar was used as legal tender, Liberia's constitution was written at Harvard Law School, and many Liberians have relatives in the U.S. Even the names of towns and streets reflect the U.S. connection—Monrovia, the capital, is named after President James Monroe.

The U.S. used this relationship to further its own interests. Liberia was the only country in West Africa where the U.S. had landing and refueling rights for military planes on twenty-four hour notice, and the Voice of America transmitter in Monrovia broadcast throughout West Africa. Under the regime of Samuel Doe, Liberia contributed to the U.S. Cold War strategy by expelling the Libyan Embassy and nine Soviet diplomats. The CIA and Defense Department also had facilities in Liberia for intelligence communications throughout Africa. In addition, private American investments were substantial. Firestone's rubber plantation in Liberia, for example, was one of the largest in the world.

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After his campaign to silence the opposition, Doe stole the presidential elections in October 1985. Although the U.S. had provided considerable funding to ensure that the elections would be free and fair, the Reagan Administration ignored the widespread fraud and intimidation and quickly gave a stamp of approval to the new government. According to Blaine Harden's *Africa: Dispatches From a Fragile Continent*, a senior American diplomat commented.: 'It was one of those rare times when U.S. foreign policy could have made the difference. We funded the elections, we organized it, we supervised the voting, and then when Doe stole it, we didn't have the guts to tell him to get his ass out of the mansion.'

The Administration became an apologist for the Doe government. Chester Crocker, Assistant Secretary of State for African Affairs, refused to acknowledge that the elections were fraudulent. Testifying before Congress in December 1985, Crocker declared: 'There is now the beginning, however imperfect, of a democratic experience that Liberia and its friends can use as a benchmark for future elections, one on which they want to build.' He went even further: 'The prospects for national reconciliation were brightened by Doe's claim that he won only a narrow 51 percent election victory . . . ' Many informed Liberians were shocked by the Administration's efforts to legitimize the fraudulent elections, further damaging American credibility.

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Contrary to the Reagan Administration's inaction, Congress made its opposition to Doe's policies clear. After the 1985 elections, both houses of Congress declared the elections fraudulent. In 1986, Congress drastically reduced U.S. aid. In 1985 U.S. military and economic aid totaled about $78 million. That amount was cut almost in half over the next two years, partly because of human rights abuses, but also due to blatant corruption in the Doe government and constraints on U.S. foreign aid imposed by America's own economic woes. The Reagan and Bush administrations, however, continued to rely on 'quiet diplomacy' and refused to engage in forceful public advocacy to curb human rights violations. While visiting Monrovia in January 1987, Secretary of State George Shultz praised Liberia's 'genuine progress' toward democracy.

Despite the introduction of a new constitution in January 1986 which guaranteed fundamental rights, many of the repressive features of martial law remained in effect, including Decree 88A. Freedom of expression and political activity continued to be tightly curtailed, arbitrary arrest and imprisonment were frequently used against opponents, and Doe's government refused to investigate or punish those responsible for the widespread killing that followed the 1985 coup attempt. Nevertheless, in a letter to Human Rights Watch in 1987, Assistant Secretary Crocker commented: 'We believe there has been a movement in a positive direction. If you take a moving picture, it shows a trend which we think is a good one. If you take a snapshot, then in that snapshot you can see problems. Problems are not absent, but the situation has improved.'

With the U.S. unwilling to use its considerable leverage to restrain Doe, the human rights situation in Liberia deteriorated.

. . .

Doe's death on September 10, 1990 did not end the war. The country disintegrated into warring factions.

. . .

QUESTIONS

1. 'I do not understand why the United States should be concerned with recipient states' reactions to decisions to cut off military or economic aid because of human rights violations. States cannot make serious objections to cut-offs. No one has a *right* to aid; it's not like, say, blocking trading relationships that are a normal part of the the world's business within a world regulatory framework. Consistent or inconsistent, effective or ineffective in trying to bring about change, decisions under the Foreign Assistance Act are this country's business alone.' Comment.

2. The materials make clear how radically inconsistent U.S. policy about aid and human rights appears to be.

a. Do you view inconsistency as such to be a substantial criticism of human rights conditionality? Is it possible for a great power like the United States to act consistently on these matters?

b. What factors could, in your view, properly influence considerations about suspensions of aid? What factors that have been historically relevant do you view as improper? Why?

3. What do you view as the primary justification for this human rights policy? If, for example, you believe that it should persuade or pressure other states to change their ways, would you abandon the policy unless you had proof that it had been effective in these ways? How would you go about collecting that proof? How, for example, would you solve the problems of causation in explaining why a country changed its practices (stopped systematic torture)?

4. Would you support an amendment to the foreign aid legislation eliminating the President's power to continue aid under the clauses dealing with 'extraordinary circumstances' and 'national interest'? Or do you wish to leave considerable discretion with the Executive? Why?

5. If a suspension of economic aid is being considered, what steps could realistically be taken to assure that the cut-off will not severely hurt the poor and needy in the target country, the very groups that may be the primary victims of human rights violations?

C. CASE-STUDY: MOST FAVORED NATION TREATMENT AND THE PEOPLE'S REPUBLIC OF CHINA

COMMENT ON MOST FAVORED NATION TREATMENT

The following materials about the bearing of human rights considerations on trade with China draw on human rights conditions to trade that were stated in legislation, proposed legislation and a recent Executive Order. Neither of the statutory provisions previously considered—Section 502B and Section 116 of the Foreign Assistance Act of 1961, as amended, p. 822, *supra*—are here relevant, for the United States has provided neither security assistance nor development assistance to the PRC.

The so-called Jackson–Vanik Amendment to the Trade Act of 1974 (Sec. 402, 19 U.S.C. § 2432) at once authorizes the granting of trade benefits to designated categories of states and qualifies its authorization by stating:

> To assure the continued dedication of the United States to fundamental human rights . . . products from any nonmarket economy country shall not be eligible to receive nondiscriminatory treatment (most-favored-nation treatment) . . . during the period beginning with the date on which the President determines that such country—
>
> (1) denies its citizens the right or opportunity to emigrate;
>
> (2) imposes more than a nominal tax on emigration . . .; or
>
> (3) imposes more than a nominal tax . . . or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice. . . .

This provision is subject to Presidential waiver under stated conditions and procedures.

The most favored nation (MFN) treatment to which the amendment refers is a familiar clause and concept regulating many types of relationships among states. In general, a MFN clause (in, say, a treaty) grants a state benefiting from it (state 'X') the same treatment (say, with respect to the ability of X's citizens to do business in state 'Y', the other party to the treaty) as has been given by Y to some other 'most-favored' state. In other words, X and its citizens benefit from the most favored treatment that Y has granted to any other state on this matter.

For example, suppose that state 'Z' had previously entered into a treaty with Y giving Z's citizens extensive rights to do business in Y, rights that are as favorable as or more favorable than those given by Y to any other state. By virtue of the MFN clause in its treaty with Y, X is assured that its citizens doing business in Y will be treated as favorably as the nationals of Z.

In the case of the Jackson–Vanik Amendment, the MFN clause appears in

domestic legislation (not a treaty) and affects tariffs, a field highly regulated both by multilateral arrangements such as the General Agreement on Tariffs and Trade (GATT) and by national legislation. Special categories of states may fall within special treaty or statutory regimes, such as the System of Generalized Preferences covering a range of exports from less developed countries. In the case of the PRC, which the U.S. views as not being a party to the GATT, MFN treatment plays a vital role. If such treatment were withdrawn by the U.S., statutory tariff rates that are often much higher would apply to imports from the PRC.

The Jackson–Vanik Amendment was enacted primarily in response to bars erected by the Soviet Union to emigration. Those bars particularly affected members of several groups anxious to leave, including principally Soviet Jews. After the (ongoing) transformation of the former Soviet Union, the question of MFN treatment has involved principally issues other than a state's denial of the right of its citizens to emigrate. That has surely been the case with respect to decisions about MFN treatment for China. Conditions other than those stated in the Jackson–Vanik Amendment have become relevant to tariffs on imports from the PRC, such as conditions set forth in proposed legislation and in the Presidential Executive Order at p. 851, *infra*.

The following materials look at the Chinese-American conflict, and at the related Congressional-Executive conflict, over human rights conditions to MFN treatment for tariffs on trade from China. A previous reading—Kausikan, *Asia's Different Standard*, p. 226, *supra*—is particularly relevant to the present discussion.

ROBERT DRINAN AND TERESA KUO, THE 1991 BATTLE FOR HUMAN RIGHTS IN CHINA

14. Hum. Rts. Q. 21 (1992), at 22.

. . .

While [President Bush] believes that the unconditional extension of MFN is the best way to advance US ideals of freedom and democracy in China, the majority of lawmakers disagree. . . .

. . . [T]he President recognized in 1991 that an overwhelming majority of the House of Representatives likely will not support unconditional MFN renewal. Therefore, from the initial stages of the 1991 MFN debate, the administration focused its efforts on garnering the thirty-four Senate votes needed to sustain a presidential veto of conditional MFN renewal.

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The Jackson–Vanik Amendment allows the President to waive the emigration requirement only when it would 'substantially promote' the goals of the Amendment *and* the President has received assurances that the country's emi-

gration practices will 'lead substantially' to such objectives. Since 1980 three presidents have used the waiver method to grant MFN status to China.

. . .

In 1991 both the Senate and the House took early action to disapprove the presidential waiver renewing China's MFN status. In addition to voicing its increasing dissatisfaction over China's human rights abuses, Congress also expressed growing concerns both over China's unfair trade practices toward the United States and with regard to the sales of nuclear weapons to developing nations. . . .

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Examples of ongoing human rights violations in China include restrictions on emigration, a lack of fair trials and due process, deplorable prison conditions, suppression of political dissent, religious persecution, interference with foreign journalists, harrassment of Chinese nationals in the United States, repression of Tibetan nationals, and exporting of products of prison labor.

. . . Restrictive regulations adopted by Chinese authorities after June 1989 . . . have made emigration much more difficult for political dissidents. In addition to getting approval from both the police and their work units, post-Tiananmen passport applicants also must give detailed explanations of their whereabouts during the spring of 1989. Passports were not issued for applicants who gave unsatisfactory answers regarding their involvement in the pro-democracy movement or who lacked the requisite authorization from the appropriate authorities.

. . .

Despite the long list of human rights violations, the issue which captured the attention of many members of Congress last year was China's $10.4 billion trade [surplus] with the United States in 1990. The Treasury, along with the Central Intelligence Agency, attributed the trade imbalance to China's use of protectionist policies toward US imports. . . .

. . .

The bills which received the strongest support among congressional members and which observers saw as the most likely to override an expected presidential veto were the bills sponsored by Mitchell and Pelosi. Both bills allowed the extension of MFN trade status for another year, but with the condition that when it comes up for renewal in 1992, the President must certify, among other things, that China has:

- accounted for citizens detained, accused, or sentenced because of pro-democracy protests;
- released political prisoners taken from the pro-democracy protests;

- adhered to the joint Declaration on Hong Kong, which states terms under which Britain is to transfer the territory to China;
- stopped jamming Voice of America broadcasts; and
- made 'significant' progress in (1) ending the harassment of Chinese citizens in the United States, (2) granting access for humanitarian and human rights groups to prisoners, trials, and detention centers, and (3) taking action to stop human rights violations.

. . .

. . . However, five amendments were added to Pelosi's original bill, making the final bill resemble the more restrictive Mitchell bill. The amended conditions required that China abandon its practice of coercive abortions or sterilization, provide assurances that it is not assisting non-nuclear weapon states to develop nuclear devices, not contribute to the proliferation of missiles, prohibit the export of prison-made goods, and moderate its opposition to Taiwan's access to the General Agreement on Tariffs and Trade (GATT).

. . .

. . . A breakdown of the final votes shows that three major factors influenced the Senators to vote against the Mitchell bill: deference to the President, concerns about the overly restrictive amendments to the MFN bill, and the desire to protect US farmers from possible Chinese retaliation at MFN revocation.

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In addition, pro-MFN lobby groups also made a big impact on the Senate vote last year. Unlike 1990, when the farmers mostly stayed out of the MFN debate, during 1991 the National Association of Wheat Growers was one of the most active lobbying groups for unconditional MFN extension. As the final Senate decision showed, the farmers' efforts influenced key Democratic votes.

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In addition, the key players for unconditional MFN renewal from 1990—the US and Hong Kong companies doing business in China—were again involved in lobbying lawmakers during the summer of 1991. A leading pro-MFN group, the Business Coalition for US-China Trade, mobilized the employees of its 100 companies and trade associations to contact members of Congress.

None of these lobbying groups, however, had an interest in preserving unconditional MFN status quite as intense as that of the Chinese government. Despite the Beijing leaders' repeated rhetoric about not bending under international pressure, the Chinese government hired the public relations giant Hill and Knowlton in mid-July to lobby on its behalf. The Chinese government also hired former executive director of the National Republican Congressional

Committee, R. Marc Nuttle, and the law firm of Jones, Day, Reavis & Pogue to boost its image among influential figures in Washington.

On the other side of the MFN debate, overseas Chinese students, human rights watch groups, and labor organizations argued that MFN status either should be revoked completely or only should be renewed with conditions attached. Of these groups, the most active lobby in support of conditional MFN status renewal was the Independent Federation of Chinese Students and Scholars (IFCSS), which represents over 40,000 Chinese citizens from some 150 US universities. . . .

Although some have argued that MFN status should not be used as a tool to advance the cause of human rights in China, the United States has had a history of denying MFN status to other countries with similar human rights violations. For example, not only has it refused to grant MFN status to Vietnam for its human rights abuses, but the United States also has led Europe and Japan on a decade-long embargo against investing in that country. The United States also has steadfastly refused to grant MFN status to countries such as Afghanistan, Albania, Cambodia, Cuba, and North Korea, all run by tyrannical rulers. From 1982 to 1987, while Poland was under martial law, the United States refused to renew Poland's MFN status in order to protest the government's mass arrests and imprisonment of people connected with the Solidarity Movement. . . .

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NOTE

In September 1992, Congress enacted the United States China Act of 1992, 138 Cong. Rec. H. 8841, 102nd Cong. 2d Sess. It provided that the President could not recommend from July 1993 the continuation of a waiver related to nondiscriminatory MFN treatment for China unless he reported that China had taken 'appropriate actions' to 'begin adhering' to the UDHR in China and Tibet; allowed emigration for reasons of political or religious persecution; accounted for and released political prisoners and prevented export to the U.S. of goods made by prison labor. Moreover, the President's report had to state that China had 'made overall significant progress' in other respects, including ending unfair trade practices against American business.

Even if the President could not report as required, nondiscriminatory MFN treatment was still to apply to goods manufactured by a business venture 'that is not a state-owned enterprise' of China, provided that such goods were not marketed or exported by a state-owned enterprise.

President Bush vetoed the Act. The House of Representatives overrode the veto by a vote of 345–74, but the Senate vote of 59–40 fell short of the required two-thirds majority for an override and hence sustained the veto.

ROGER SULLIVAN, DISCARDING THE CHINA CARD

86 For. Pol. 3 (1992), at 8.

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. . . American policy treated [human rights] as a secondary issue during the Cold War because there seemed little to be done. For the most part, Chinese human rights violations were simply ignored. In fact, before the 1989–91 worldwide collapse of communism, few questioned two key assumptions guiding Washington's China policy: first, that communist regimes cannot be fundamentally reformed or overthrown; and, second, that the Chinese communist government was firmly in control and that it enjoyed the support of the Chinese people. Events in Eastern Europe and the Soviet Union have done much more to undercut these assumptions than has the massacre at Tiananmen.

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American overtures to China in 1971 made sense for a number of reasons, none of which apply today. Achieving normal relations with the PRC enabled the United States to end military support for South Vietnam, which had become politically insupportable in America. It also put the United States in a position to exploit the Sino-Soviet split and reap the obvious benefits of blocking the advance of Soviet influence in Asia and drawing Soviet forces away from Europe.

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Immediately after Tiananmen, it was not clear how the administration would respond.

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. . . [T]he administration reverted to the old approach to China. The annual process of renewing non-discriminatory (so-called 'most-favored-nation,' or MFN) tariff treatment for China became the outlet for congressional frustration and the vehicle for engaging the administration in a general policy debate. Renewal had been routine every year since MFN treatment was first extended to China in 1980 because Congress was well aware that MFN treatment is not a special benefit but is considered standard for almost all trading partners. Congress even let Bush's decision to renew MFN treatment for China immediately after Tiananmen pass without a vote. But when Congress saw no change in administration China policy, despite the collapse of communism in Eastern Europe and the Soviet Union and the clear evidence that China was becoming more repressive, congressional opposition to China's MFN status mounted.

. . .

Nor would Chinese leaders compromise in any substantial way to secure continued MFN status. They are convinced that compromise and reform brought down the communist parties in Eastern Europe, and they have no intention of suffering the same fate. The Chinese leadership also does not believe compromise is necessary because it thinks the MFN threat is a bluff.

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. . . As long as China is ruled by a clique whose overriding concern is survival, which sees peaceful demonstrations as 'counterrevolutionary rebellion' aided by 'anti-China forces in the United States,' and which dismisses even such a moderate summary of human rights abuses as the State Department's 1990 human rights report on China as slander, flagrant interference in China's internal affairs, and 'expressions of out-and-out hegemonism and power politics,' foreign government attempts to talk to Beijing about human rights will prove fruitless and perhaps even counterproductive.

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NOTE

In May 1993, President Clinton issued Executive Order 12850, Conditions for Renewal of Most Favored Nation Status for the People's Republic of China in 1994 (56 Fed. Reg. 31327, June 1, 1993). The Order continued the waiver for China for an additional twelve months to June 1994, so as to assure it of most favored nation treatment during this period, but made renewal after June 1994 subject to stated conditions.

Those conditions included a determination that further extension of the waiver would promote 'freedom of emigration objectives,' and that China was complying with the 1992 agreement on prison labor. Further determinations were required to the effect that China had made 'overall, significant progress' with respect to matters including: 'taking steps to begin adhering' to the UDHR, giving an accounting of and releasing political prisoners, ensuring humane treatment of prisoners, 'protecting Tibet's distinctive religious and cultural heritage,' and permitting international radio and television broadcasts into China.

U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994

(1995), at 555.

CHINA

The People's Republic of China (PRC) is an authoritarian state in which the Chinese Communist Party (CCP) monopolizes decisionmaking authority.

Almost all top civilian, police, and military positions at the national and regional levels are held by party members. A 22-member Politburo and retired senior leaders hold ultimate power, but economic decentralization has increased the authority of regional officials. Socialism continues to provide the ideological underpinning, but Marxist ideology has given way to pragmatism in recent years. The party's authority rests primarily on the success of economic reform, its ability to maintain stability, and control of the security apparatus.

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In 1994 there continued to be widespread and well-documented human rights abuses in China, in violation of internationally accepted norms, stemming both from the authorities' intolerance of dissent and the inadequacy of legal safeguards for freedom of speech, association, and religion. Abuses include arbitrary and lengthy incommunicado detention, torture, and mistreatment of prisoners. Despite a reduction during the year in the number of political detainees from the immediate post-Tiananmen period, hundreds, perhaps thousands, of other prisoners of conscience remain imprisoned or detained. The Government still has not provided a comprehensive, credible public accounting of all those missing or detained in connection with the suppression of the 1989 demonstrations. Chinese leaders moved swiftly to cut off organized expressions of protest or criticism and detained government critics, including those advocating greater worker rights. Citizens have no ability peacefully to change their government leaders or the form of government. Criminal defendants are denied basic legal safeguards such as due process or adequate defense. The regime continued severe restrictions on the freedoms of speech, press, assembly and association, and tightened controls on the exercise of these rights during 1994. Serious human rights abuses persisted in Tibet and other areas populated by ethnic minorities.

The human rights situation in 1994 was, however, marked by the same diversity that characterizes other aspects of Chinese life. In several instances, the Government acted to bring its behavior into conformity with internationally accepted human rights norms. These actions included releasing several prominent political and religious prisoners, granting passports to some critics of the regime and their relatives, and adopting a law, which became effective in January 1995, that allows citizens to recover damages from the Government for infringement of their rights. The Government continued to acknowledge the need to implement the rule of law and build the necessary legal and other institutions, but it has not yet significantly mitigated continuing repression of political dissent. In 1994 China also continued a human rights dialog with some foreign critics, and reaffirmed its adherence to the Universal Declaration of Human Rights. Chinese officials provided limited information about the status of several hundred specific cases of international concern.

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SUBSEQUENT DEVELOPMENTS ABOUT CHINA–U.S. TRADE: NEWSPAPER ACCOUNTS

There follow excerpts from articles in the *New York Times* that indicate the considerations and forces at work with respect to U.S. action bearing on human rights violations in China.

China Rejects Call from Christopher for Rights Gains

by Elaine Sciolino, *New York Times*, March 13, 1994, p. A1

Chinese officials today flatly rejected Secretary of State Warren Christopher's demand that Beijing improve its human rights performance and warned that stripping China of its trade privileges would backfire.

. . .

This took place against a backdrop of heightened American demands for steady and substantive progress on human rights, and in large part they clashed with China's traditional resistance against being told what to do about its internal affairs and with the authorities' desire to maintain strict control as democracy advocates begin to become more assertive.

Mr. Christopher told Foreign Minister Qian Qichen this morning that China's actions toward its citizens, including the recent detention of a number of prominent dissidents, 'suggest that China attaches relatively little weight to core human rights issues,' the State Department spokesman, Michael McCurry, told reporters.

If that is so, the Secretary added, it 'certainly bodes in' for the chances of renewing the most-favored-nation trade status that gives China lower tariffs accorded to most American trading partners.

. . .

In an afternoon meeting, Prime Minister Li Peng seemed to reverse China's earlier pledges this year to try to make progress on human rights.

'China will never accept the U.S. human rights concept,' Mr. Li told Mr. Christopher, according to a Foreign Ministry spokesman, Wu Jianmin. 'History has already proven that it is futile to apply pressure on China.'

. . .

In taking a tougher line than at any time since the Clinton Administration took office, the Chinese appear willing to gamble that Washington has too much to lose by revoking the trade privileges, a policy they see as driven by anti-China lawmakers in Congress. Both Mr. Qian and Mr. Li warned Mr. Christopher today that the United States would suffer more than China if its trade privileges were revoked.

China is nearly self-sufficient economically, Mr. Li boasted, adding that if the United States were to revoke its trade status, 'it means the United States would lose its share of the big Chinese market.' He said Chinese imports were growing at a rate of 9 percent a year and would reach a trillion dollars by the turn of the century.

. . .

Gauging the Consequences of Spurning China

by Edward Gargan, *New York Times*, March 21, 1994, p. D1

As the Clinton Administration weighs whether to renew China's most favored nation status after the strained visit by Secretary of State Warren Christopher to Beijing, legions of American business leaders and Washington lobbyists for industry and trade associations are describing the consequences of withdrawing the designation in near-apocalyptic terms.

But some economists and legislators, pointing to the United States' $22.7 billion trade deficit with China—second only to its $59.32 billion deficit with Japan—suggest that much of the oratory about damage to American exports and investment in China is overstated and that higher duties could go some distance toward trimming the trade deficit.

In fact, both sides, while summoning considerable data, have shaped their analyses to suit their arguments. Any clear-cut assessment remains elusive.

'Our exports were $9 billion last year to China,' said Donald M. Anderson, the president of the United States–China Business Council, a group that promotes trade between the countries. 'No one really knows how much they would be hit, but they would be hit because the Chinese would unquestionably retaliate.'

Jagdish Bhagwati, a trade economist at Columbia University, does not agree. 'All this number-crunching is purely hypothetical,' he said. 'Would the Chinese retaliate by saying, "The U.S. wants to play hardball so we'll play hardball"? That is a vague, general fear, in my view. If they start playing that game, we are a superpower and we have lots of leverage. We have a whole range of punishments and rewards at our command.'

The threat of Chinese retaliation against American companies selling to China and what would be a surge in duties on Chinese products exported to this country have rattled industries with large stakes in China and worried trade experts about the broader relationship between the two countries should China's trade privileges be revoked.

By June, President Clinton must decide whether China has made 'significant, overall progress' toward improving its human rights record, a condition of an executive order that the President issued last year on renewing China's trade status. Virtually every country with which the United States trades holds most favored trading status, which results in significantly lower duties on their exports to this country than would otherwise be the case.

The Boeing Company, one of the most influential American manufacturers—and with orders from China for $3.9 billion in new airplanes—has led the charge against any change in China's trade status. Last Tuesday, at a panel discussion in Washington sponsored by the Council on Foreign Relations, Lawrence W. Clarkson, Boeing's corporate vice president for planning and international development, attacked proposals to link renewal of most favored nation status to China's record on human rights.

'Boeing currently has orders for 64 planes for delivery to China with a value of $3.9 billion,' Mr. Clarkson said, 'These orders, plus an additional $2 billion to $3 billion in near-term potential orders, would be at great risk if M.F.N. was not renewed. During the next 15 years, China will need 800 airplanes worth $40 billion, making it the world's third-largest aviation market.'

Like many executives who have urged renewal of China's trade privileges, Mr. Clarkson couched his argument in broader social and political terms as well. 'We believe strongly that this U.S. trade is contributing to the rapid decentralization and transformation of China's economy, helping millions of Chinese to obtain greater freedom to choose their work, their employer and their place of residence,' he said. 'As in Taiwan and South Korea, the development of a vigorous middle class will bring the development of social and political freedom for all Chinese more than any other factor.'

American industry leaders often say, as some business executives did to Secretary of State Christopher in Beijing on March 13, that 167,000 American jobs depend on trade with China. This figure comes from a Commerce Department estimate that every $1 billion in exports generates 19,000 jobs; thus, the roughly $9 billion in exports to China accounts for 167,000 jobs.

The calculation implies that most if not all of these jobs are in jeopardy if China responds to a cut-off of trade privileges by slashing imports from the United States. But, as economists like Mr. Bhagwati note, this inference is not warranted given the uncertainty of the Chinese response and the complexity and size of trade between the two countries.

Still, Lawrence Chimerine, the chief economist at the Economic Strategy Institute, a Washington based economic and trade policy lobby organization, said cases like Boeing suggest that American manufacturers could lose large chunks of the China market. 'I think Japan and Europe would get a lot of orders that we wouldn't get,' he said.

In 1993, according to the Commerce Department, the United States exported $8.76 billion worth of goods to China, including airplanes, fertilizer, wheat and automobiles. China, during the same period, sold $31.53 billion in goods to this country, products ranging from toys and shoes, to combs and clocks.

Peter T. Mangione, president of the Footwear Distributors and Retailers of America, said that ending China's access to low duties would mean higher shoe prices for Americans because China accounted for one of every two pairs of shoes sold here. 'Almost 90 percent of all shoes sold in America are

imported,' Mr. Mangione said 'And China is by far the largest supplier of imported shoes; it supplies 60 percent of all imported shoes.'

Neal M. Soss, the chief economist at CS First Boston, has calculated the potential inflationary impact of revoking China's most favored nation status. If this trade privilege is denied, he said, the increase on duties on Chinese products imported into this country would fuel inflation by at least 0.15 percent annually. 'The slippery slope of protectionism is the reason,' he said.

But Representative Nancy Pelosi, a Democrat from San Francisco who has led the campaign in Congress against renewing China's trade status, argues that the size of America's trade deficit with China suggests that China needs American markets.

'China's economic growth depends on preferential access to the United States markets,' Ms. Pelosi said. 'The deficit is growing. Compound that with cheap labor and you see that they are flooding our markets with products made by people making $24 a month.'

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U.S. Signals China It May End Annual Trade-Rights Battles

by Thomas Friedman, *New York Times*, March 24, 1994, p. A1

The Clinton Administration, in an effort to resolve the crisis in relations with China, has been quietly signaling Beijing that if it met Washington's minimum human rights demands, the United States would consider ending the annual threat of trade sanctions to change Chinese behavior.

Administration officials said today that there was already a consensus within President Clinton's economic team, which is now spreading to the White House and even parts of the State Department, that the annual rite of threatening China with a withdrawal of its beneficial trade status if it does not meet certain human rights conditions is outmoded and should be replaced.

That sentiment, which has been conveyed to China by the Administration, also seems to be taking hold in Capitol Hill, from which the pressure to link human rights and trade originally came.

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Administration officials are increasingly arguing that the current policy is outmoded because, as the President has told aides and lawmakers in recent days, the last thing Mr. Clinton wants to do is withdraw China's trade benefits, which would costs thousands of American jobs and billions of dollars in contracts. So in some ways the policy rests on an empty threat.

It is also outmoded, other officials argue, because trade is now such an important instrument for opening up Chinese society, for promoting the rule of law and the freedom of movement there, and for encouraging the Chinese authorities to allow citizens to own everything from their own satellite dishes

to foreign newspapers, that revoking it would be self-destructive for both sides.

Finally, American policy toward China is only effective if there is a united front, and that united front has broken down in recent years, as more and more Americans do business in China and refuse to see their economic interests imperiled by making them an annual weapon for pressing human rights concerns.

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U.S. Is To Maintain Trade Privileges for China's Goods: A Policy Reversal

by Douglas Jehl, *New York Times*, May 27, 1994, p. A1

President Clinton renewed China's favorable trade status today with virtually no conditions, and said he would abandon his effort to use trade as a lever to force Beijing to make progress on human rights.

While Mr. Clinton said there had been some improvement in human rights, he acknowledged that China's actions had fallen far short of the steps he set forth a year ago as conditions for renewing the trade privileges. But he said that as punishment he would do little more than prohibit imports of Chinese guns and ammunition.

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. . . Thus Mr. Clinton cast aside the executive order issued last year.

Human Rights Watch, which led the battle to block renewal of the trade benefits, voiced even greater disdain, accusing Mr. Clinton of 'effectively removing all pressure on China to improve its human rights practices.'

But the decision was applauded by business groups, including the United States Chamber of Congress, which likened the policy of tying human rights to trade to 'using a blunt instrument for brain surgery.'

The decision by Mr. Clinton leaves intact the Jackson–Vanik Amendment of two decades ago that ties trade benefits for Communist countries to their [*emigration*] policies. But since it first won the privilege in 1980, that barrier has never prevented China from winning renewal of its 'most favored nation' trade status, which allows it to send its exports to the United States at the lowest applicable tariffs.

Instead, Mr. Clinton's approach becomes roughly comparable to Washington's strategy toward other nations—using diplomatic pressure but not holding trade hostage in efforts to make progress on rights.

Today, Mr. Clinton mentioned China's importance in putting pressure on North Korea to abandon its nuclear weapons program as one of the reasons he believed it wise to tread softly. He also cited China's role as the most populous country, with 1.2 billion people, and the third-largest economy.

But the fundamental reason he offered for the shift amounted to a repudiation of a year's worth of American pressure tactics. He said there would be 'inevitably a reluctance' for China to act on rights issues 'if it looks like every step that is taken, is taken under the pressure of the United States, some outside power making them do it.'

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Rights Issues Aside, Asia Deals Rise

by Key Brown, *New York Times*, Aug. 1, 1994, p. D1

After years of trying unsuccessfully to quiet criticism of human -rights records, Asian nations have found powerful allies: American businesses eager to invest in their growing markets and the Clinton Administration with its emphasis on economic interests in post-cold-war foreign policy.

The Clinton Administration's spring decision to continue China's favorable trade status gave some of the largest and fastest growing countries new confidence that their influence is now strong enough to have an effect on American policy. And from India and Indonesia to smaller nations like Singapore, Vietnam, Thailand and Malaysia, they are showing it.

'It seems to me the message is loud and clear: if American business gets strongly involved in a country, human rights takes second place or even less than that,' Ashutosh Varshney, an India expert at Harvard, said of the China decision.

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The Administration's China decision was also closely watched by Indonesia, which is in the middle of the latest trade case brought against it by American labor unions. The case comes under the Guaranteed System of Preferences, which was created to help developing countries, and will be decided by the United States trade representative. Under the preferences program, Indonesia can export $650 million worth of goods duty free to the United States.

The A.F.L.-C.I.O. is protesting what it says is Indonesia's quashing of its labor movement. A ruling is due this month, but there is a growing feeling in Indonesia that the battle is already won.

'I think the Indonesians are resting a little easier that the decision won't go against them,' said Wayne J. Forrest, the executive director of the American Indonesian Chamber of Commerce, a group founded in 1949, whose members include Mobil, Texaco and several other large oil and mining companies as well as some small businesses.

A month after the Clinton Administration's May 26 decision to continue China's most-favored-nation status with virtually no conditions, despite its spotty record on human rights, the Indonesian Government shut three of the country's most influential magazines and broke up a protest in Jakarta over

the closings. Amnesty International said 56 people were beaten and arrested. In mid-April, more than 100 workers and labor campaigners were arrested after strikes and demonstrations.

Meanwhile, abuses continue in the disputed territory of East Timor, a former Portuguese colony that was invaded and annexed by Indonesia in 1976, human rights groups say.

An Indonesian Embassy official in Washington, who insisted on anonymity, said Indonesia had followed China's lead and enlisted American oil and mining companies that do business in Indonesia to stress the country's economic importance to the United States. Nearly 800 big American companies wrote to President Clinton supporting China, a tactic crucial to China's success in the trade decision.

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President Imposes Trade Sanctions on Chinese Goods

by David Sanger, *New York Times*, Feb. 5, 1995, p. A1

The Clinton Administration today imposed punitive tariffs on more than $1 billion of Chinese goods, the largest trade sanctions in American history, and warned of further action if the Communist Government continued to refuse to crack down on rampant piracy of American software, movies and music.

The decision to impose 100 percent punitive tariffs on goods ranging from silk blouses to cellular telephones was met almost immediately by an angry Chinese announcement of tariffs against American-made goods.

The trade confrontation comes at a particularly delicate moment in Chinese-American relations, with disagreements brewing on human rights and arms control as well, and with China's paramount leader, Deng Xiaoping, reported to be seriously ill.

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Each country said its penalties would take effect on Feb. 26. . . .

Today's action was the culmination of a dispute between the United States and China that has bubbled along for nearly two years, a period in which the Administration had set aside serious concerns about human rights in China in the hope of bolstering trade, among other things.

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[Eds: On February 26, 1995, the two countries signed an agreement purporting to end the dispute over intellectual property rights. Thus the announced trade sanctions that were to become effective on that date were avoided. See *New York Times*, Feb. 27, 1995, p. A1.]

China Warns of New Peril to U.S. Ties

by Patrick Tyler *New York Times*, Feb. 23, 1995, p. A9

China is threatening a new rupture in relations unless the United States backs away from a proposed United Nations resolution criticizing its human rights record.

The warning was delivered today by officials who summoned the American Ambassador to discuss the resolution, which has been raised and defeated repeatedly, with the United States as co-sponsor, at the annual meeting of the United Nations Human Rights Commission.

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Mr. Clinton pledged to press human rights concerns when he decided last May to separate American trade policy toward China from its human rights record.

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A State Department official in Washington said that because 'this year there did not seem to be any significant, concrete' improvement in China's human rights record, the Administration had concluded that it could not 'justify taking a different course of action' in Geneva.

The United States Embassy in Beijing opposed bringing the resolution this year, arguing that the United States would get nothing by embarrassing China and would stoke anti-American sentiment as China prepares for the death of its paramount leader, Deng Xiaoping.

Taking a hard line last fall, the Chinese Foreign Minister, Qian Qichen, warned in a meeting at the White House that China would end its high-level talks on human rights if Washington pressed the condemnatory resolution again in 1995.

. . . In addition to condemning China's human rights performance, the proposed resolution calls on China to cooperate with United Nations investigators and to 'take further measures to insure the observance of all human rights, including the rights of women, and to improve the impartial administration of justice.'

A year ago, the resolution failed by four votes. This year the Administration has undertaken a broad international campaign to win it support. New Commission members include countries with strong ties to the United States that could change the voting pattern. They are Egypt, Nicaragua, the Philippines, El Salvador and the Dominican Republic.

The United States has co-sponsored a human rights resolution on China every year since the 1989 military crackdown on the Tiananmen Square democracy movement, with one exception. The exception was in 1991, when the Bush Administration was seeking China's support for a Persian Gulf war resolution.

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U.N. Rights Panel Declines to Censure China

New York Times, March 9, 1995, p. A5

Despite heavy lobbying by the United States, China narrowly escaped criticism of its human rights record today in a vote by the United Nations Human Rights Commission.

The commission voted 21 to 20 to reject a resolution expressing concern about human rights in China. Russia voted against the proposal.

The resolution would have obliged the commission to investigate human rights in China. That would have been considered an insult to China as a permanent member of the United Nations Security Council.

The proposed resolution cited reports of torture and other violations, but it also praised the Government for improving the lives of its people through economic and legal reforms.

China's representative, Jin Yongjian, said the sponsors had 'turned a blind eye to the achievements of China in the field of human rights.'

Even though the measure was defeated, human rights groups regarded the vote as a victory because it was the first time the commission had formally considered the China rights issue at all.

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QUESTIONS

1. 'Trying to enforce human rights against other countries by threatening withdrawal of MFN status is a losing battle. Too many constituencies are involved, too many pressure groups both domestic and foreign have a keen interest in the outcome. Instead of maintaining a sharp and single moral purpose, the threat of withdrawal becomes enmeshed in a great power struggle involving many different economic interests and actors.' Comment. Is the situation notably different from threats of suspending military or economic aid?

2. Note the catalog of conditions in the proposed legislation and in the President's Executive Order. What coherence does it have? Why were these conditions chosen and other more significant issues overlooked?

3. If China had accepted all these conditions and made the necessary changes, would something substantial have been accomplished? Or is it not the purpose of this legislation to achieve something basic, structural? Does it mean only to secure a few precise steps, as with the focus of the original Jackson–Vanik Act on emigration?

4. 'All of this is conventional politics, good or bad drama, not serious. Human rights are not taken that seriously. When the U.S. really cares, as with respect to the announced trade sanctions in retaliation for trade piracy, it knows how to act.' Comment.

D. A COMPARISON: THE EUROPEAN COMMUNITY (UNION)

Among the major powers, the United States has the most developed legal scheme about restraints on aid and trade to serve human rights purposes. Multilateral institutions formed on regional or other bases have also pursued human rights goals through their aid policies, either by imposing conditions on their own lending to developing countries or by acting to coordinate the policies of their member states with respect to developmental aid and human rights.

Section D offers a comparison with the policies, laws and experience of the United States. The European Union (earlier known as the European Community, see pp. 574–77, *supra*) has given human rights an important place in its development cooperation policy; through that policy, it ensures coordination among policies of its member states and gives substantial aid to developing countries around the world. The following article by Marantis traces the recent evolution of its policy, and indicates some comparisons and many contrasts with the U.S. approach described in the preceding materials.

DEMETRIOS MARANTIS, HUMAN RIGHTS, DEMOCRACY, AND DEVELOPMENT: THE EUROPEAN COMMUNITY MODEL

7 Harv. Hum. Rts. J. 1 (1994).

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Guided by the 28 November 1991 Resolution on Human Rights, Democracy and Development ('28 November Resolution'), the European Community[1] has recently placed human rights and democracy at the heart of its development cooperation policy.' The import of this Resolution is twofold. First, the Resolution confirms the relationship between human rights,

[1] As of November 1993, the European Community has become known as the European Union. Because the events discussed in this Article occurred prior to this date, the Article will refer to the European Community.

accountable government, and development. Second, it comprehensively defines this relationship to include both proactive and reactive measures that together tackle the problems associated with development cooperation. In so doing, the European Community has broken from past models of development aid which regarded human rights and democracy as marginal to development cooperation.

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. . . [T]he European Community has attempted to . . . assist governments and local organizations in their own efforts to lay the foundations for democracy and human rights. Today's funding of an election enables tomorrow's construction of a health center sensitive to the needs of a particular constituent group. Today's support for a legal training seminar facilitates the codification of tomorrow's penal code. With a human rights and democracy orientation, the European Community is attempting to promote a development process that is both meaningful and accessible to expanding segments of donee populations.

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. . . The European Community's development assistance policy is determined primarily by the Commission of the European Communities (Commission) and the Council of Ministers (Council).[2] The Commission makes policy suggestions to the Council, negotiates and implements aid agreements with donees, and ultimately determines whether to curtail or interrupt aid. The Council, composed of the development ministers from the twelve Member States, sets the guiding principles of European Community development policy and helps to ensure coordination between the policies of the Member States. . . .

The European Community provides a substantial amount of aid to the developing world.[3] The nations of the African, Caribbean, and Pacific group (ACP) receive almost half of the total sum. Since 1975, the European Community has adopted four successive Lomé Conventions to govern development cooperation links between the Community, its Member States, and the ACP group.[4] The Lomé IV Convention is currently in force and expires

[2] European Community development assistance policy is distinct from the policies of each of its Member States. However, the Member States recently have taken steps to coordinate their development cooperation policies through the European Community framework. *See* Treaty on European Union and Final Act, Feb. 7, 1992, art. 130x, 31 I.L.M. 247, 287.

[3] In 1991 alone, the Community advanced $3.8 billion, mainly in grant form, to developing countries and extended an additional $160 million of non-concessional flows through the European Investment Bank (EIB). DAC, 1992 Development Co-Operation Report 9, 102-3 (1992).

[4] ACP-EEC Convention, Feb. 28, 1975, 14 I.L.M. 596 (1975) (hereinafter Lomé I); Second ACP-EEC Convention, Oct. 31, 1979, 1277 U.N.T.S. 3 (hereinafter Lomé II); Third ACP-EEC Convention, Dec. 8, 1984, 24 I.L.M. 571 (1985) (hereinafter Lomé III); Fourth ACP-EEC Convention, Dec. 1, 1989, 29 I.L.M. 783 (1990) (hereinafter Lomé IV). The Lomé Conventions govern development issues such as trade cooperation, technical assistance, the stabilization of export earnings, and aid. . . .

in the year 2000. Currently, most European Community aid flows to the ACP through Lomé IV's National Indicative Programs, which are negotiated by the Commission and individual ACP states.[5] In addition, Lomé IV provides an institutional forum for ACP–EC development cooperation.

. . .

By the late 1980s, political conditions in Europe and the developing world had changed dramatically. Both the European Community and the developing world became more committed to the principles of human rights and democracy. At the same time, the economic conditions in the ACP states collapsed, making the ACP heavily dependent on foreign aid to meet basic foreign exchange needs, domestic requirements, and recurrent costs. This new political and economic climate undermined ACP resistance to European demands to incorporate human rights and democracy concerns into development cooperation.

These developments facilitated the inclusion of prominent references to human rights in Lomé IV.[6] The most significant reference is Article 5, which states:

> Cooperation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights. Cooperation operations shall thus be conceived in accordance with the positive approach, where respect for human rights is recognized as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights. . . .
>
> Hence, the Parties reiterate their deep attachment to human dignity and human rights. . . . The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.

. . . Furthermore, Lomé IV endorses decentralized aid distribution as a means of strengthening the role of grassroots organizations in preparing and implementing development programs.

[5] . . . Much of the financing for these projects is provided in grant form from the European Development Fund (EDF), to which each Member State contributes. The balance of the funding comes from risk capital from the EDF or loans from the European Investment Bank (EIB). . . .

[6] References to human rights appear throughout the Convention. The Preamble refers for the first time to the Universal Declaration of Human Rights and to both the Civil and Political and the Economic, Social and Cultural Covenants. Other provisions of the Convention advance a number of key economic, social, and cultural rights. These provisions include: environmental protection (tit. I), rural promotion (art. 46), enterprise and service sector development (tits. VIII–IX), cultural development (arts. 139–40), education and training (art. 151), scientific and technical cooperation (art. 152), the advancement of women (art. 153), and improved access to health care (art. 154). The Convention is supplemented by joint declarations on apartheid (Annex IV to the Final Act) and on ACP migrant workers and students in the Community. . . .

In spite of the Convention's symbolic emphasis on human rights, Lomé IV suffers from two major weaknesses. First, like its predecessors, Lomé IV pays scant attention to civil and political rights. Second, the Convention does not provide a legal basis for responding to human rights violations. Firm ACP opposition to the use of Article 5 as a basis for sanctions leaves consultation through the Convention's weak institutional network as the only means of confronting human rights violations.[7] These shortcomings have prevented Lomé IV from becoming a comprehensive human rights, democracy, and development program.

The 28 November Resolution officially inaugurated the European Community's current approach to development cooperation. . . .

The Resolution advances the Community's development policy beyond Article 5 of Lomé IV in five significant ways. First, the Resolution establishes a framework for European Community action in both positive and negative terms. Second, the Resolution places equal emphasis on economic, social, and cultural rights and civil and political rights and, for the first time, recognizes the importance of fostering 'democracy' and 'good governance' in development. Third, the Resolution applies human rights and democracy criteria to European Community development cooperation links around the world, not just with the ACP. Fourth, the Resolution builds on Lomé IV's endorsement of decentralized funding, explicitly adopting 'a decentralized approach to cooperation.' Fifth, the Resolution, as one of the Council and of the Member States meeting in the Council, represents the first time that the Member States have agreed in principle to coordinate certain aspects of their individual development policies.

A. Negative Measures

Curtailing or suspending development aid in reponse to human rights abuses can be instrumental in pressuring a wayward government to institute reform. Traditionally, donors have considered punitive strategies the primary means of linking development assistance to human rights and democracy. There are, however, many drawbacks to the exclusive use of reactive, or negative, measures.

First, negative measures do not address the root causes of human rights abuses. Rather, they punish governments and populations for the consequences of inadequacies in their legal, political, economic, and educational systems. Second, a reactive policy assumes that the recipient is both capable and willing to respond to external pressure. Countries with no capacity to act

[7] The ACP–EC Joint Assembly, for example, serves as a forum for negotiating responses to human rights violations. *See*, e.g., 1992 O.J. (C 31) 50 (criticizing the human rights situation in the Sudan). The Joint Assembly also sends special fact-finding missions to investigate human rights situations and submit recommendations. ACP–EC consultation, however, has proved problematic on the issue of human rights. . . .

and countries with low aid dependence are scarcely affected by donor threats to decrease or suspend aid.

Third, negative measures often antagonize donee states which view them as interferences with their sovereign right to determine internal policies. Recipient states have repeatedly challenged the international legal basis for conditioning development aid on adherence to norms of human rights and democracy. Fourth, negative measures often have devastating impacts on donee populations. Because negative measures are designed to influence governments, they are often applied without regard to their effects on local populations.

Fifth, reactive measures have not been guided by coherent implementation criteria. Conflicting foreign policy objectives, shifting funding priorities, and domestic pressure groups often thwart the consistent application of human rights conditions. The United States, for instance, has failed to implement seriously its policy of suspending aid to countries engaging in 'a consistent pattern of gross violations of internationally recognized human rights.'[8] Sixth, negative measures narrowly construe human rights as civil and political rights and ignore economic, social, and cultural rights. While violations of civil and political rights are often dramatic and easy to expose, they are no more serious than the denial of basic human needs.

. . .

B. Positive Measures

In contrast to negative measures, positive measures address the structural obstacles to sustained and equitable development. Positive measures incorporate the people and their needs into the development process, whether by helping to create a democractic environment conducive to popular participation in development or by building the political and social institutions necessary for a functioning civil society.

Whereas negative measures focus on the violator government, positive measures can target the actual needs of the donee population. Through flexible mechanisms, such as decentralized cooperation and policy dialogue, donors and recipients at the grassroots, non-governmental and government levels can work together to identify areas for funding and implement effective programs. Using decentralized cooperation, donors reinforce sustainable development efforts of the population through financial support to local groups and non-governmental organizations (NGOs). To complement these efforts, donors engage in joint consultation with donee states to devise strategies that satisfy the overall development needs of the recipient.

[8] Foreign Assistance Act of 1961, §502(b)75. Stat. 424 (codified as amended at 22 U.S.C. §2304(a)(2) (1993)) (prohibiting security assistance to gross violators). *See also* 22 U.S.C. §215(n) (1993) (linking other forms of foreign aid to human rights). Wide presidential discretion and interbranch conflicts have allowed foreign policy objectives to overshadow human rights concerns. . . .

This model of employing positive measures through decentralized cooperation and policy dialogue overcomes the six weaknesses of an exclusively reactive policy. . . .

Third, proactive development programs encroach less upon donees' sovereignty than do negative measures. Because positive measures aim to build the infrastructure necessary for sustainable development, donees and donors can jointly target priority areas for funding. . . .

Fifth, donors are less likely to behave inconsistently when pursuing promotional programs than when deciding whether to suspend aid. Proactive policies are more insulated from donors' foreign policy considerations because promotional programs tend to focus on immediate human needs and deliver funding through nongovernmental and grassroots projects rather than through governments.[9] As a result, donors are more apt to judge proactive programs by their usefulness as development tools rather than by their effects on foreign policy. Sixth, donors are likely to use promotional measures to foster a broader range of human rights. Unlike negative measures, which focus on egregious violations of civil and political rights, such as genocide and torture, positive measures can generally be used to advance both civil and political rights and economic, social, and cultural rights.

Despite their potential for addressing some of the traditional problems associated with negative measures, positive measures have a major limitation: they are an insufficient response to current patterns of gross human rights violations and interruptions of democratic processes. For this reason, effective development aid programs must encompass both strategies in a way that builds on the strengths of each approach while avoiding its weaknesses. . . .

. . .

The European Community has funded a variety of proactive initiatives to solidify democratic reforms, and reinforce civil society. Efforts to promote democracy dominate the European Community's development program. The Community has acted to safeguard the right of political participation through fair and open democratic transitions. Unfortunately, these programs have not always met with success. . . .

Because the problems of new democracies do not end with the holding of free and fair elections, the European Community has recognized the need for post-election projects to strengthen the political and legal institutions of fledgling democracies. In fact, the Community has pledged to expand its support for institution-building. By helping to make these new democratic institutions work, the Community hopes to demonstrate to the people of the developing world that 'democracy can answer some of the problems of development.'

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[9] For instance, the European Community has continued programs to benefit the population while ceasing official cooperation assistance in countries like Haiti, Sudan, and Zaire.

At the grassroots level, the European Community has employed decentralized cooperation in order to involve donee populations in programs that address their basic needs. . . .

Decentralized cooperation at the intermediary level entails donor support for NGOs that link donors to the population. Through direct aid and co-financing schemes, the European Community provides necessary financial assistance for NGOs to implement development projects that empower community-based organizations, stimulate local initiatives and promote human rights awareness of democracy.

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For the European Community, cooperation with NGOs offers tremendous advantages. These organizations have proved to be efficient and reliable development partners with unique abilities to carry out development activities at the grassroots level. . . .

. . .

With its preference for positive measures, the 28 November Resolution also recognizes the possible need for negative measures to respond to 'grave and persistent human [rights] violations or the serious interruption of democratic processes.' . . .

. . .

While the European Community has eschewed fixed procedures for responding to egregious human rights violations, it has established three general principles to frame its action. First, "measures taken must be guided by objective and equitable criteria.' One Commission official explained this phrase to mean that the Community should be courageous enough to respond to violations irrespective of its political, economic, and security interests. In practice, however, the European Community has suspended aid only to economically weak states, such as Sudan, Zaire, Haiti, and Malawi, and not to human rights violators with greater geopolitical stature, like Indonesia.

In addition, objective and equitable criteria would demand a response free from the particular political and economic interests of the various Member States. Coordinating a united Member State response, however, remains difficult in light of these individual interests. Nevertheless, the Member States have agreed in principle to coordinate their individual policies, and the 28 November Resolution envisions some form of coordination at Council meetings and at the level of European Political Cooperation. Still, the proposed coordination procedures are too weak to structure a united response.

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. . .[T]he European Community has developed four responses to human rights violations. At the lowest diplomatic level are confidential *démarches* to

governments. Next are public statements that voice the European Community's human rights and democracy concerns. More serious measures include the deferral of signing National Indicative Programmes or financing agreements. The most severe negative measure is the interruption of cooperation agreements. Although hesitant to do so in the past, the Community has interrupted its cooperation programs with several nations, such as Sudan, Haiti, Zaire, and Malawi.

. . .

The European Community's third guiding principle stipulates that negative measures should 'avoid penalizing the population of the country in question and particularly its poorest sections.' This principle requires the European Community to redirect its development assistance away from the government and toward the poorest sections of the population through non-governmental networks. The Commission has established two preconditions to continued NGO financing: first, there must be no interference by the government; and second, the financed projects must directly aid those in need or promote some form of grassroots democracy.

This principle allows the European Community to interrupt official cooperation with the government while maintaining a humanitarian aid relationship with the population of the given country.[10] . . .

QUESTIONS

1. Assume that the goal of a human rights policy is not to 'punish' a state for violations but rather to induce its government to end abuses, move toward participatory government, and so on. How do you assess the different approaches of the United States and the European Union with respect to reaching this goal?

2. 'The approach of the European Union makes great sense if you're dealing with a state and government that has some genuine concern for the well being and development of its population. It makes less sense when serious violations are committed by governments that are heedless of the population's general welfare and intent on controlling all foreign funding directly so as to prevent the growth of independent centers of power and influence.' Comment.

[10] The Community continued to furnish humanitarian aid to the Sudan, Haiti, Zaire, and Malawi despite its interruption of governmental assistance. Until mid-September 1992, the Community financed 17 NGO projects totaling Ecu 3,914 million mainly in Haiti and Zaire that have supported NGO networks, workers' cooperatives, peasant farmer associations, integrated rural development projects, food security and health care programs, and the promotion of women. The Community recently granted Sudan Ecu 3 million in emergency aid to help the victims of the drought. . . .

E. CODES OF CONDUCT FOR FOREIGN OPERATIONS OF U.S. BUSINESS FIRMS

The following materials shift attention *from* governmental conditions and sanctions relating to aid, trade and investment to or with states engaged in serious human rights violations, *to* conditions imposed by U.S. businesses engaged in manufacturing or service operations abroad, whether directly (as through a subsidiary in a foreign state) or indirectly (as by contracting with an unrelated foreign firm to manufacture or assemble specified products in that state).

Should the U.S. business firm be concerned with human rights conditions in the foreign state, or should it remain attentive only to the goal of generating profits? Does it matter whether those foreign conditions (a) bear on torture in the prisons and repression of the press (that is, matters not of direct interest to the U.S. business), or (b) bear on repression of unions and other forms of association within the labor force and regulation of working conditions with which U.S. firms will be directly or indirectly involved? If U.S. business is concerned, what policies might firms devise? Should those policies be conceived, implemented and enforced solely within the U.S. business sector, or ought the government to play some regulatory role? Such are the issues here considered.

DIANE ORENTLICHER AND T. GELATT, PUBLIC LAW, PRIVATE ACTORS: THE IMPACT OF HUMAN RIGHTS ON BUSINESS INVESTORS IN CHINA

14 Northwestern J. of Int. L. & Bus. 66 (1993).

. . .

The focus of debate has been the annual renewal of China's most-favored-nation (MFN) trade status, but concerns about China's enduring human rights problems have pervaded virtually every aspect of U.S.–China trade and investment relations. However inconsistently enforced, sanctions ranging from a ban on military and high-technology sales to China to a prohibition on involvement by the Overseas Private Investment Corporation in Chinese projects have been used to promote human rights improvements.

But if the most visible debates have centered on U.S. trade and aid policies, a potentially more far-reaching debate is taking place in the boardrooms of corporate America. From Levi Strauss & Co. to Phillips–Van Heusen, from Sears, Roebuck and Co. to Reebok International Ltd., companies are asking how their role as investors can and should be shaped by human rights concerns in the PRC and other countries.

The answers that have emerged from these companies' deliberations reflect a pathbreaking reconception of corporate responsibility—one in which human

rights occupy a central place. In March 1992, Sears, Roebuck and Co. announced that it would not import products produced by prison or other involuntary labor in China, and established a monitoring procedure to ensure compliance with its policy. In November 1990, Reebok International Ltd. condemned military repression in China and vowed that it 'will not operate under martial law conditions' or 'allow any military presence on its premises.' Two years later, Reebok adopted a human rights code of conduct governing workplace conditions in all of its overseas operations, including those in China. Phillips–Van Heusen currently threatens to terminate orders from suppliers that violate human rights principles enshrined in its ethical code. Adopting the most far-reaching policies, Levi Strauss & Co. and the Timberland Company apply human rights criteria in their selection of business partners, and avoid investing at all in countries where there are pervasive violations of basic human rights. In February 1993, the Timberland Company decided to end its sourcing from China. Two months later, Levi Strauss & Co. announced that it would end its relations with business partners in China, and would not initiate any direct investment there.

While these companies are in the vanguard of an emerging trend, their approach to human rights remains exceptional within the business community. . . .

. . . Are there basic principles that transnational companies should observe to ensure, at a minimum, that they do not become complicit in a host government's abrogation of universally-recognized human rights? Should such principles be enforced by Executive or congressional fiat, or should companies take primary responsibility for policing themselves? How can companies that wish to factor human rights considerations into their business decisions be assured that they will not pay a price in lost investment opportunities or reduced market share?

This article addresses these questions in light of relevant principles of international law and U.S. foreign policy. A central thesis of this article is that businesses that may or do invest in China bear a responsibility to ensure that their actions do not, however inadvertently, contribute to the systematic denial of human rights in the PRC. We believe, moreover, that international human rights law provides an objective basis for identifying those responsibilities.

We also believe that, in some circumstances, companies that invest in China can and should play a more proactive role in advancing respect for human rights. This view is based, above all, on the unique influence of major foreign investors in China. Today, after a temporary downturn in business activity in the year following the Tiananmen incident, the U.S. business presence in China is at an all-time high. With total committed investment close to six billion dollars, in 1993 the United States is China's second largest foreign investor. In the 1980s, U.S. companies became one of China's top providers of foreign investment, technology and management expertise. . . .

The importance of this large and growing U.S. presence to China's drive for economic and technical modernization cannot be overestimated. . . .

. . .

c. The Role of the Business Community

While views within the business community have not been monolithic, U.S. companies that invest in China have, on the whole, strongly opposed efforts to attach human rights conditions to renewal of China's MFN status. . . .

Demonstrating a sophisticated grasp of the U.S. political process, the PRC government exploited these apprehensions in the period preceding President Clinton's decision about renewal of China's MFN status. As the MFN debate approached, Chinese trade delegations went on a buying frenzy throughout the United States, spending more than $800 million for jetliners, $160 million for cars, and $200 million for oil exploration equipment. . . .

Throughout this process, China made it clear that it expected U.S. companies to lobby for continuation of its MFN status in return for its purchases. U.S. companies are 'regularly threatened with cancellation of orders or loss of future deals if China loses its preferred status,' according to business sources cited in *The Washington Post*. The message was not lost on U.S. companies, who mounted a campaign of unprecedented scope and intensity to secure unconditional renewal of China's MFN status in the period leading up to President Clinton's determination on this issue.

By letter dated May 12, 1993, some 370 companies and business associations, representing virtually every U.S. company active in China, stated their case to President Clinton:

> . . .We represent companies that exported products to China worth nearly $7.5 billion in 1992, and that employ an estimated 157,000 American workers producing those goods. We represent the aerospace industry which exported products to China worth over $2 billion in 1992, and which expects China to purchase approximately $40 billion in new aircraft over the next twenty years. We represent the farmers whose largest market for wheat is China. . . . America's economic stake in maintaining trade relations with China is high. Withdrawing or placing further conditions on MFN could terminate the large potential benefits of the trading relationship, lead the Chinese to engage in retaliatory actions that would harm U.S. exporters, farmers, laborers and consumers. . . .

But while emphasizing U.S. economic stakes, the signatories to this letter endorsed the human rights goals of the Clinton Administration's policy toward Beijing. Echoing arguments by spokesmen for business interests that had become increasingly common during previous debates about renewal of China's MFN status, they asserted:

> We in the business community . . . believe that our continued commercial interaction fuels positive elements for change in Chinese society. The expansion of trade and free market reforms has strengthened the pro-democratic forces in China. . . .
>
> . . .

5. Code of Conduct Legislation

While MFN conditionality has dominated the U.S. human rights policy debate about China, a little-noticed legislative initiative has introduced a new, and potentially vital, plank in the policy options. Senator Edward Kennedy (D-Massachusetts) and Representative Jolene Unsoeld (D-Washington) have agreed to sponsor bills, in the Senate and House respectively, to establish a voluntary code of conduct governing the Chinese operations of U.S. companies. By directly focusing on the role of U.S. corporations in addressing human rights concerns in China, this legislation sharpens the broader debate about corporate responsibility vis-a-vis human rights violations in the PRC.

a. Background and Overview

The Kennedy and Unsoeld initiatives build upon a similar effort by then-Congressman John Miller (R.-Washington), who on June 21, 1991, introduced legislation that would have established a set of human rights principles governing the conduct of U.S. companies with investments and other business operations in the PRC. . . .

The proposed code-of-conduct bill does not seek to impose sanctions on China for failing to meet human rights standards, nor does it discourage U.S. businesses from investing in China. Instead, the bill asks companies with a significant presence in China to adhere to a set of basic human rights principles, on a 'best efforts' basis, in the course of their operations.

In this way, the proposed law seeks to assure that U.S. business activities in the PRC do not inadvertently encourage or themselves contribute to repressive practices, but instead make a constructive contribution to human rights. Under the proposed law, these goals would be promoted by encouraging U.S. nationals conducting industrial cooperation projects in China to adhere to nine principles that have the cumulative effect of (1) assuring that U.S. businesses operating in China extend to their foreign employees the same type of minimum human rights protections that they have long been required to provide to employees in the United States, such as protections against discrimination on the basis of religious beliefs, political views, gender and ethnic or national background; (2) assuring that the premises of U.S. business operations are not used in a fashion that violates fundamental rights (for example, the proposed code of conduct includes a pledge to discourage compulsory political indoctrination programs from taking place on the premises of U.S. nationals' industrial cooperation projects in the PRC); and (3) bringing the considerable—and indeed unique—influence of the U.S. business community to bear to promote an end to flagrant violations of human rights (for example, the proposed code of conduct urges U.S. nationals to use their access to Chinese officials informally to raise cases of

individuals detained solely because of their nonviolent expression of political views).[11]

There are no penalties for failure to comply with the principles, and in this respect compliance with the code depends upon the voluntary efforts of U.S. companies. The bill itself is framed as a 'sense of Congress that any United States economic cooperation project in the People's Republic of China or Tibet should adhere to.' 'Adherence' is defined as 'agreeing to implement the principles set forth' in the bill, 'implementing those principles by taking good faith measures with respect to each such principle,' and 'reporting accurately to the Department of State on the measures taken to implement those principles.'

The bill imposes only two 'requirements' on U.S. companies: (1) the U.S. parent company of a PRC investment project must register with the Secretary of State and indicate whether it will implement the principles; and (2) the parent company must report on an annual basis to the Department of State describing the China project's adherence to the code. The Secretary of State is directed to review these reports to determine whether the project is adhering to the principles, and may request additional information to supplement company reports. The Secretary is further required to submit an annual report to Congress and the Secretariat of the Organization for Economic Cooperation and Development (OECD) describing the level of adherence to the principles by U.S. company projects in China.

. . .

. . .[W]hile some members of the U.S. business community have expressed support for the principles established in the legislation, many others have spoken out against it. The critics have raised two principal objections. The first, in essence, is that Congress should not dictate business practices to U.S. companies operating in China, and that the latter should not appear to be the 'lackeys' of U.S. policy. . . .

. . .

[11] Somewhat analogous codes have been developed to promote human rights in other countries. The best known of these are the Sullivan Principles for businesses operating in South Africa. First developed in 1977 and subsequently amplified, the Sullivan Principles were for many years adopted by corporations on a voluntary basis. In 1985, President Reagan issued an executive order that included a provision forbidding U.S. export assistance to any U.S. firm with 25 or more employees that had not adopted the principles enumerated in the Sullivan code. The Anti-Apartheid Act of 1986, which superseded President Reagan's executive order, incorporated the Sullivan Principles by, *inter alia*, requiring '[a]ny national of the United States that employs more than 25 persons in South Africa [to] take the necessary steps to insure that the Code of Conduct [based on the Sullivan Principles] is implemented with respect to the employment of those persons.' Comprehensive Anti-Apartheid Act of 1986 §207(a), 22 U.S.C. §5034(a) (1988). Another precedent is the MacBride Principles, which set forth employment standards for companies operating in Northern Ireland. A number of city and state governments have enacted laws supporting the MacBride Principles (by, for example, threatening to bar firms that do not adhere to the Principles from city contracts).

The general tenor of substantive objections by members of the business community is that the code would require U.S. companies to take action that may be 'impractical' or provocative, and that could jeopardize their position in China. This line of objection, which is more pronounced with respect to some provisions of the code than others, has often been backed by the claim that compliance with the bill's principles would require U.S. companies to violate Chinese law or policy.

A close examination of the proposed legislation suggests that these concerns are unwarranted. [T]he bill grants companies wide leeway to avoid taking action that could imperil their business relationships in China, urging only that they endeavor, on a 'best efforts' basis, to comply with and promote basic international standards in their Chinese operations.

. . .

II. RESPONSIBILITIES OF THE BUSINESS COMMUNITY

. . .

. . . Business leaders now rarely press the claim, once commonplace, that social policy and corporate practice occupy distinct spheres and that a rigid separation should be preserved.[12] . . .

Further, no company can afford to disregard the impact of massive human rights violations on the investment climate in a country where it may operate. The rule of law—the bedrock of human rights protection—is also essential to a stable and predictable environment for investment. One need only consider the devastating effect on the economies of the Latin American countries ruled by military dictatorships throughout the 1970s and, in many cases, into the 1980s to appreciate the correlation between massive human rights violations and investment risk.

. . .

Is there, for example, any principled reason to fault corporations for taking advantage of cheap labor in a developing country? Does the answer to this question depend on whether labor conditions fall below a minimum standard

[12] For a classic statement of the view that businesses should not be concerned with 'social responsibility,' see Milton Friedman, The Social Responsibility of Business is to Increase its Profits, N.Y. TIMES, Sept. 11, 1970 (Magazine), at 32. This claim has long been discredited, at least in its most sweeping form, in part because it is hopelessly circular. Our beliefs about what are proper concerns of the business community are themselves social constructs, and have evolved significantly over time in tandem with broader changes in the social and political environment. Further, to the extent that this argument asserts that it is the role of government to fashion and implement policy—in this case human rights policy—it also necessarily concedes to government the right to further specific policies by, *inter alia*, regulating the practices of U.S. corporations. Examples of such regulation, from legislation restricting companies' ability to discriminate or pollute at home, to laws prohibiting corrupt practices by corporations abroad, are too numerous to leave any room for doubting the legitimacy of government efforts to advance social policies in part by regulating corporate behavior.

of acceptability? Do transnational investors in a nation like China bear some measure of responsibility for the country's human rights problems on the ground that their investments help sustain a highly repressive government? On the other hand, in today's economy, can U.S. companies afford *not* to invest in the world's largest and fastest-growing market? Does their investment indeed serve human rights goals—as many companies claim—as well as their economic interests?

. . . In the context of China, business leaders have frequently asserted that the web of contacts between Chinese citizens and U.S. investors that develops in the course of business relationships promotes the transfer of liberal democratic values from this side of the Pacific to the East. Further, advocates of 'constructive engagement' also claim that transnational investment in repressive nations promotes greater integration of the host country in the international community, thereby enlarging its exposure to the shared values of civilized nations. It is sometimes further asserted that liberal political values are an inevitable concomitant of a liberal market economy, and that transnational efforts to foster development of such an economy in China through expanded trade and investment practices will therefore promote political liberalization as well.

A third and related claim is that U.S. investment in developing countries promotes economic growth, thereby fostering development of a middle class. Since, the argument continues, it is when this happens that citizens begin to assert demands for fundamental liberties, business investment spurs longer-term progress in respect of human rights. In the shorter term, foreign investment creates opportunities for employment that enhance the economic and social rights of the direct beneficiaries.

These are compelling arguments, and cannot be readily dismissed. But are the claims justified?

It depends. Whether a substantial U.S. business presence contributes to improved human rights conditions or helps bolster a repressive regime depends on the particular circumstances of each country, the conditions under which businesses operate, and the behavior of the businesses themselves. When, for example, the manager of a joint venture operation discharges a Chinese employee because of government pressure based on the individual's support for democracy, that manager becomes an agent for the Chinese government's denial of internationally-recognized human rights. When, instead, a potential investor insists as a precondition of investing on assurances that its employees' right to freedom of association will be fully protected, that investor's presence may in fact help foster improved human rights conditions. But here, too, an investor's ability to promote human rights may vary widely depending on both the conditions in a host country and on the nature of its investment. A company with direct investments in a country may, for example, have greater scope to promote human rights than a corporation that merely utilizes contractors there.

. . .

The claim that enhanced employment opportunities made possible by foreign investment in and of themselves advance human rights is initially appealing, but proves problematic upon closer scrutiny. To the extent that the transnationalization of investment has engendered a global chase for the cheapest labor markets, international investment practices inevitably drive down wage levels as developing countries compete for foreign investment. In this setting, it has become increasingly difficult to persuade governments of developing countries to respect internationally-recognized labor rights, particularly the right to receive a wage that meets the 'basic human needs' of workers.

In the longer term, this phenomenon has in many developing countries apparently retarded further expansion of the middle class, and instead has widened the economic gap between laborers and the management class. Against this background, it is increasingly difficult to assume that investment in and of itself will promote expansion of a middle class. . . .

. . .

Reebok International Ltd. adopted a human rights policy that responded to specific concerns raised by the human rights situation in China, and subsequently adopted a more comprehensive set of human rights principles governing workplace conditions in all of its overseas operations, including those in China.[13] . . .

. . .

III. UNIVERSAL HUMAN RIGHTS PRINCIPLES FOR TRANSNATIONAL COMPANIES

. . . [I]nternational law provides objective standards for determining the human rights responsibilities of transnational corporations.

. . . The [Treaty of Versailles] also established the International Labour Organisation (ILO), a tripartite organization comprising governments and representatives of employers and workers, which has established and monitored compliance with a broad array of labor standards. The ILO has promulgated some 170 international conventions elaborating labor standards, and members of the ILO are automatically bound to respect the core principles of freedom of association.

Basic workers' rights have also been incorporated in various international human rights instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, which collectively are considered the international equivalent of the U.S. Bill of Rights. Over the course of the past decade, moreover, the United States has adopted

[13] Those standards, adopted in December 1992, are set forth in Appendix B.

a range of laws that incorporate these international standards into U.S. trade policy.

. . .

In 1984 Congress enacted a law that incorporated workers rights criteria in the General System of Preferences (GSP) program initiated in 1974. That program authorizes the President to grant duty-free treatment to eligible imports from certain developing countries. The GSP law conditions duty-free treatment to otherwise eligible imports on whether the exporting country . . . 'has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights.' Drawing on ILO-established standards, the GSP law defines 'internationally recognized worker rights' to include:

(1) the right of association;
(2) the right to organize and bargain collectively;
(3) a prohibition on the use of any form of forced or compulsory labor;
(4) a minimum age for the employment of children; and
(5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

As this and other legislation tying U.S. trade privileges to worker rights suggest, international law establishes a core set of universally-protected labor rights, and those rights can be fully protected only through international cooperation in enforcement. And as our previous analysis suggests, a key component of an effective international strategy for protecting workers' rights is adherence by multinational corporations to minimum standards. . . .

. . .

APPENDIX B

Reebok International Ltd.'s 'Human Rights Production Standards'

Reebok's devotion to human rights worldwide is a hallmark of our corporate culture. As a corporation in an ever-more global economy we will not be indifferent to the standards of our business partners around the world.

We believe that the incorporation of internationally recognized human rights standards into our business practice improves worker morale and results in a higher quality working environment and higher quality products.

In developing this policy, we have sought to use standards that are fair, that are appropriate to diverse cultures and that encourage workers to take pride in their work.

Non-Discrimination

Reebok will seek business partners that do not discriminate in hiring and employment practices on grounds of race, color, national origin, gender, religion, or political or other opinion.

Working hours/overtime

Reebok will seek business partners who do not require more than 60-hour work weeks on a regularly scheduled basis, except for appropriately compensated overtime in compliance with local laws, and we will favor business partners who use 48-hour work weeks as their maximum normal requirement.

Forced or Compulsory Labor

Reebok will not work with business partners that use forced or other compulsory labor, including labor that is required as a means of political coercion or as punishment for holding or for peacefully expressing political views. In the manufacture of its products, Reebok will not purchase materials that were produced by forced prison or other compulsory labor and will terminate business relationships with any sources found to utilize such labor.

Fair Wages

Reebok will seek business partners who share our commitment to the betterment of wage and benefits levels that address the basic needs of workers and their families so far as possible and appropriate in light of national practices and conditions. Reebok will not select business partners that pay less than the minimum wage required by local law or that pay less than prevailing local industry practices (whichever is higher).

Child Labor

Reebok will not work with business partners that use child labor. The term 'child' generally refers to a person who is less than 14 years of age, or younger than the age of completing compulsory education if that age is higher than 14. In countries where the law defines 'child' to include individuals who are older than 14, Reebok will apply that definition.

Freedom of Association

Reebok will seek business partners that share its commitment to the rights of employees to establish and join organizations of their own choosing. Reebok will seek to assure that no employee is penalized because of his or her non-violent exercise of this right. Reebok recognizes and respects the right of all employees to organize and bargain collectively.

Safe and Healthy Work Environment

Reebok will seek business partners that strive to assure employees a safe and healthy workplace and that do not expose workers to hazardous conditions.

AMERICAN SOCIETY OF INTERNATIONAL LAW, PANEL: HUMAN RIGHTS, BUSINESS AND INTERNATIONAL FINANCIAL INSTITUTIONS

Proceedings of 88th Annual Meeting, 1994, 271 (1995), 272.

John Keller (employee of Citicorp)

. . . [W]hat obligations do corporations have in the face both of host country human rights violations and of their need to pursue low-wage environments and rapidly expanding markets?

A wide spectrum of response is available.

At one end is the option chosen by most multinational corporations. I call this the 'don't ask don't tell' option. Let me caricature it here. Mr./Ms. Corporate Executive speaking: 'The human rights policies of a particular country are none of our business. We're here to produce product and make money for our shareholders, many of whom are pension funds and school districts. Our only obligation is to obey the laws of our host country and the laws of the United States of America, which are complicated enough to begin with. We might be paying low wages, but if we don't pay them somebody else will. And, by the way, if it weren't for 'exploiters,' people wouldn't have jobs in the first place. So go bother somebody else.'

. . .

. . . [S]hould businesses even care about human rights or any 'rights' other than those of their shareholders?

I believe that the answer is, clearly, Yes. And here I'd like to suggest an approach that tries to find some common ground between both sides of this very painful debate.

. . .

. . . [L]eadership must come from within the business community—U.S. companies need to make clear that their paramount fiduciary obligation to their shareholders resides in a unique context—the context of the democratic values on which this nation was founded and which are prized by their customers, employees and shareholders alike. I propose this is an open-ended starting point for a dialogue between the business and human rights communities—a dialogue that would explore appropriate Codes of Conduct for multinationals operating abroad. These codes do not need to tell a local government how to behave. There are countless ways, short of 'preaching' to local officials, that U.S. companies can affirm their values overseas. These codes could just state, for example, that a corporation will not purchase goods from a supplier that is known to use child labor or that operates with substandard wage and working conditions. Several U.S. corporations have already taken the lead in this area.

. . . The business community needs to broaden its definition of self-interest when it comes to human rights. I believe that there is more common ground between the objectives of business and the goals of the human rights community than is commonly acknowledged. Let me cite three examples:

> – In the long run, an educated and healthy workforce is necessary for continued economic development. It is logical for business to encourage local government policies that support these goals.
> – Employees whose basic nutritional and medical needs are met will be better and more productive workers. Company policies that assure adequate wages, workplace access to a good meal and—very importantly—superior local health care, will all support this objective.
> – Employees who do not have to live in fear of a battered-in door in the middle of the night, or of speaking freely to one another at appropriate times during the work day, will be more focused on the profitable task at hand. Company policies that refuse to cooperate with the presence of political or government 'monitors' in the workplace will help ensure this focus.

. . .

Bruce Landay (counsel to The Timberland Company)

. . .

The Timberland Policy drafters, who considered a firm policy to boycott countries where certain human rights and other standards are not met, ultimately opted for a more flexible human rights standard:

> While Timberland respects cultural differences, Timberland believes that basic human rights and nondiscrimination should cross all cultural barriers.
> Timberland will favor a partnership in a country where:
> – there is social and/or political commitment to the basic tenets of human rights, including free, democratic elections.
> – the government is proactive about eliminating discrimination, including discrimination based on race, color, national origin, gender, religion, disability, sexual orientation and political opinion.
> Timberland will not favor a partnership in a country where:
> – basic human rights are pervasively violated.

In addition, the 'Partnership Standards' section of the Timberland Policy contains a general policy statement on constructive engagement:

> We recognize that there will be situations in which a business partner meets our standards but operates within a country that does not. We will

consider each such case very carefully, balancing the potential for reinforcing repressive countrywide conditions with the opportunity for meaningful change through constructive engagement.

. . .

. . . Were a corporation to shun all countries where governments are alleged to violate civil and human rights, perhaps as construed by organizations such as Amnesty International, the United States and many of its most important and developed allies might be off limits. In addition, the individuals whose rights are violated by their governments would in many cases be hurt by the loss of manufacturing work that the corporation provides.

. . . [T]he Timberland Policy contains 'Partnership Standards' regarding human rights to guide it in selecting contractors:

> While Timberland respects the necessity to balance our concern for human rights with respect for local culture and customs, Timberland believes that basic human rights and nondiscrimination should cross all cultural barriers.
> Timberland will favor Partners who:
> – have written policies regarding their position on human rights and discrimination.
> – are proactive in their commitment to the basic tenets of human rights and to the elimination of discrimination based on race, color, national origin, gender, religion, disability, sexual orientation and political opinion.
> – actively support community and cultural development projects.
> – take affirmative steps to eliminate repression.
> Timberland will not continue or initiate a partnership when:
> – the Partner discriminates against others based on race, color, national origin, gender, religion, disability, sexual orientation or political opinion.
> – the Partner is involved in any unfair or unethical trade practices;
> – the Partner has been found guilty of willful noncompliance with local, national or international human or civil rights requirements.

A key element in the Partnership Standards is the mechanism used for monitoring third-party conduct. The Timberland Policy provides that Timberland will require its contractors (1) to complete an annual compliance letter and (2) to consent to periodic, unannounced inspections of its facilities by Timberland, or such other measures as Timberland may deem necessary to confirm that the contractor has integrated the standards of the Timberland Policy into its operations. . . .

NOTE

As indicated in the article of Orentlicher and Gelatt, proposals have issued from the business community and from Congress about codes of conduct for

U.S. business operations abroad. Consider the following (*New York Times*, March 27, 1995, p. D1):

> In its latest attempt to win back the good will of human rights groups disappointed by President Clinton's decision last year to extend trade benefits to China without tying them to human rights concerns, the White House will announce on Monday a voluntary code of human rights principles for American companies operating abroad.
>
> . . .
>
> The chief problem is that America's allies, who are also its biggest economic competitors, have no such codes, and companies in those nations stand to sweep on business that the United States passes by. That issue was highlighted earlier this month when the Clinton Administration barred Conoco Inc. from entering a million-dollar development deal with Iran. Now French oil companies are negotiating with Iran to replace Conoco.
>
> It is unclear how many businesses will abide by the Administration's proposed code. Some executives reached last week said that if the wording is sufficiently weak or vague and appears unlikely to affect their competitiveness, there will probably be widespread adherence to what the Administration calls 'a model of behavior.'
>
> But already there are signs that the final draft has so many compromises that it will disappoint the human rights groups it was trying to satisfy in the first place.
>
> . . .
>
> People who have seen parts of the code say its strongest statements refer to bans on child labor and the use of prison laborers, actions that most large companies already say they oppose. The code will have deliberately vague language urging companies to respect the right of workers to organize and stops short of asking them to encourage such activities. The fear, several administration officials said, is that such activity could be viewed in many stations—including China—as an effort to undermine national laws that strictly regulate labor activities.
>
> . . . [T]he code will make no mention of paying a 'fair wage' to workers in developing countries and emerging markets, and it sidesteps the question of how companies should treat workers who are prosecuted for engaging in political dissent in countries like China. . . .
>
> President Clinton's plan quickly evolved into the development of what Secretary of State Warren Christopher described to Congress last month as 'the promulgation of a worldwide standard for the conduct of American business, not focused primarily on China, but focused on the world as a whole.'
>
> Many private companies already have codes of conduct for their operations abroad, including running-shoe manufacturers like Reebok and Nike, which have advertised their standards and used them as a selling point with American consumers. . . .

PART E

AN ILLUSTRATIVE STUDY

Drawing on the framework that Parts B–D have elaborated, this Part explores one topic of central importance to the human rights movement, women's rights. It has two functions. First, Part E examines one substantive field of human rights in a more systematic and comprehensive way than was possible in prior chapters developing other ideas. That field touches many others, from economic development to political participation, from sociology and history to religious and political culture.

Second, the topic of women's rights brings together within one illustrative study most of the ideas within the framework, both reviewing and elaborating on earlier chapters. The materials in this chapter involve relationships among norms, institutions and processes; the interpenetration of international and national systems; and broader themes pervading the human rights movement, like the claims of cultural relativism and the reach of international human rights to 'private' or non-governmental conduct.

Above all, the study of women's rights illustrates the increasing diffuseness and complexity of the human rights movement. We see a proliferation of instruments and institutions, world conferences and NGO initiatives, active proposals running in several directions, and growing conflicts about premises and goals within the women's movement itself. All such complexity is captured in what may be the human rights movement's most innovative and ambitious treaty, the Convention to Eliminate All Forms of Discrimination against Women.

13

Women's Rights

Of the several blind spots in the development of the human rights movement from 1945 to the present, none is as striking as that movement's failure to give to violations of women's (human) rights the attention, and in some respects the priority, that they require. It is not only that these problems adversely affect half of the world's population. They affect all of us, for a deep change in women's circumstances means corresponding change throughout social life.

Even in fields where the human rights movement has acted with vigor in setting standards, passing resolutions and at times imposing sanctions—for example, racial discrimination—it is too often clear that progress has been measured or slight, and that problems of the most serious character remain entrenched. Nonetheless, it is instructive to contrast the vigor of the movement in trying to 'eliminate' racial discrimination with its relative apathy over several decades in responding to gender discrimination—and to explore why this is so.

The subject of women's rights as international human rights offers distinctive perspectives on the human rights movement as a whole. The basic treaty in the field—the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, effective 1981, 144 ratifications as of September 1995)—has exceptional reach. At the same time, the problems that it addresses have exceptional depth and complexity.

The materials in this chapter suggest the complexly interwoven socio-economic, legal, political and cultural strands to the problem of women's subordination and women's rights. Indeed, it is difficult to know where to begin inquiry and analysis. Each starting point implicates others and by itself seems patently insufficient for yielding an adequate understanding of the problem, let alone solutions. When one focuses specifically on what appear to be women's issues, links between those issues and other aspects of social order (disorder) appear pervasive. All is interrelated. The problem is truly systemic.

The materials in Chapter 4 on cultural relativism used gender issues to illustrate the conflict between universalism and relativism, as well as questions about the reach of international norms to non-governmental practices. Those materials—particularly the article of An-Na'im and the readings on female circumcision, pp. 210 and 240, *supra*—could now be usefully reviewed.

A. BACKGROUND TO CEDAW: SOCIO-ECONOMIC CONTEXT

These introductory materials presents reports about women's circumstances in different parts of the world. They suggest the complex relationships among diverse phenomena that bear on women's rights. Several themes recur in the readings.

Legal norms capture and reinforce deep cultural norms and community practices. They entrench ideas and help give them the sense of being natural, part of the order of things.

Social forces and analysts insist that change is possible, so that what was seen as natural, if not inevitable, comes to be understood as socially constructed and thus contingent, open to change.

Property rights and economic dependence interact with patterns of authority within family and workplace, and with vital issues like education and health.

Major economic and political programs, like a development or privatization scheme or structural adjustment requirements, impose particular and severe costs on women that are not apparent on the face of the programs.

The statistics created by bureaucracies or scholars structure and confine our imagination. We often view them as objective data, without awareness of what contentious concepts and information determine their formulation. What they record as well as what they do not record influence policies as well as perceptions.

INITIAL REPORT OF GUATEMALA SUBMITTED TO THE CEDAW COMMITTEE

CEDAW/C/Gua/1–2, 2 April 1991.

[In its introduction to this report submitted to the CEDAW Committee pursuant to the requirement of Article 18 of the Convention, Guatemala noted the difficulty of assembling the report, stressing that 'studies of this type are only a recent innovation.' The task of preparation 'has also been a positive exercise in thought, analysis and self-appraisal with respect to the position of women in Guatemala in 1983, and the changes made to date.' That work stimulated action to design 'strategies and targets . . . to improve the situation encountered in the short and medium term.' The following excerpts from the report deal with Articles 5 and 16 of the Convention.]

ARTICLE 5

46. Guatemala is a multi-ethnic, multi-cultural and multilingual country with traditional, cultural patterns that reinforce the subordination of women on the social, cultural, economic and political planes. Extended Guatemalan families in the country and nuclear families in the city are governed by a patriarchal system in which decisions are taken by men (husband, father or eldest son), who are considered the heads of the household, a role assumed by women only in their absence.

47. In Guatemalan society the man is expected to be the breadwinner, the legal representative, the repository of authority; the one who must 'correct' the children, while the mother is relegated to their care and upbringing, to household tasks, and to 'waiting on' or looking after her husband or partner. These roles often have to be performed in addition to engaging in some profitable activity which generates earnings that are always regarded as 'complementary'.

48. For their childhood, little boys and girls are guided towards work considered 'masculine' or 'feminine'; for example, boys play at working outside the home as carpenters, mechanics, farmers or pilots, and in all those jobs that are considered 'tough' or that require physical strength. Girls, on the other hand, are taught to interest themselves in cooking, weaving, sewing, washing, ironing, or cleaning the house and, especially, caring for the children and helping the mother, as a responsibility and duty more than just a game.

49. Care of the children is strictly considered the responsibility of the mother, grandmother, and/or sister; and in the event of divorce, separation or dissolution of the marriage, custody of the children is generally awarded to the mother.

50. The aforementioned patterns vary slightly with the socio-economic stratum, which generally also determines the social class to which the women belong and which in addition is related to their level of education and knowledge.

51. Notwithstanding what has been said, the woman is the chief social agent in the majority of spheres of action. An empirical profile of a Guatemalan woman may cover the following characteristics.

52. She is responsible for family health and hygiene and for the supervision of the formal and informal upbringing of the children in the home; she organizes and maintains living and sanitary conditions and a supply of water for domestic use. She produces nutritional supplements for the family, including animal proteins (cattle, sheep and goats) and sources of vitamins (fruit and vegetables); she is the one in charge of the purchase, preparation, stocking and distribution of food within the home. In addition, she manages the family income, ensuring that payment in kind and in cash is used in such a way as to maximise the material well-being of the family.

53. She takes responsibility for generating additional income or for producing consumer goods when her partner's income does not cover the minimum family requirements.

54. In the case of an irresponsible father, the entire responsibility for the support of the children devolves upon her, reflected in particular by a considerable increase in her hours of work.

55. Her work is poorly paid or not paid at all and is generally of low productivity owing to lack of access to capital.

56. It is falsely assumed that the man is the one who makes the principal economic contributions to the family, for which reason he is the owner and beneficiary of all payments and services.

57. The educational level of the woman is low, which reflects on the effectiveness of her efforts to maintain and improve the health, feeding, housing and other living conditions of her family.

58. In the paid work that she does, her salary is inferior to a man's and her instability in the sense of a job is greater.

59. The man has traditionally been considered the 'head of the household'.

ARTICLE 16

184. Family relations in Guatemala, as regards the guardianship, wardship, trusteeship and adoption of children, the ownership of property, its disposition and enjoyment, etc. are governed by the Guatemalan Civil Code (Decree-Law No. 106).

. . .

190. The woman's rights and responsibilities in marriage are as follows:

. . .

2. The husband owes his wife protection and assistance, and must provide her with all the means necessary to maintain the household, in accordance with his financial resources. *The woman has a special right and duty to nurture and care for her children during their minority, and to take charge of domestic affairs.*

. . .

5. The woman may be employed or ply a trade, occupation, public office or business, where she is able to do so without endangering the interests and the care of her children, or other needs of her household.

. . .

197. Married women are restricted in representing the marriage and in administration of marital assets, roles which are assigned by law to the husband, and this constitutes a relative incapacity.

198. Parental authority is a right which is virtually forbidden to women, since it is assigned to the father. *Women only come to exercise this right when the father is imprisoned or legally barred from such.*

. . .

201. The legal context allows the husband to object to the wife engaging in activities outside the home, thus barring her from the right and freedom to work. The legal context restricts her right to personal fulfilment in areas outside her function as mother and housewife and restricts her personal liberty.

. . .

203. A judicial declaration of paternity in cases of rape, rape of juveniles and abduction is dependent on the conduct of the mother, based on what the law terms 'notoriously disorderly conduct', an express form of discrimination against women and the product of conception resulting from forced intercourse.

. . .

209. Adultery defined as an 'offence against honour' protects the legal right of filiation and 'the interests of the family', but makes a clear distinction concerning the gravity of the act, depending on whether it involves the man or the woman, providing a tougher sentence for the woman; the proof and the procedure are different in the two cases, so that in practice it is only applied to women.

210. Offences 'against life' in which women are most affected are defined as abortion, which is defined as criminal conduct by which the death of the foetus is caused deliberately, within the mother's womb or by its premature expulsion. Medical abortion to avoid danger to the health or death of the mother, or due to deformities of the foetus, is not punishable. This is not envisaged when it is the result of rape.

211. With regard to the offence of rape, the punishment is graded according to the age of the victim and the relationship of authority which may exist between the victim and the offender. Reference is made to the 'honourable woman', requiring that the offender has used seduction, promise of marriage or deceit and the woman is a virgin; this emphasizes the value of 'honour', defining it as an offence against honour rather than against personal integrity, as would be correct.

212. Maltreatment of women and children and domestic violence are not defined as offences against the person and in practice are lumped together with injuries, coercion and threats, causing serious difficulties with regard to proof and other procedural problems.

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WENDY PATTEN AND J. ANDREW WARD, EMPOWERING WOMEN TO STOP AIDS IN CÔTE D'IVOIRE AND UGANDA

6 Harv. Hum. Rts. J. 210 (1993).

The AIDS death toll continues to mount. The Global AIDS Policy Coalition estimates that as of 1992, 2.6 million people worldwide had developed AIDS. Africa, which contains only 9% of the global adult population, has absorbed roughly 67.7% of the adult AIDS cases, and 70% of cumulative adult AIDS deaths. Worldwide, these cases are occurring increasingly among women. More women developed AIDS in 1991 than in the entire preceding decade. In Africa, women are already bearing a disturbingly high share of the AIDS burden. Women constitute 48% of AIDS cases in Africa as compared to 13.7% in the United States and 17.2% in Europe. Côte d'Ivoire and Uganda, the countries examined in this Article, have particularly high levels of AIDS infection.

Violations of women's human rights make them especially vulnerable to AIDS in Africa. . . .

Although some international health experts are beginning to recognize the link between women's rights and HIV infection, the subject is conspicuously absent from HIV-prevention campaigns. Most public health practitioners see themselves as health engineers and consider human rights to be beyond the scope of their profession. Internationally, HIV prevention programs focus on disseminating information as a crucial step in ultimately changing the behavior of individuals. However, if people cannot change their behaviour because they lack the means to control their own destinies, information dissemination wastes time and resources.

The legal systems of both Côte d'Ivoire and Uganda disempower women, making it difficult for them to exercise control over their lives and to reduce their vulnerability to HIV infection. Côte d'Ivoire and Uganda, like most African countries, have a dual system of law: customary, or tribal law; and formal, or statutory law. In both countries, formal law preempts customary law. However, the principles of the formal law, largely inherited from the European colonial powers, are unknown or inaccessible to the vast majority of women, whose rights are defined by local custom. A central feature of both systems of law is the subordinate status of women.

This subordination is most apparent in marriage. Women's sexual availability is underscored by the tradition of bride price, whereby a man and his relatives pay the family of his prospective bride in order to marry her. This practice reinforces the notion that a husband has purchased his wife's sexual services, her labor, and her perpetual obedience and consent. While the majority of women have sexual relations only with their spouses, husbands are allowed greater sexual liberty. First, men often have open and socially accepted extramarital relationships. In the context of AIDS, men's multiple

sexual partners increase their exposure to HIV, thereby endangering their wives. Second, the institution of polygamy allows men multiple wives. The addition of an HIV-positive co-wife to a stable polygamous union allows transmission of the virus to the husband and the other co-wives.

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Although a woman may suspect that her husband has multiple sexual partners, her access to information about his HIV status is often blocked. Men are ashamed of the disease, maintaining a veil of secrecy around their HIV status. Since abstinence or condom use can raise suspicions, infected men often avoid such crucial protective measures. Even when women know that their husbands have multiple sexual partners, they rarely question them. When women do confront their husbands, they are often subjected to verbal and physical abuse, even rape.

. . .

Women's extreme reluctance to discuss sex reflects their relative powerlessness in the domestic sphere. Their husbands or partners exert almost exclusive control over decision making regarding sexual behaviour. Educating women to protect themselves from AIDS by using condoms is therefore ineffective since women find it extremely difficult to negotiate with men on this issue.

Traditional reproductive expectations also discourage women from insisting on condom use. In both Côte d'Ivoire and Uganda, it is a wife's duty to produce offspring, who, in turn, serve to insure vital family interests . . . Moreover, in both countries, women who wish to use birth control to protect themselves against AIDS have only limited access to contraceptives.

. . .

Both countries criminalize rape. In Uganda, however, rape, defilement (the term for statutory rape), and indecent assault are increasing. Most women are raped by men known to them, resulting in family intervention and settlements out of court. In Uganda, as elsewhere, women are reluctant to report rapes and to testify in humiliating court proceedings. When cases are reported to the police or to Resistance Councils, they are neither investigated effectively nor prosecuted seriously. Without an effective criminal penalty for rape, women remain vulnerable to AIDS.

. . .

In Côte d'Ivoire and Uganda, women's efforts to exercise control over their bodies are also frustrated by their lack of economic opportunity. Both economic dependence and social norms operate to coerce women to remain in relationships. Since a woman must submit to her husband's sexual demands if she remains in the home, her only other option is to leave, thereby abandoning her husband, her sole source of economic stability. Women whose

husbands are infected with HIV must choose between the risk of AIDS and a life of extreme poverty and hardship.

Low education levels, lack of access to credit and appropriate technology, and employment discrimination all serve to limit women's economic opportunities. . . .

Property laws in both countries reflect and reinforce women's lack of economic rights, limiting their financial and social independence. In Côte d'Ivoire, the dominant marital property regime, community property, gives the husband full legal control over all family property including any property brought to the marriage by the wife. . . .

Discriminatory laws also limit a wife's right to inherit. . . .

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COMMENT ON WOMEN'S SOCIAL AND ECONOMIC CONDITIONS

The status of women within the international human rights regime and the task of ensuring human rights for women are incomprehensible without taking into account the social and economic conditions that characterize women's lives around the world.

Later readings underscore the degree to which rights abuses are strongly correlated to victims' slight social and economic power, hence political power. Those who are most vulnerable to human rights abuses often lack the favour or protection of the state, as well as the power within their communities to protect and further their basic needs and interests.

According to virtually every indicator of social well-being and status—political participation, legal capacity, access to economic resources and employment, wage differentials, levels of educations and health care—women fare significantly and sometimes dramatically worse than men. The following information from the *Human Development Report* for 1993 of the United Nations Development Programme suggests the dimensions of the problem (at p. 25):

> • *Literacy*—Women are much less likely than men to be literate. In South Asia, female literacy rates are only around 50% those of males. . . . in Nepal 35% . . . Sudan 27%. Women make up two-thirds of the world's illiterates.
>
> • *Higher education*—Women in developing countries lag far behind men. In Sub-Saharan Africa, their enrolment rates for tertiary education are only a third of those of men. Even in industrial countries, women are very poorly represented in scientific and technical study. . . .
>
> • *Employment*—In developing countries women have many fewer job opportunities; the employment participation rates of women are on average only 50% those of men (in South Asia 29% and in the Arab States only

16%). . . . Wage discrimination is also a feature of industrial countries; in Japan, women receive only 51% of male wages. Women who are not in paid employment are, of course, far from idle. Indeed, they tend to work much longer hours than men. . . .

• *Health*—Women tend on average to live longer than men. But in some Asian and North African countries, the discrimination against women—through neglect of their health or nutrition—is such that they have a shorter life expectancy. . . .

• *National statistics*—Women are often invisible in statistics. If women's unpaid housework were counted as productive output in national income accounts, global output would increase by 20–30%

Although employment outside the home provides women with increased income and often social status, employment remains a major source of discrimination. Women are doubly disadvantaged, occupying lower status and lower wage jobs in virtually every society while retaining the overwhelming burden of child care and household responsibilities. Alternatively, the labor women do outside caring for the family may remain unvalued and uncompensated (to a large extent, unvalued because uncompensated) where it does not form part of the cash economy. Consider the following (*Human Development Report* for 1993, at p. 45):

By 1990, women's share of the total economically active population in the industrial countries increased dramatically to 42%. In East Asia, it had risen to 43%, in Latin America and the Caribbean to 32%, and in North Africa and the Arab States to 13%.

But women are generally employed in a restricted range of jobs—in low-paid, low-productivity work. . . . In Africa, about 78% of economically active women work in agriculture (compared with 64% for men) . . .

Low status is reflected in low productivity and low pay, with women's earnings frequently only 50–80% those of men. . . .

In fact, there is considerable evidence that the well-being of women can be at risk rather than advanced through development including economic globalization and restructuring, in view of the types of jobs and wages that will be available for them. Women's tasks in the process of development tend to remain those involving long hours at basic labor like water collection, while men receive the necessary technical assistance.[1]

The structural adjustment programs that were intended to manage the debt crises endured by many developing countries during the 1980s further exacerbated the precarious situation of women. The orthodox formula for economic reform that has been promoted by institutions such as the World Bank and

[1] See generally Ester Boserup, Women and Economic Development (1970).

the International Monetary Fund involves some or all of the following elements: privatization of government services and corporations, economic deregulation and liberalization of trade, and reduction in the civil service and social services spending. As a consequence, these programs have led to sharp cutbacks in 'social safety net' spending in health, education and social services. The burden often fell disproportionately on women and children.[2]

In East and Central European states and the former Soviet Union, the burden of transition to market economies has similarly been borne disproportionately by women, despite their education levels that frequently exceed men's. In the new 'privatized' economies, job retraining programs have been targeted almost exclusively toward men. Women are regarded as more expensive and less attractive workers because of their responsibilities for the household and children. Employers may advertise explicitly for or tend to hire men. At the same time, the free or subsidized child care facilities which enabled women to work outside the home under the socialist regimes are disappearing or have been privatized, rendering it increasingly difficult for women to participate in the formal economy. Governments have indeed found it convenient to encourage women to leave paid employment and 'return home' as a means of dealing with the problem of unemployment.[3]

AMARTYA SEN, MORE THAN 100 MILLION WOMEN ARE MISSING

New York Review of Books, Dec. 20, 1990, at 61.

It is often said that women make up a majority of the world's population. They do not. This mistaken belief is based on generalizing from the contemporary situation in Europe and North America, where the ratio of women to men is typically around 1.05 or 1.06, or higher. In South Asia, West Asia, and China, the ratio of women to men can be as low as 0.94, or even lower, and it varies widely elsewhere in Asia, in Africa, and in Latin America. How can we understand and explain these differences, and react to them?

At birth, boys outnumber girls everywhere in the world, by much the same proportion—there are around 105 or 106 male children for every 100 female children. Just why the biology of reproduction leads to this result remains a subject of debate. But after conception, biology seems on the whole to favor women. . . . When given the same care as males, females tend to have better survival rates than males.

[2] Third Periodic Report of Ecuador to CEDAW Committee, CEDAW/C/ECU/3. 10 Jan. 1992; Lourdes, Beneria and Feldman (eds.), Unequal Burden: Economic Crises, Persistent Poverty, and Women's Work (1992); Akua Kuenyehia, The Impact of Structural Adjustment Programs on Women's International Human Rights: The Example of Ghana, in Rebecca Cook (ed.), Human Rights of Women: National and International Perspectives 422 (1944).

[3] Barbara Einhorn, Cinderella Goes to Market: Citizenship, Gender and Women's Movements in East Central Europe (1993); UN Centre for Social Development and Humanitarian Affairs, The Impact of Economic and Political Reform on the Status of Women in Eastern Europe (1992).

Women outnumber men substantially in Europe, the US, and Japan, where, despite the persistence of various types of bias against women (men having distinct advantages in higher education, job specialization, and promotion to senior executive positions, for example), women suffer little discrimination in basic nutrition and health care. . . .

The fate of women is quite different in most of Asia and North Africa. In these places the failure to give women medical care similar to what men get and to provide them with comparable food and social services results in fewer women surviving than would be the case if they had equal care. In India, for example, except in the period immediately following birth, the death rate is higher for women than for men fairly consistently in all age groups until the late thirties. This relates to higher rates of disease from which women suffer, and ultimately to the relative neglect of females, especially in health care and medical attention. Similar neglect of women vis-à-vis men can be seen also in many other parts of the world. The result is a lower proportion of women than would be the case if they had equal care—in most of Asia and North Africa, and to a lesser extent Latin America.

This pattern is not uniform in all parts of the third world, however. Sub-Saharan Africa, for example, ravaged as it is by extreme poverty, hunger, and famine, has a substantial excess rather than deficit of women, the ratio of women to men being around 1.02. The 'third world' in this matter is not a useful category, because it is so diverse.

. . .

To get an idea of the numbers of people involved in the different ratios of women to men, we can estimate the number of 'missing women' in a country, say, China or India, by calculating the number of extra women who would have been in China or India if these countries had the same ratio of women to men as obtain in areas of the world in which they receive similar care. If we could expect equal populations of the two sexes, the low ratio of 0.94 women to men in South Asia, West Asia, and China would indicate a 6 percent deficit of women; but since, in countries where men and women receive similar care, the ratio is about 1.05, the real shortfall is about 11 percent. In China alone this amounts to 50 million 'missing women,' taking 1.05 as the benchmark ratio. When that number is added to those in South Asia, West Asia, and North Africa, a great many more than 100 million women are 'missing.' These numbers tell us, quietly, a terrible story of inequality and neglect leading to the excess mortality of women.

To account for the neglect of women, two simplistic explanations have often been presented or, more often, implicitly assumed. One view emphasizes the cultural contrasts between East and West (or between the Occident and the Orient), claiming that Western civilization is less sexist than Eastern. That women outnumber men in Western countries may appear to lend support to this Kipling-like generalization. . . . The other simple argument looks instead

at stages of economic development, seeing the unequal nutrition and health care provided for women as a feature of underdevelopment, a characteristic of poor economies awaiting economic advancement.

. . .

Despite their superficial plausibility, neither the alleged contrast between 'East' and 'West,' nor the simple hypothesis of female deprivation as a characteristic of economic 'underdevelopment' gives us anything like an adequate understanding of the geography of female deprivation in social wellbeing and survival. We have to examine the complex ways in which economic, social, and cultural factors can influence the regional differences.

It is certainly true that, for example, the status and power of women in the family differ greatly from one region to another, and there are good reasons to expect that these social features would be related to the economic role and independence of women. For example, employment outside the home and owning assets can both be important for women's economic independence and power; and these factors may have far-reaching effects on the divisions of benefits and chores within the family and can greatly influence what are implicitly accepted as women's 'entitlements.'

[Sen discusses decision-making within the family as the pursuit of cooperation 'in which solutions for the conflicting aspects of family life are implicitly agreed on.' Analysis of these 'cooperative conflicts' in different regions and cultures can 'provide a useful way of understanding the influences that affect the "deal" that women get in the division of benefits within the family.' Perceptions of who is doing 'productive' work or contributing to the family's welfare can be very influential, and such social perceptions are 'of pervasive importance in gender inequality,' particularly 'in sustaining female deprivation in many of the poorer countries.'

Division of a family's joint benefits are apt to be more favorable to women if (1) they earn outside income, (2) their work is recognized as productive, (3) they own some economic resources or hold economic rights, and (4) there is an understanding of ways in which women are deprived. 'Considerable empirical evidence' suggests that gainful employment such as working outside the home for a wage as opposed to unpaid housework 'can substantially enhance the deal that women get.' Not only access to funds but also women's status and standing in the family improve. Moreover, women bring home experience of the outside world, a form of education. Such factors can 'counter the relative neglect of girls as they grow up,' as women are seen as economic producers.

Sen discusses the different situation in China, where other explanatory factors may be important, such as the strong measures to control the size of families in the framework of a strong cultural preference for boys.]

In comparing different regions of Asia and Africa, if we try to relate the relative survival prospects of women to the 'gainful employment' of both sexes—

i.e., work outside the home, possibly for a wage—we do find a strong association. . . .

. . .

Analyses based on simple conflicts between East and West or on 'underdevelopment' clearly do not take us very far. The variables that appear important—for example, female employment or female literacy—combine both economic and cultural effects. To ascribe importance to the influence of gainful employment on women's prospects for survival may superficially look like another attempt at a simple economic explanation, but it would be a mistake to see it this way. The deeper question is why such outside employment is more prevalent in, say, sub-Saharan Africa than in North Africa, or in Southeast and Eastern Asia than in Western and Southern Asia. Here the cultural, including religious, backgrounds of the respective regions are surely important. Economic causes for women's deprivation have to be integrated with other—social and cultural—factors to give depth to the explanation.

Of course, gainful employment is not the only factor affecting women's chances of survival. Women's education and their economic rights—including property rights—may be crucial variables as well. Consider the state of Kerala in India. . . . It does not have a deficit of women—its ratio of women to men of more than 1.03 is closer to that of Europe (1.05) than those of China, West Asia, and India as a whole (0.94). The life expectancy of women at birth in Kerala, which had already reached sixty-eight years by the time of the last census in 1981 (and is estimated to be seventy-two years now), is considerably higher than men's sixty-four years at that time (and sixty-seven now). While women are generally able to find 'gainful employment' in Kerala—certainly much more so than in Punjab—the state is not exceptional in this regard. What is exceptional is Kerala's remarkably high literacy rate: not only is it much higher than elsewhere in India, it is also substantially higher than in China, especially for women.

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Moreover, in parts of Kerala, property is usually inherited through the family's female line. These factors, as well as the generally high level of communal medicine, help to explain why women in Kerala do not suffer disadvantages in obtaining the means for survival. While it would be difficult to 'split up' the respective contributions made by each of these different influences, it would be a mistake not to include all these factors among the potentially interesting variables that deserve examination.

In view of the enormity of the problems of women's survival in large parts of Asia and Africa, it is surprising that these disadvantages have received such inadequate attention. . . . We confront here what is clearly one of the more momentous, and neglected problems facing the world today.

HILARY CHARLESWORTH, C. CHINKIN AND S. WRIGHT, FEMINIST APPROACHES TO INTERNATIONAL LAW

85 Am. J. Int. L. 613 (1991), at 614.

I. INTRODUCTION

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International law has thus far largely resisted feminist analysis. The concerns of public international law do not, at first sight, have any particular impact on women: issues of sovereignty, territory, use of force and state responsibility, for example, appear gender free in their application to the abstract entities of states. Only where international law is considered directly relevant to individuals, as with human rights law, have some specifically feminist perspectives on international law begun to be developed.

In this article we question the immunity of international law to feminist analysis–why has gender not been an issue in this discipline?—and indicate the possibilities of feminist scholarship in international law. . . Our approach requires looking behind the abstract entities of states to the actual impact of rules on women within states. We argue that both the structures of international lawmaking and the content of the rules of international law privilege men; if women's interests are acknowledged at all, they are marginalized. International law is a thoroughly gendered system.

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IV. TOWARD A FEMINIST ANALYSIS OF INTERNATIONAL LAW

The right to development. The right to development was formulated in legal terms only recently and its status in international law is still controversial. Its proponents present it as a collective or solidarity right that responds to the phenomenon of global interdependence, while its critics argue that it is an aspiration rather than a right. The 1986 United Nations Declaration on the Right to Development describes the content of the right as the entitlement 'to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized.' [4] Primary responsibility for the creation of conditions favorable to the right is placed on states:

> States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

[4] G.A. Res. 41/128, art. 1(1) (Dec. 4, 1986).

The right is apparently designed to apply to all individuals within a state and is assumed to benefit women and men equally: the preamble to the declaration twice refers to the Charter exhortation to promote and encourage respect for human rights for all without distinction of any kind such as of race or sex. Moreover, Article 8 of the declaration obliges states to ensure equality of opportunity for all regarding access to basic resources and fair distribution of income. It provides that 'effective measures should be undertaken to ensure that women have an active role in the development process.'

Other provisions of the declaration, however, indicate that discrimination against women is not seen as a major obstacle to development or to the fair distribution of its benefits. For example, one aspect of the right to development is the obligation of states to take 'resolute steps' to eliminate 'massive and flagrant violations of the human rights of peoples and human beings'. The examples given of such violations include apartheid and racial discrimination but not sex discrimination.

Three theories about the causes of underdevelopment dominate its analysis: shortages of capital, technology, skilled labor and entrepreneurship; exploitation of the wealth of developing nations by richer nations; and economic dependence of developing nations on developed nations. The subordination of women to men does not enter this traditional calculus. . . .

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. . . Women and children are more often the victims of poverty and malnutrition than men. Women should therefore have much to gain from an international right to development. Yet the position of many women in developing countries has deteriorated over the last two decades: their access to economic resources has been reduced, their health and educational status has declined, and their work burdens have increased. . . .

The distinction between the public and private spheres operates to make the work and needs of women invisible. Economic visibility depends on working in the public sphere and unpaid work in the home or community is categorized as 'unproductive, unoccupied, and economically inactive.' Marilyn Waring has recently argued that this division, which is institutionalized in developed nations, has been exported to the developing world, in part through the United Nations System of National Accounts (UNSNA).

The UNSNA, developed largely by Sir Richard Stone in the 1950s, enables experts to monitor the financial position of states and trends in their national development and to compare one nation's economy with that of another. It will thus influence the categorization of nations as developed or developing and the style and magnitude of the required international aid. The UNSNA measures the value of all goods and services that actually enter the market and of other nonmarket production such as government services provided free of charge. Some activities, however, are designated as outside the 'production boundary' and are not measured. Economic reality is constructed by the UNSNA's 'production boundaries' in such a way that reproduction, child

care, domestic work and subsistence production are excluded from the measurement of economic productivity and growth. This view of women's work as nonwork was nicely summed up in 1985 in a report by the Secretary-General to the General Assembly, 'Overall socio-economic perspective of the world economy to the year 2000.' It said: 'Women's productive and reproductive roles tend to be compatible in rural areas of low-income countries, since family agriculture and cottage industries keep women close to the home, permit flexibility in working conditions *and require low investment of the mother's time.*'

The assignment of the work of women and men to different spheres, and the consequent categorization of women as 'nonproducers,' are detrimental to women in developing countries in many ways and make their rights to development considerably less attainable than men's. For example, the operation of the public/private distinction in international economic measurement excludes women from many aid programs because they are not considered to be workers or are regarded as less productive than men. . . .

Although the increased industrialization of the Third World has brought greater employment opportunities for women, this seeming improvement has not increased their economic independence or social standing and has had little impact on women's equality. Women are found in the lowest-paid and lowest-status jobs, without career paths; their working conditions are often discriminatory and insecure. Moreover, there is little difference in the position of women who live in developing nations with a socialist political order. The dominant model of development assumes that any paid employment is better than none and fails to take into account the potential for increasing the inequality of women and lowering their economic position.

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B. CEDAW: PROVISIONS AND COMMITTEE

COMMENT ON PROTECTION OF WOMEN UNDER CONVENTIONS PRIOR TO CEDAW

Of course women benefit, and are meant to benefit, from provisions of the basic human rights instruments on state-inflicted torture or killing, denials of due process, freedom of speech and so on. The emphasis of this Comment is on issues of distinctive concern to women, on issues related to gender whether or not they so appear on the surface.

One fundamental protection of women stems from the assurance of equal protection. Such protection has been a dominant theme in the human rights

movement, and prohibition of discrimination because of sex has been an essential ingredient of that theme. It is true that application of the equal protection principle in the field of women's rights raises particularly subtle and difficult problems, but the thrust of that principle is also direct and clear on basic issues like voting or admission to higher study.

Recall the stress on the equal protection norm in the following provisions in the UN Charter and the International Bill of Rights.

1. The Charter's preamble states the determination of the peoples of the United Nations to reaffirm faith 'in the equal rights of men and women.' Article 1(3) sets forth the organization's purpose of promoting respect for human rights 'for all without distinction as to race, sex, language, or religion.' Article 55(c) is to similar effect.

2. Article 2 of the Universal Declaration states that 'everyone' is entitled to the rights declared 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Under Article 16, men and women are 'entitled to equal rights as to marriage, during marriage and at its dissolution.'

3. Under Article 2 of the ICCPR, states undertake to ensure to all within their territory the rights recognized in the Covenant 'without distinction of any kind.' The list of prohibited distinctions is identical with that above in the UDHR. States further undertake in Article 3 to 'ensure the equal right of men and women' to enjoyment of all rights set forth in the Covenant. Under Article 23(4), states are to take 'appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.' Article 26 contains undertakings by states to prohibit discrimination on the same grounds as those identified in the UDHR.

4. Similar anti-discrimination provisions appear in the International Covenant on Economic, Social and Cultural Rights.

These instruments have been sharply criticized, in terms of both their substantive provisions bearing explicitly or implicitly on women and the means by which those provisions have been implemented. Some of the most trenchant analyses have been made by scholars and advocates writing from a feminist perspective—for present purposes, a perspective that examines instruments so as to identify their overt or covert bearing on women, particularly with respect to gender bias.

Consider, for example, the following analysis of Article 16 of the UDHR by Helen Holmes.[5] The article states that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Holmes notes the widely divergent definitions of the family in different

cultures—nuclear, extended, matrilineal, patrilineal, and so on—and asserts that 'those with the power to implement Article 16 will implement it to conform to their own concepts of "family".' She notes the ongoing conflicts over the advantages and disadvantages of different types of families, including the prototypical ideal in the developed West of the nuclear family. She questions the wisdom or fairness, in the midst of such conflicts and changing perceptions, of institutionalizing a vision of the family as (quoting from the Article 16) the 'natural and fundamental group unit.'

What, moreover, is meant by (again quoting) 'protection by society and the State' of the family? What are such protection's implications, say, for divorce or for the desire of a child to leave a family because of abuse or other reasons? How will such protection be reconciled with the provisions about children in Article 25(2)? Holmes asks whether protection of the family would in fact amount to the defense of patriarchy and hierarchy.

Another critic, Laura Reanda, develops related perspectives on the older human rights corpus.[6] Writing in 1981, she observes that the main international human rights organs like the UN Commission on Human Rights or the ICCPR Human Rights Committee 'do not appear to deal specifically with violations of the human rights of women, except in a marginal way or within the framework of other human rights issues.' Through the UN Commission on the Status of Women and the CEDAW Committee, p. 911, *infra*, there has been a 'ghettoization' of questions relating to women and their relegation to structures endowed with less power and resources than the general human rights structures.

Reanda notes that the periodic reports submitted by states to the Human Rights Committee under Article 40 of the ICCPR rarely deal with the situation of women and, when they do so, generally stress laws on the books rather than custom or practice. Thus 'forms of oppression not specifically defined in the Covenant tend to be neglected.' She continues (at p. 15):

> . . . It is well known, for instance, that in many states parties to the Covenant, discriminatory practices against women persist, whether in law or in fact, such as segregation from public life, polygamy, the dowry system, bride-price, and genital mutilation. Another example is forced prostitution, which is considered a form of slavery by other United Nations organs but has never been raised in connection with the antislavery provision of the Covenant.
>
> While none of these institutions and practices are specifically mentioned by the Covenant, it is hard to see how women can be guaranteed the full enjoyment of the human rights and fundamental freedoms to which they are entitled under the Covenant so long as these and other forms of oppression continue. To bring these practices under the purview of the

[5] A Feminist Analysis of the Universal Declaration of Human Rights, in Carol Gould (ed), Beyond Domination: New Perspectives on Women and Philosophy 250 (1983).

[6] Human Rights and Women's Rights: The United Nations Approach, 3 Hum. Rts. Q. 11 (No. 2, 1981).

Covenant, however, would require a concerted effort in terms of fact-gathering and interpretation, and there is no evidence that this is among the goals of the Committee. In fact, none of these practices has been mentioned in state reports or in the debates of the Committee. It would appear that the interpretation given to the Covenant so far is that the Covenant does not apply to these obvious violations of the human rights of women.

Felice Gaer[7] after describing some provisions that are distinctive to CEDAW rather than characteristic of most human rights conventions, observes that 'women's issues are *not* commonly dealt with in the mainstream international human rights debates and bodies of the UN or by the international human rights NGOs.' She notes the stress of IGOs and NGOs on violations of bodily security by state actors. 'Put simply, the human rights organizations do not rank the problem [of gender discrimination] very high on a hierarchical list of human rights violations.' Gaer suggests several reasons:

(1) A sociological factor. Most of the delegates to UN human rights bodies are men; most are lawyers. They tend to look principally at due process questions and traditional formal procedures. The same is true of nongovernmental human rights organizations.

(2) The *de facto* hierarchy of international human rights practice is to favor civil and political rights over economic and social. To the extent the latter are considered at all, it is from a development perspective, not in terms of gender or other discrimination.

(3) There is a lack of consciousness of gender discrimination among the human rights organizations. In part, this is due to a lack of information regularly transmitted. Women become visible to many human rights groups only when they are 'victims' of traditional mainstream violations: torture, arbitrary arrest and imprisonment.

(4) There is a widespread sense that gender discrimination issues are private and outside the responsibilities of government. Even issues like forced prostitution are seen as private matters not involving the government.

Gaer concludes by arguing that there is a 'great need for reconceptualization of the issues. . . . Once reconceptualized, the issues must be made visible. Documentation is a key factor. . . .'

NOTE

Section 702 of the *Restatement (Third), Foreign Relations Law of the United States*, p. 145, *supra*, sets forth categories of the contemporary *customary*

[7] Human Rights at the UN: Women's Rights Are Human Rights. Int. League for Hum. Rts., In Brief, No. 14 (Nov. 1989).

international law of human rights. It provides that a state violates international law if, 'as a matter of state policy, it practices, encourages, or condones' conduct that includes genocide, torture, systematic racial discrimination, or 'a consistent pattern of gross violations of internationally recognized human rights.' The section does not include gender discrimination among the seven identified categories. Note the *Restatement*'s comments following the text of §702.

> a. *Scope of customary law of human rights.* This section includes as customary law only those human rights whose status as customary law is generally accepted (as of 1987) and whose scope and content are generally agreed. The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.
>
> . . .
>
> b. *Gender discrimination.* The United Nations Charter (Article 1(3)) and the Universal Declaration of Human Rights (Article 2) prohibit discrimination in respect of human rights on various grounds, including sex. Discrimination on the basis of sex in respect of recognized rights is prohibited by a number of international agreements, including the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, and more generally by the Convention on the Elimination of All Forms of Discrimination Against Women, which, as of 1987, had been ratified by 91 states and signed by a number of others. The United States had signed the Convention but had not yet ratified it. The domestic laws of a number of states, including those of the United States, mandate equality for, or prohibit discrimination against, women generally or in various respects. Gender-based discrimination is still practiced in many states in varying degrees, but freedom from gender discrimination as state policy, in many matters, may already be a principle of customary international law. . . .

QUESTION

As an advocate of women's rights, in what respects and contexts would you find it helpful to argue that prohibition of gender discrimination has become part of the customary international law of human rights? If this argument were persuasive, would you nonetheless prefer to rely if possible on CEDAW? Why?

COMMENT ON CEDAW'S SUBSTANTIVE PROVISIONS

The Convention is among the many that elaborate in one particular field the norms and ideals that are generally and tersely stated in the Universal Declaration, and stated somewhat more amply in the ICCPR. Its preamble suggests how deeply the issues run and that the norms of this Convention must be placed in a broader transformative context. It recognizes 'that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women.'

You should review the provisions of the Convention. To understand its structure and varied aspirations, as well as the radically different kinds of duties that are placed on states parties, it will be useful to characterize the obligations of states under CEDAW's varied provisions within the following scheme:[8]

> *(1) respect*: the duty to treat persons equally, to respect their individual dignity and worth, hence not to interfere with or impair their declared rights—that is, the classical 'hands-off' duties of liberal states that are correlative to individual rights;
>
> *(2) protect, prevent*: the duty to extend protection against violations of rights by the state as well as by non-state actors (individuals or organizations), hence the duty to create and administer an adequate system of police, law enforcement, and civil and criminal justice;
>
> *(3) provide*: the duty to ensure, to assure individuals of defined minimum levels of welfare, to improve (and not only refrain from worsening) the situation of individuals up to such levels—that is, the type of duty elaborated in the International Covenant on Economic, Social and Cultural Rights, as in its Article 11 where states parties undertake to 'ensure the realization' of the right of everyone to an adequate standard of living; and
>
> *(4) promote*: the (varied and often indeterminate) duty to take measures such as education to reduce violations of rights, to train people to help to gain recognition of their own rights, to transform (to one or another extent) existing attitudes inimical to realization of rights.

Article 1: Note three vital characteristics of the definition of 'discrimination against women.' (a) The article refers to *effect* as well as *purpose*. thus directing attention to the consequences of governmental measures as well as the intentions underlying them. (b) The definition is not limited to 'discrimination through 'state action' or action by persons acting under color of law.

[8] A similar scheme is set forth, and elaborated with respect to the right to food, in G.J.H. Van Hoof, The Legal Nature of Economic, Social and Cultural Rights, in Philip Alston and K. Tomasevski (eds.). The Right to Food 97 (1984). Excerpts appear at p. 279, *supra*. The terms and categories in the text above vary in several respects from the article.

as are the definitions of many rights such as the definition of torture under the Convention against Torture. (c) The definition's range is further expanded by the concluding phrase, 'or any other field.'

Article 2: The goals stated in this article are to be pursued 'without delay.' Consider the possible meanings of the terms 'equality' in clause (a) and 'any act of discrimination' in clause (c). Note the breadth of clauses (e) and (f) with respect to the private, non-governmental sectors of society, particularly in relation to the definition in Article 1. Note throughout the Convention the blurred lines between the private and public spheres of life, and the range of obligations on states to intervene in the private sector, to go beyond 'respect' to 'protect,' 'ensure,' and 'promote.'

Article 3: Note the grand goal set forth for states, to 'ensure the full development and advancement of women,' and consider whether the other human rights instruments examined contain a similar conception for any group, or for people in general.

Article 4: This 'affirmative action' clause, however qualified, appears as well in the Convention on the Elimination of all Forms of Racial Discrimination, but not in the ICCPR. Nonetheless, note General Comment 18 of the ICCPR Human Rights Committee, p. 529, *supra*, particularly pars. 7–9. Consider this Article 4 in relation to Article 2(e) and (f), and Article 11.

Article 5: The breadth and aspiration of this article are surely striking. Provisions such as Article 10(c) impose a similar obligation on states in defined contexts. Other human rights treaties lack a similar provision, although Article 2 of the Racial Discrimination Convention, p. 777, *supra*, comes close. Consider how a state in good faith might decide on 'appropriate measures' under this article, bearing in mind the injunction in Article 2 to proceed 'without delay' as well as the claims of the Convention's other provisions.

Article 6–16: These articles evidence how a treaty devoted to one set of problems—here, ending discrimination against women and achieving equality—makes possible discrete, disaggregated treatment of the different issues relevant to these problems. Clearly the variety and detail in these articles would have been out of place, indeed impossible, in a treaty of general scope like the ICCPR. Note the great range of verbs that are used throughout these articles to define states parties' duties, including: eliminate, provide, encourage, protect, introduce, accord, ensure.

Article 6 is typical of many provisions in requiring a state party to regulate specific non-governmental activity.

Articles 7–9, to the contrary, deal with the traditional notion of state action, here barring discrimination by the state.

Article 10 concerns a particular field, education, and lists specific goals which, in their totality, take on a programmatic character. Note paragraph (h) on family planning and its relationship to three other provi-

sions: Articles 12(1), 14(2)(b) and 16(e). The Convention does not address as such the question of abortion.

Article 12 together with a number of other provisions indicate the degree to which CEDAW involves and interrelates the classical categories of civil–political rights and economic–social rights. It imposes a limited duty to provide free health care.

Article 14 disaggregates women's problems in regional and functional terms. It underscores strategies for realizing goals that permeate the entire Convention, such as mobilization through functional grass roots groups and participation in local decision making. CEDAW is not a convention in which solutions are to be provided only by the central authority of the state.

Article 16 orders the states to sweep away a large number of fundamental, traditional discriminations against and forms of subordination of women. Like several other articles, it could be understood as a complement to, one specification of, the broad goals stated in Article 5. Compare its provisions with the Report of Guatemala, p. 888, *supra*.

QUESTIONS

1. Consider CEDAW's stress (as in its title) on eliminating discrimination to achieve equality between men and women, as well as its means for realizing that equality. The phrase 'on the basis of equality of men and women' recurs in many articles. Compare the notion of equality in the ICCPR—say, in ICCPR Article 3 ('to ensure the equal rights of men and women to the enjoyment of all civil and political rights' in that covenant), or ICCPR Article 26 ('All persons are equal before the law and are entitled without any discrimination to the equal protection of the law'). Are the two treaties' conceptions of equality identical, similar, very different?

2. Note that CEDAW has no provision specifically addressing bodily security in the manner that other human rights instruments do by, for example, prohibiting arbitrary deprivation of life, torture, or arbitrary detention. What provisions of CEDAW would you rely on to assert a woman's right to bodily security?

3. Do the provisions of CEDAW on their face make any concession to cultural relativism, to cultural diversity in regional, ethnic, religious or other terms? Or do they insist throughout on a uniform universalism of norms and their applications?

4. Under Article 2, states parties agree to pursue the required policies, 'by all appropriate means and without delay.' Contrast the description of state obligations in Article 2 of the Covenant on Economic, Social and Cultural Rights:

'achieving progressively the full realization' of the recognized rights. Is this textual contrast accurate with respect to CEDAW? How do you understand the question of CEDAW's 'time frame' in comparison, say, with the ICCPR?

5. Anti-discrimination measures followed a certain chronology both in the United States and in the international human rights movement: prohibition first of types of racial discrimination and then of types of sex discrimination, while today the debate rages about what measures to take against discrimination on the basis of sexual orientation.

As far as the international movement is concerned, racism was considered an evil from the start. Because of its connections with the issues of apartheid and colonialism it fuelled the entire movement. Sex discrimination was also barred in the Universal Declaration of Human Rights, but had to wait decades longer to become a focus of attention and to be incorporated into the mainstream discussion of human rights. The normative consensus regarding elimination of gender discrimination started to develop much later. Today that consensus obtains on certain core issues, while on many others dispute continues at the practical, doctrinal and ideological level in political fora and within the women's movement. As yet we see no consensus at the universal level regarding the rights of sexual minorities or the right to sexual orientation.

Why this sequence? Is it significant, or merely an accident of history? Do the feared consequences of ending discrimination differ radically among these three fields? Is there an implicit hierarchy, some forms of discrimination being considered worse than others? What explanations can we offer?

NOTE

Two institutions within the universal human rights system are concerned exclusively with women's rights. The older of the two, the UN Commission on the Status of Women, is formally the body with primary responsibility for monitoring and encouraging implementation of international law on women's rights.[9] It was established by the General Assembly at the same time as the Human Rights Commission, but it has been a less effective and influential body.

The more significant and influential organ has been the Committee formed under CEDAW (referred to in this chapter as the CEDAW Committee). Hence the following materials examine only that Committee. You should now read Articles 17–21 of the Convention, and compare them with the equivalent provisions concerning another treaty organ, the ICCPR Human Rights Committee considered in Chapter 9.

[9] See Sandra Coliver, United Nations Commission on the Status of Women: Suggestions for Enhancing its Effectiveness, 9 Whittier L. Rev. 435 (1987).

ANDREW BYRNES, THE 'OTHER' HUMAN RIGHTS TREATY BODY: THE WORK OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

14 Yale J. Int. L. 1 (1989), at 6.

. . .

II. Criteria for Assessing the Committee's Work

In assessing the work of CEDAW [used herein to refer to the Committee itself], one must recognize at the outset the limitations of such an international supervisory body. Although CEDAW is not a body of governmental representatives, it is nonetheless created by governments and its members are nominated and elected to positions on the Committee by States Parties. Governments are also in a position to influence the allocation of resources to the Committee. Thus, the scope of its activities and its effectiveness are ultimately constrained by the support which States Parties are willing to give it. By the same token, the nature of the Committee means that it has a level of access to governments which other groups may lack.

CEDAW's powers to promote implementation of the Convention are relatively limited. The Committee has no quasi-judicial powers enabling it to pronounce a State Party in violation of the Convention and to order an appropriate remedy. While it may offer suggestions to individual States, or to the States Parties generally, as to appropriate ways to pursue the Convention's goals, its major means for exerting pressure on States to comply with their obligations lies in its public review of individual country reports. Many governments care whether the supervisory committees make positive or adverse comments on their human rights performance. A positive appraisal in an international forum of a country's commitment and efforts can give impetus to further progress. An adverse assessment can embarrass a government at home and abroad, ideally providing it with some incentive to do more in the future. . . .

In both cases, the impact of the Committee's assessment depends on support from the States Parties as a whole. CEDAW needs the States Parties to ensure that it is given adequate resources to function efficiently, to support its role as a critic of individual States Parties which have not fulfilled their obligations, and to support the pursuit of the Convention's goals in other international fora. Thus the Committee must, as a tactical matter, conduct its work in a manner so as not to alienate a large number of States Parties.

. . .

Any assessment of the effectiveness of the work of CEDAW must also take into account factors internal and external to the review of national reports by the Committee. Among these factors are the following: whether the reporting

procedure itself functions effectively and meaningfully, whether the work of the Committee has a significant and useful impact on other international bodies responsible for promoting rights guaranteed by the Convention, and perhaps most importantly, whether the process has had any impact on national laws, practices and conditions.

. . .

The ultimate criterion for success is whether the process contributes to a greater awareness and observance of the human rights of women in domestic fora. . . . The reporting process must have official and unofficial linkages back into the domestic forum if it is to have any significant impact on domestic policies. Developing these linkages represents the Committee's most important challenge, but it requires the cooperation of governmental organizations and independent NGOs to do so.

III. The Composition of the Committee

A. CEDAW'S Membership

Article 17(1) of the Convention provides that, in the election of the twenty-three members of the Committee, consideration be given 'to equitable geographical distribution and to the representation of the different forms of civilization as well as the principal legal systems.' The current composition of the Committee is largely in accordance with that injunction. At the same time, one of the most striking features of CEDAW's membership is that, with one exception, all its members have been women. CEDAW thus provides a stark contrast to the other human rights treaty bodies where, as of 1988, women comprised a grand total of seven out of sixty-four members.

. . .

. . . In contrast [to other treaty bodies], only about half of the experts who have served as CEDAW members are lawyers. Other members come from such areas as medicine, public health and hospital administration, political science, geography, trade union and labor relations, education, social work and engineering. This diversity of experience has been reflected in the Committee's questions and has been valuable to the Committee's work, particularly in the areas of economic and social rights and development.

. . .

Perhaps the major reason for the relatively critical stance that CEDAW as a collective body has been able to maintain is . . . the feminist background of most of CEDAW's members. Nearly all the members of CEDAW have been involved in some manner with feminist or other groups working to advance the position of women. In fact, in many cases their expertise on issues of particular concern to women and their commitment to the cause of women's equality have been decisive factors in their appointment to the official positions they hold as well as in their nomination to CEDAW.

As a result of their involvement in feminist activities, CEDAW members' commitment to women's rights is often deeper than their commitment to government institutions. This dimension of experts' backgrounds also means that they have access to networks and communities outside the governmental structure to which other officials, particularly male officials, may not; these contacts provide not only information but also a different perspective and a sense of solidarity and support for the work of the Committee.

. . .

V. Consideration of Reports by the Committee

A. 'A Constructive Dialogue'

The Committee has endorsed the concept of a 'constructive dialogue' with States Parties as the basis for its consideration of reports. The notion of a constructive dialogue is one that has developed in the work of other committees: it embodies a distinction between a procedure in which allegations of specific human rights violations can be made and considered, and one in which the supervisory body considers the overall progress made in the implementation of a convention by examining the reports of States Parties. This approach envisions the States Parties and the Committee as engaged in a joint enterprise to advance the goals of the Convention by cooperative endeavors involving the exchange of information, ideas and suggestions.

. . .

It is essential to the integrity of the review process that CEDAW members be prepared to adopt an adversary stance towards States Parties in appropriate cases. Of course, these questions and criticisms are those of individual members and not a formal collective pronouncement by CEDAW.[10]

. . .

The other dimension of a constructive dialogue, the exchange of ideas and experience between the Committee and States in order to assist States in the implementation of the Convention, has remained largely rhetorical. The Committee has not made a concerted effort to make detailed suggestions to individual States about specific measures and, in its general recommendations addressed to all States Parties, has only provided broad guidance on measures which the Committee would like States Parties to take.

[10] [Eds.] The Committee subsequently adopted the practice of issuing collective concluding remarks at the end of the examination of the country report. These remarks concern matters of procedure and reporting, as well as particular problems thought to demand instant attention or to be addressed in the state's next report. This development probably reflects both the high degree of consensus among members about the most serious problems facing women and the Committee's growing confidence about strategies that it should pursue. Compare the collective comments of the ICCPR Human Rights Committee, p. 517, *supra*.

B. General Features

A number of general features of the Committee's examination of reports can be identified; many of them parallel the experiences of the other supervisory committees. One feature of CEDAW's approach has been to press States Parties to provide information that shows the actual position of women in their societies and not just the formal legal status. To this end, it has consistently sought meaningful statistics and other empirical information about women's position in each country.

Another characteristic of CEDAW's consideration of reports has been an effort to overcome the common tendency of States Parties to paint an excessively favorable picture of the condition of women in their societies, making no reference to the difficulties experienced in their implementation of the Convention. However, the development of a more candid, self-critical approach to reporting by States Parties may only be possible when there is an adequate source of independent information such as that provided by NGOs, against which the Committee, the public and other governments can assess the accuracy of the State Party's report.

. . .

[The author signals two major problems facing CEDAW. (1) Many states submit reports late, sometimes years late. CEDAW's powers to ensure timely submission are very limited. (2) Reports are often 'grossly inadequate,' so that the Committee must seek (with mixed success) additional information. Much 'crucial material' for a probing discussion is missing. 'In the absence of a significant input from the specialized agencies, NGOs or other sources, the Committee has great difficulty in assessing the progress made by the State Party in implementing the Convention. . . .']

. . .

VI. Substance of Issues Concerning CEDAW

While the questions asked by CEDAW members have ranged over all the areas covered in the Convention, the Committee has not explicitly articulated any collective view of its understanding of the models of equality/nondiscrimination embodied in the Convention. Furthermore, although there is widespread agreement on the Committee about the existence of women's inequality and subordination, no unified theory about the nature and causes of that oppression has emerged.

The Convention itself embodies a number of different perspectives about the causes of women's oppression and the steps needed to over come it. It imposes an obligation to ensure that women enjoy formal equality under the law, and it recognizes that temporary affirmative action measures are necessary in many cases if guarantees of formal equality are to become reality. Various provisions of the Convention also embody a concern that women's

reproductive lives should be under their own control, and that the State should ensure that women's choices are not coerced and do not prejudice them in their access to social and economic opportunities. The Convention also recognizes that there are experiences to which women are subjected which need to be eliminated (such as rape, sexual harassment and other forms of violence against and sexual exploitation of women which affect women asymmetrically), whether or not they can be fitted neatly within an equality model which requires that there be a direct male comparison available. In short, underlying the Convention is a view that women are entitled to all the rights and opportunities which men enjoy; in addition, their particular abilities and needs arising from biological differences between the sexes must also be recognized and accommodated, but without detracting from their entitlement to equal rights and opportunities with men.

. . .

If there is an overarching theme to the Committee's questioning it is probably article 5's obligation to take steps to discourage stereotyped attitudes about the roles of men and women.[11] The Committee has been particularly interested in the roles of the media and the educational system in perpetuating and changing stereotypes. It has been extremely critical of general policy statements or particular social arrangements which give primacy to motherhood, to the neglect of women's other roles and of men's responsibilities as fathers.

B. Information from NGOs

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At this stage the Committee has not developed any procedure whereby it may formally request or receive reports from non-governmental organizations. Doubts have been expressed about the possibilities for the formal involvement of NGOs in the work of the Committee in view of the fact that there is no mention of them in the Convention and that a proposal to permit NGO participation was not taken up during the drafting process. Nonetheless, neither of these facts seems to pose insuperable barriers to such involvement, particularly in the light of the experience of other committees which have, by their practice, expanded their jurisdiction beyond what was arguably envisaged by those who originally drafted their enabling treaties.

. . .

[11] One issue which has been significantly absent from the Committee's agenda is that of sexual preference and discrimination against lesbians, an issue of major importance to many feminists from all parts of the world. Apart from the areas of child custody and adoption, the matter has hardly been mentioned. This reflects the largely heterosexist orientation of the Convention and, presumably, caution on the part of Committee members who would be somewhat apprehensive of the likely hostile reaction of many States Parties if the issue were raised with any frequency.

VIII. Suggestions and General Recommendations

A. The Power

Article 21 of the Convention provides that the Committee may 'make suggestions and general recommendations based on the examination of reports and information received from the States Parties.'

. . .

Article 21 provides that the Committee may make 'suggestions' and '*general* recommendations.' . . .

. . . [D]espite some division of opinion among its members, the Committee has taken the view that, in appropriate cases, it can base both suggestions and general recommendations on its examination of the report of an individual State Party. Nonetheless, a significant number of Committee members are clearly reluctant to adopt formal recommendations and suggestions directed to an individual State Party, lest this be misconstrued as an exercise of investigative and adjudicatory functions in relation to individual complaints for which the Convention makes no provision.

. . .

C. Development of a 'Jurisprudence' of the Convention

. . . While CEDAW does not have the formal power to interpret the Convention authoritatively, it necessarily interprets the Convention in the course of its work, even if only implicitly. In any event, the sort of interpretive exercise that might be undertaken, if worded appropriately, would not be viewed as an attempt to arrogate ultimate interpretive power to itself but rather as an appropriate exercise of the power to make suggestions and general recommendations. Both the Human Rights Committee and CERD offer models of how that task might be undertaken.

. . .

An area of particular importance to which CEDAW must direct its attention is the developing jurisprudence of the other committees, in particular that of the Human Rights Committee. The Human Rights Committee has now elaborated a large number of general comments interpreting the articles of the ICCPR and giving influential interpretations of major civil and political rights. With the exception of those comments concerning the articles of the ICCPR which deal specifically with non-discrimination, there is virtually no explicit mention of women in those general comments nor does there appear to be any recognition that gender is an important dimension in defining the substantive content of individual rights.

For example, the general comment dealing with privacy [see General Comment No. 16, pp. 524 and 529, *supra*] makes no mention of the importance that this right has assumed in women's struggle for control over their

reproductive lives. Similarly, the general comments on the right to life [see General Comments No. 6 and 14, p. 526, *supra*] do not address the implications of that right for women's access to abortion. Although they do refer to the need to reduce infant mortality, they ignore the differential threats to life facing women and girls and the consequences for a State's obligation to ensure enjoyment of the right to life without discrimination. This neglect of women's experiences pervades the general comments, despite the fact that women are assured equal enjoyment of the rights guaranteed by the Covenant.

Thus, CEDAW could make a major contribution to the development of substantive human rights law by exploring the limitations of these mainstream interpretations of important civil and political rights and introducing women's different perspectives into that discourse. As the Convention guarantees equal enjoyment of essentially the same rights guaranteed by both Covenants, it is quite appropriate for CEDAW to undertake this task.

. . .

COMMENT ON THE CEDAW COMMITTEE AND SOCIO-ECONOMIC FACTORS IMPAIRING WOMEN'S RIGHTS

The earlier Comment at p. 894, *supra*, indicated the significance of economic and social factors in placing and maintaining women in their low status. For its part, the CEDAW Committee has placed great emphasis on overcoming stereotypes preventing women from fully participating in all fields of economic and social life. It continually stresses the need for states parties to adopt programs countering entrenched social and cultural attitudes about appropriate sex roles, and to encourage girls to enrol in education and job training that will give them access to the highest paying jobs. The Committee has also been concerned about the concomitant stereotypes that consign child care and the bulk of domestic duties to women, thus contributing to their disproportionate work load.

The earlier Comment noted that much women's work tends to be 'invisible' and accordingly undervalued or not valued at all. In its General Recommendation No. 17,[12] the Committee called on states parties to take steps to 'measure and value' domestic activities, such as by conducting time-use surveys and collecting gender-based statistics on time spent working in the home and on the labor market. States should quantify such work and include it in the gross national product, both to reveal the true contribution of women to the national economy and to provide the basis on which policies for the advancement of women could be formulated.

In recent sessions, the CEDAW Committee has been attentive to the

[12] Measurement and Quantification of the Unremunerated Domestic Activities of Women and their Recognition in the Gross National Product. General Recommendation No. 17 of CEDAW Committee, Tenth Sess. 1991. UN Doc. A/46/38, 1 Int. Hum. Rt. Rep. 24 (1994).

increasing importance of structural adjustment programs for the implementation of the Convention's objectives. Note the following comments in the third periodic report submitted by Ecuador to the Committee, CEDAW/C/ECU/3, 10 Jan. 1992:

> 207. In addition to external economic and political conditions, such as the country's external debt burden, adjustment policies that are impoverishing the economy have increased the deficit in the health services. The fact is that, under growing economic pressure, 37 of the poorest countries have reduced their spending on health and education (in Ecuador, by 50 and 25 per cent, respectively).
>
> 208. What can be stated with confidence is that if the position of women before the crisis was extremely difficult, it has now worsened both in quantitative and qualitative terms.

The Committee has expressed concern that structural adjustment programs, if they continue to ignore their effects on women, risk exacerbating historical disadvantages. It has taken the view that women and issues of concern to women must be integrally involved in any economic restructuring or development plan.

QUESTIONS

1. 'I suppose CEDAW had to pay the price somewhere. The provisions are bold, far-reaching, innovative. Compared with, say, the ICCPR Human Rights Committee, let alone the UN Commission on Human Rights, the CEDAW Committee is weak, isolated, a marginal rather than mainstream voice in the human rights movement. A trade-off.' Comment.

2. In view of your knowledge of other human rights organs within the UN or serving the human rights treaty regimes, what changes would you urge for the CEDAW Committee— including both changes that could be realized within the present treaty and those that require a protocol? Can you predict with some confidence what effect those changes would have in advancing the cause of women's rights?

COMMENT ON RESERVATIONS TO THE CONVENTION

The high number of reservations that have accompanied ratifications of CEDAW have become a regrettably notorious feature of the Convention, which is in this respect first among the human rights treaties. By way of contrast, only four states parties have entered reservations to the Convention on

Racial Discrimination. Moreover, many of the CEDAW reservations have eliminated or eroded fundamental provisions.

Unlike the ICCPR, which is silent on the issue, CEDAW addresses reservations in Article 28(2), which prohibits those incompatible with the 'object and purpose' of the Convention. See the Comment on reservations at p. 756, *supra*, describing the provisions in the Vienna Convention on the Law of Treaties and the advisory opinion of the International Court of Justice in the *Reservations to the Genocide Convention* case.

Tolerance of reservations has been urged on various grounds—for example, the desirability of securing widespread participation in treaties serving a 'purely humanitarian and civilizing purpose' (in the words of the *Genocide Convention* case), and hence the reluctance to view a ratification as invalid because of its reservations. A commentator emphasizes another ground:[13]

> Most states are apprehensive about the possible consequences of accepting a human rights treaty, not least because such treaties may have a dynamic force, and interpretation of their scope and impact is less certain than that of commercial treaties. . . . Reservations are seen to offer an assurance that the state can protect its interest to the fullest extent possible.

Other commentators have considered reservations to Article 2 to be 'manifestly incompatible' with the object and purpose of the Convention.[14] Several states parties have objected to these reservations on grounds that they threaten the integrity of the Convention and the human rights regime in general. See p. 921, *infra*.

Unlike, say, objections to the United States reservations to the ICCPR, p. 773, *supra*, these objections that purport to be applying Article 28(2) of CEDAW raise issues of religious intolerance and of cultural relativism. The net result, claims one commentator, has been the widespread view that international obligations assumed through the ratification of CEDAW are somehow 'separate and distinct' from and less binding than those of other human rights treaties.[15]

Consider the following suggestions of Rebecca Cook about criteria for distinguishing between reservations that are compatible and incompatible with the Convention:[16]

> The thesis of this article is that the object and purpose of the Women's Convention are that states parties shall move progressively towards elimination of all forms of discrimination against women and ensure equality between men and women. Further, states parties have an obligation to

[13] Rebecca Cook, Reservations to the Convention on the Elimination of All Forms of Discrimination against Women, 30 Va. J. Int. L. 643, 650 (1990).

[14] Belinda Clark, The Vienna Convention Reservations Regime and the Convention on Discrimination against Women, 85 Am. J. Int. L. 281 (1991).

[15] *Ibid.*

[16] *Op. cit.* Note 13, *supra*, at 648.

provide the means to move progressively toward this result. Although the Women's Convention envisions that states parties shall move progressively towards elimination of all forms of discrimination against women and ensure equality between men and women, reservations to the Convention's substantive provisions pose a threat to the achievement of this goal. . . . Accordingly, reservations that contemplate the provision of means towards the pursuit of this goal will be regarded as compatible with 'the object and purpose of the treaty' as provided by article 28(2) of the Women's Convention and article 19 (c) of the Vienna Convention. Similarly, any reservation that contemplates enduring inconsistency between state law or practice and the obligations of the Women's Convention is incompatible with the treaty's object and purpose.

RESERVATIONS OF PARTIES TO CEDAW

[There follow a few of the reservations made by states to ratifications of CEDAW, and an example of objection of other states parties to those reservations.

DECLARATIONS AND RESERVATIONS

Bangladesh

'The Government of the People's Republic of Bangladesh does not consider as binding upon itself the provisions of articles 2, 13 (*a*) and 16 (1) (*c*) and (*f*) as they conflict with Shariah law based on Holy Koran and Sunna.'

Brazil

Reservation made upon signature and confirmed upon ratification:

'The Government of the Federative Republic of Brazil hereby expresses its reservations to article 15, paragraph 4, and to article 16, paragraph 1 (*a*), (*c*), (*g*) and (*h*), of the Convention on the Elimination of All Forms of Discrimination against Women.

'Furthermore, Brazil does not consider itself bound by article 29, paragraph 1, of the above-mentioned Convention.'

Egypt

Reservations made upon signature and confirmed upon ratification:

In respect of article 9:

Reservation to the text of article 9, paragraph 2, concerning the granting to women of equal rights with men with respect to the nationality of their children, without prejudice to the acquisition by a child born of a marriage of the nationality of his father. This is in order to prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be

prejudicial to his future. It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality between men and women, since it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality.

In respect of article 16:

Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Shariah's provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses. The provisions of the Shariah lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Shariah therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.

Iraq

Reservations:

1. Approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by the provisions of article 2, paragraphs (*f*) and (*g*), of article 9, paragraphs 1 and 2, nor of article 16 of the Convention, the reservation to this last-mentioned article shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses so as to ensure a just balance between them. Iraq also enters a reservation to article 29, paragraph 1, of this Convention with regard to the principle of international arbitration in connection with the interpretation or application of this Convention.

OBJECTIONS

Germany, Federal Republic of

The Federal Republic of Germany considers that the reservations made by Egypt regarding article 2, article 9, paragraph 2, and article 16, by Bangladesh regarding article 2, article 13 (*a*) and article 16, paragraph 1 (*c*) and (*f*), by Brazil regarding article 15, paragraph 4, and article 16, paragraph 1 (*a*), (*c*), (*g*) and (*h*), by Jamaica regarding article 9, paragraph 2, by the Republic of Korea regarding article 9 and article 16, paragraph 1 (*c*), (*d*), (*f*) and (*g*), and

by Mauritius regarding article 11, paragraph 1 (*b*) and (*d*), and article 16, paragraph 1 (*g*), are incompatible with the object and purpose of the Convention (article 28, paragraph 2) and therefore objects to them. In relation to the Federal Republic of Germany, they may not be invoked in support of a legal practice which does not pay due regard to the legal status afforded to women and children in the Federal Republic of Germany in conformity with the above-mentioned articles of the Convention.

This objection shall not preclude the entry into force of the Convention as between Egypt, Bangladesh, Brazil, Jamaica, the Republic of Korea, Mauritius and the Federal Republic of Germany.

QUESTIONS

1. Suppose that the substance of General Comment No. 24 of the ICCPR Committee (p. 774, *supra*), stating criteria for determining the consistency of a reservation with the ICCPR, was adopted with appropriate changes in a General Recommendation of the CEDAW Committee. What would be the status under such a General Recommendation of a broad reservation to Article 2 of CEDAW?

2. Suppose that State X submits with its ratification of CEDAW several reservations of the type noted on the preceding pages. Other states object on the basis of Article 28(2) of CEDAW. What arguments would you make on behalf of State X to justify the reservations?

3. How do you assess the criteria suggested by Cook? Can you give illustrations of two reservations to CEDAW that would be judged differently under those criteria?

COMMENT ON EFFORTS TOWARD U.S. RATIFICATION OF CEDAW

Ratification has been considered by the U.S. on several occasions and, in October 1994, almost occurred. The President had submitted the Convention to the Senate, and the Senate Committee on Foreign Relations recommended the Senate's consent to ratification. [17] It observed among other things that failure to ratify had limited U.S. leadership in the promotion of equality for women.

The Committee recommended ratification subject to a number of reservations, understandings and declarations, including the following:

[17] See S384–10. Exec. Rep. Sen. Comm. on For. Rel. Oct. 3. 1994.. Various related documents and the text of all reservations are set forth in 89 Am. J. Int. L. 102 (1995).

> [T]he Constitution and laws of the United States establish extensive protections against discrimination, reaching all forms of governmental activity as well as significant areas of non-governmental activity. However, individual privacy and freedom from governmental interference in private conduct are also recognized as among the fundamental values of our free and democratic society. The United States understands that by its terms the Convention requires broad regulation of private conduct, in particular under Articles 2, 3 and 5. The United States does not accept any obligation under the Convention to enact legislation or to take any other action with respect to private conduct except as mandated by the Constitution and laws of the United States.

Compare the reservation attached by the United States to its ratification of the Convention on Racial Discrimination, p. 778, *supra*.

The Committee also proposed reservations to the right to equal pay understood as comparable worth, the right to paid maternity leave, and any obligation under Articles 5, 7, 8 and 13 of the Convention that might restrict constitutional rights to speech, expression and association.

Five senators (a Republican minority) on the Committee objected to ratification. Their statement of Minority Views recognized the 'unfortunate prevalence of violence and human rights abuses against women around the world' and shared the 'majority's strong support for eliminating discrimination against women.' Nonetheless, they were not 'persuaded' that CEDAW was 'a proper or effective means of pursuing that objective.' The Minority Views made the following points:

> (1) CEDAW may enable ratifying states to generate 'political capital,' but is 'unlikely to convince governments to make policy changes they would otherwise avoid.'
>
> (2) Countries like the U.S. 'must guard against treaties that overreach,' and must not promise 'more than we can deliver or we risk diluting the moral suasion that undergirds existing covenants.' Indeed, the fear exists that 'creating another set of unenforceable international standards will further dilute respect for international human rights.'
>
> (3) More than 30 states ratifying CEDAW have made significant reservations, sometimes 'so broad as to appear to be at variance with the object and purpose of the treaty itself.' The Minority Views drew illustrations from Islamic states. The statement questioned 'whether such behavior does not, in fact, 'cheapen the coin' of human rights treaties generally.' These reservations suggest that CEDAW 'may reach beyond the necessarily restrictive scope of an effective human rights treaty.'
>
> (4) 'Improvement in the status of women in countries such as India, China, and Sudan will ultimately be made in those countries, not in the United States Senate.'

(5) Evolution of 'internationally accepted norms' on human rights 'is important and must be carefully encouraged. It must, however, take place within an international system of sovereign nations with differing cultural, religious and political systems. Pushing a normative agenda beyond that system's ability to incorporate it leads, we believe, to what is represented by this convention. . . .'

In the end, as the session of Congress came to an end, the Convention never reached the Senate floor.

QUESTIONS

1. Which objections to ratification of CEDAW that were set forth in the Minority Views seem particular to CEDAW, and which could refer generally to many human rights treaties?

2. The Minority Views state that CEDAW 'may reach beyond the necessarily restrictive scope of an effective human rights treaty.' The Views refer to the differing cultural, religious and political systems among states, and assert that '[p]ushing a normative agenda beyond [the international system's] ability to incorporate it leads . . . to what is represented by this convention. . . .' Does CEDAW raise special and more difficult problems for U.S. ratification than did the ICCPR, Genocide Convention, Torture Convention, or Racial Discrimination Convention? If so, why?

3. Assume that an appropriately modified General Comment No. 24 of the ICCPR Human Rights Committee, p. 774, *supra*, is adopted by the CEDAW Committee as a General Recommendation. What would be the status under such a General Recommendation of the proposed reservation set forth in the preceding Comment on the private–public issue in Articles 2, 3 and 5?

4. Note the ambiguity in the term 'private conduct' in the proposed reservation referred to in Question 3. Should that reservation have been drawn more narrowly—for example, by distinguishing between (a) the 'privacy' values to which it refers and (b) conduct within the 'private' sphere? How would you have drafted such a reservation, and what illustrations might you have used to clarify and justify your distinction?

C. PRESENT PROPOSALS

There follow a number of proposals about the implementation and reform of CEDAW and its Committee that range from the specific to the broad and pro-

grammatic. What these materials also indicate is the wealth of sources that now form part of an international legal and political process contributing to the development of women's rights as part of international human rights law. They include world conferences on human rights in general, on particular human rights problems, or on problems that have an important human rights dimension. In Chapter 13 as a whole, we see together with those conferences such other materials as NGO or scholars' proposals, reports of special rapporteurs, acts of treaty organs, demands of women's groups lobbying their own governments, statements of religious officials and movements, declarations and resolutions, and state reports.

NOTE

The shortcomings of provisions for the CEDAW Committee were underscored by the advocates of a stronger treaty regime. Theodor Meron noted several of them in a 1990 article.[18] His suggested reforms included a period longer than two weeks for the Committee's annual meeting; a change in venue for the Committee from Vienna to Geneva, where it would be less isolated and its work less fragmented; and the drafting and submission to states for ratification of an optional protocol permitting individual communications against states. Meron noted (at 215):

> . . . Both the geographical and the programmatical aspects of the Committee's work, including the possibility of a change of venue to Geneva, should be reexamined. As a result of this fragmentation, the struggle against sex discrimination has received inadequate attention and has not benefited from some salutary innovations in UN human rights procedures, such as the appointment of special rapporteurs. To reduce these shortcomings, the UN Commission on Human Rights, in coordination with another functional commission of ECOSOC, the Commission on the Status of Women, might consider appointing a 'thematic' rapporteur with a mandate similar, *mutatis mutandis*, to that of the rapporteur on religious intolerance or on torture. Acting under the powers flowing from the Charter prohibition of gender discrimination, the Commissions would authorize the rapporteur to investigate and report upon serious violations of sexual equality. The rapporteur would be permitted to receive information from governments and intergovernmental and nongovernmental organizations, to respond effectively to credible information of substantial violations and to recommend measures to prevent continuing violations. He or she could review the practice of all states members of the United Nations, including those not parties to the Convention. . . .

Since the article by Meron was published, prospects for an optional protocol to the Convention have improved. In 1994, the CEDAW Committee

[18] Enhancing the Effectiveness of the Prohibition of Discrimination against Women, 84 Am. J. Int. L. 213 (1990).

expressed its support for the right to petition through an optional protocol, suggesting that the Commission on the Status of Women request the Secretary General to arrange an expert group meeting on the subject.[19]

The expert group meeting organized by two NGOs and held in November 1994 prepared a draft optional protocol providing in part for an individual complaints procedure permitting a communication to the Committee from any 'individual, group or organization' that suffered because of the failure of a state party to fulfil its obligations under the Convention. In investigating the communication, the Committee may with the agreement of the state party involved visit its territory. Under Article 8, if the Committee concludes that a state party has failed to fulfill its obligations, it may recommend that the state take specific measures to remedy any violation. 'The State Party shall take all steps necessary to remedy any violation of the rights set forth in the Convention. . . . The State Party shall implement any recommendations made by the Committee, and shall ensure that adequate reparation or other appropriate remedy is provided.'

QUESTION

'An optional protocol to CEDAW permitting individual communications will not significantly advance the treaty's goals. As CEDAW's provisions evidence, the real problems blocking realization of goals like equality are structural, cultural, deep. These are exactly the kinds of problems that a communications procedure handling individual complaints against a state is not able to deal with effectively.' Comment.

COMMENT ON WORLD CONFERENCES ON WOMEN'S ISSUES

Another mechanism within the international system has been increasingly used to advance human rights as well as other objectives: large inter-governmental conferences organized around specific themes. These conferences provide an occasion for governments to discuss and perhaps ultimately agree on common strategies of action to resolve issues of global concern. Recent conferences have included the 1990 World Summit for Children, the 1992 Rio de Janeiro Conference on Environment and Development, the 1993 Second World Conference on Human Rights at Vienna, the 1994 Cairo Conference on Population and Development, and the 1995 Copenhagen World Summit for Social Development.

[19] Suggestion no. 5. Report of the Committee on the Elimination of Discrimination against Women, UN Doc. A/49/38.

These conferences are by no means identical in structure or flavor; the character of each is influenced by the particular purpose or issue at hand. Nonetheless, recent conferences have tended to follow a similar format. Apart from publicizing the member states' recognition of the importance of the subject under consideration, the main object of the conference is often to obtain agreement on a draft document, such as a declaration or charter, and on a related program of action.

Much of the difficult work in identifying the nature of the issue and proposing solutions to particular problems, is accomplished prior to the opening of the conference. An initial draft may be drawn up by a branch of the UN Secretariat. Expert group meetings are often convened around specific issues or areas of concern. Through a series of regional and global preparatory meetings attended by delegations of the member states, the draft document may be refined or significantly altered. By the time the conference opens, normally a significant portion of the text or program has been agreed upon. At this point it becomes a 'battle of the brackets', so called because of the practice of bracketing clauses in the text that are not yet agreed on—that is to say, an exercise in resolving the parts of the program that have remained contentious.

Throughout this process, sometimes at parallel meetings designed to facilitate it, NGOs engage in an attempt to influence the substance of the document, by providing relevant information to the Secretariat, lobbying Member States or publicizing issues of concern in the press. Reflecting NGOs' increasing influence and activity, it is becoming more common for member states to consult with them—at least ones from their own countries—prior to establishing their positions, and even to include NGO representation in their official delegations to the preparatory and world conferences.

Some of these conferences have proved to be significant milestones in the articulation and publicization of issues of concern to women. For example, a major focus and achievement of the 1993 World Conference on Human Rights was recognition of the central place of women in the human rights agenda. In Beijing in September 1995, another major conference on women's issues will take place. Delegations of the member states will meet while members of the NGO community participate in the NGO Forum, running roughly concurrently with the intergovernmental conference.

This Fourth World Conference on Women in Beijing is the most recent in a series of intergovernmental conferences devoted specifically to the status of women and the specific impact of social phenomena on women. Commencing in Mexico City in 1975, the beginning of the UN Decade on Women, and again 'mid-decade' in Copenhagen in 1980, and finally in Nairobi in 1985, the member states of the United Nations have met periodically to consider impediments to the advancement of women. The 'Forward-Looking Strategies' for the advancement of women that were adopted at the Nairobi World Conference were intended to 'review and appraise' the achievements of the United Nations Decade for Women. They provided a comprehensive

statement of the problems women faced at that time and outlined the programs and strategies for countering them.

Given the increased emphasis in recent years on issues involving women at world conferences on general issues (Vienna) or special themes (children, environment, population, social development), one might well ask in what ways it remains useful or necessary to convene a conference devoted exclusively to women's issues. The following observations may give at least a partial answer.

Although issues such as violence against women have received increased attention in recent years, many if not most of the concerns identified in the Nairobi Forward-Looking Strategies remain unaddressed or unresolved in most countries. A main focus of the Beijing Conference will be implementation by member states of the Platform for Action, including commitments to the provision of the necessary resources and institutions.

In addition, events during the ten years since Nairobi have altered the agenda of pressing concerns for women. Wars, ethnic strife and political instability in many parts of the world have created an increasing flow of internally and externally displaced persons, many of whom are women at severe risk of violence and poverty. Phenomena such as debt restructuring, political transition (including, for example, the move to market economies) and economic globalization have revealed the significance of macroeconomic issues for all efforts to improve the position of women. Although such changes may adversely affect populations as a whole, typically the burden of transition and adjustment falls disproportionately on women (and children).

The Platform for Action at the Beijing Conference addresses eleven substantive areas of concern: poverty, education, health, violence, armed conflict, economic structures and policies, decision-making, mechanisms for the advancement of women, women's human rights, mass media and the environment.

VIENNA DECLARATION AND PROGRAMME OF ACTION

UN World Conference on Human Rights, Vienna, 1993.
14 Hum. Rts. L. J. 352 (1993).

The World Conference on Human Rights . . .

Solemnly adopts the Vienna Declaration and Programme of Action.

. . .

18. The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal human rights. The full and equal participation of women in political, civil, economic, social and cultural life, at the national, regional and international levels, and the eradication of all forms of

discrimination on grounds of sex are priority objectives of the international community. . . .

. . .

37. The equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity. These issues should be regularly and systematically addressed throughout relevant United Nations bodies and mechanisms. In particular, steps should be taken to increase cooperation and promote further integration of objectives and goals between the Commission on the Status of Women, the Commission on Human Rights, the Committee for the Elimination of Discrimination against Women, the United Nations Development Fund for Women, the United Nations Development Programme and other United Nations agencies. In this context, cooperation and coordination should be strengthened between the Centre for Human Rights and the Division for the Advancement of Women.

38. In particular, the World Conference on Human Rights stresses the importance of working towards the elimination of violence against women in public and private life, the elimination of all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism. . . .

39. . . . States are urged to withdraw reservations that are contrary to the object and purpose of the Convention or which are otherwise incompatible with international treaty law.

40. . . . The Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women should quickly examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The World Conference on Human Rights welcomes the decision of the Commission on Human Rights to consider the appointment of a special rapporteur on violence against women at its fiftieth session.

41. . . . [T]he World Conference on Human Rights reaffirms, on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.

42. Treaty monitoring bodies should include the status of women and the human rights of women in their deliberations and findings, making use of gender-specific data. States should be encouraged to supply information on the situation of women *de jure* and de facto in their reports to treaty monitoring bodies. The World Conference on Human Rights notes with satisfaction that the Commission on Human Rights adopted at its forty-ninth session resolution 1993/46 of 8 March 1993 stating that rapporteurs and working groups in the field of human rights should also be encouraged to do so. Steps should also be

taken by the Division for the Advancement of Women in cooperation with other United Nations bodies, specifically the Centre for Human Rights, to ensure that the human rights activities of the United Nations regularly address violations of women's human rights, including gender-specific abuses. Training for United Nations human rights and humanitarian relief personnel to assist them to recognize and deal with human rights abuses particular to women and to carry out their work without gender bias should be encouraged.

43. The World Conference on Human Rights urges Governments and regional and international organizations to facilitate the access of women to decision-making posts and their greater participation in the decision-making process. It encourages further steps within the United Nations Secretariat to appoint and promote women staff members in accordance with the Charter of the United Nations, and encourages other principal and subsidiary organs of the United Nations to guarantee the participation of women under conditions of equality.

REPORT OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, CAIRO 1994

UN Doc. A/Conf. 171/13, 18 Oct. 1994.

[These excerpts from the Report are taken from Chapter IV, 'Gender Equality, Equity and Empowerment of Women,' Section C, 'Male Responsibilities and Participation.']

4.24. Changes in both men's and women's knowledge, attitudes and behaviour are necessary conditions for achieving the harmonious partnership of men and women. Men play a key role in bringing about gender equality since, in most societies, men exercise preponderant power in nearly every sphere of life, ranging from personal decisions regarding the size of families to the policy and programme decisions taken at all levels of Government. It is essential to improve communication between men and women on issues of sexuality and reproductive health, and the understanding of their joint responsibilities, so that men and women are equal partners in public and private life.

. . .

4.26. The equal participation of women and men in all areas of family and household responsibilities, including family planning, child-rearing and housework, should be promoted and encouraged by Governments. This should be pursued by means of information, education, communication, employment legislation and by fostering an economically enabling environment, such as family leave for men and women so that they may have more choice regarding the balance of their domestic and public responsibilities.

4.27. Special efforts should be made to emphasize men's shared responsibility

and promote their active involvement in responsible parenthood, sexual and reproductive behaviour, including family planning; prenatal, maternal and child health; prevention of sexually transmitted diseases, including HIV; prevention of unwanted and high-risk pregnancies; shared control and contribution to family income, children's education, health and nutrition; and recognition and promotion of the equal value of children of both sexes. Male responsibilities in family life must be included in the education of children from the earliest ages. Special emphasis should be placed on the prevention of violence against women and children.

. . .

4.29. National and community leaders should promote the full involvement of men in family life and the full integration of women in community life. Parents and schools should ensure that attitudes that are respectful of women and girls as equals are instilled in boys from the earliest possible age, along with an understanding of their shared responsibilities in all aspects of a safe, secure and harmonious family life. Relevant programmes to reach boys before they become sexually active are urgently needed.

QUESTION

What are the functions of world conferences like those at Vienna and Cairo? What practical consequences for women's rights and the women's movement might flow from the Vienna Declaration or Cairo Report?

D. VIOLENCE AGAINST WOMEN BY THE STATE AND IN THE HOME

It was the rare report of a human rights NGO not so many years ago that gave specific attention to human rights violations against women, although of course women figured with men as victims in reports dealing with themes like arbitrary detention, disappearances, or torture. That has changed as part of a larger change, including for example the appointment by the UN Commission of a special rapporteur on violence against women, and the introduction in the U.S. State Department's 1993 Country Reports on Human Rights Practices of a special section on women.

There follow two NGO reports exclusively on violence against women, in one case violence perpetrated directly by the state and in the other violence occurring in the home.

AMNESTY INTERNATIONAL, RAPE AND SEXUAL ABUSE: TORTURE AND ILL TREATMENT OF WOMEN IN DETENTION

(1992), at 1.

. . .

. . . In countries around the world, government agents use rape and sexual abuse to coerce, humiliate, punish and intimidate women. When a policeman or a soldier rapes a woman in his custody, that rape is no longer an act of private violence, but an act of torture or ill-treatment for which the state bears responsibility. . . .

Yet many governments persistently refuse to recognize that rape and sexual abuse by government agents are serious human rights violations. In country after country effective investigations into cases of rape do not take place nor are the perpetrators brought to justice. From the emergency zones of Peru, for instance, AI has received dozens of reports of members of the security forces raping women and girls. AI [Amnesty International] knows of no official investigations into such incidents since the state of emergency was first declared in October 1981 and the current government has not demonstrated the political will to institute such investigations. In 1986 a Peruvian prosecutor told an AI delegation in Ayacucho that rape was to be expected when troops were conducting counter-insurgency operations, and that prosecutions for such assaults were unlikely.

Even when public outrage forces officials into conducting investigations and prosecutions, the punishments imposed by the courts on government agents found guilty of rape are seldom commensurate with the enormity of the crime.

. . .

Although men are sometimes raped in custody by government agents, it is a form of torture primarily directed against women, and to which women are uniquely vulnerable. Women are also more likely to suffer sexual abuse and harassment short of rape, including fondling, verbal humiliation, excessive body searches, and other intentionally degrading treatment. . . .

When governments use military force to suppress armed insurgency movements, troops are often given extensive powers and are not held accountable to civilian legal authorities for their actions. In the course of counter-insurgency operations, government soldiers sometimes use rape and sexual abuse to try and extract information from women suspected of involvement with the armed opposition or even to punish women who simply live in areas known to be sympathetic to the insurgents. The indiscriminate use of torture and ill-treatment also helps create a permanent sense of fear and insecurity, against which the capacity for independent political action can be dulled or thwarted. The official failure to condemn or punish rape gives it an overt political sanction, which allows rape and other forms of torture and ill-treatment to become tools of military strategy.

. . .

Maria Nicolaidou was among 33 young men and women detained in Athens, Greece on 2 November 1991 after policemen found them sticking up political posters. The detainees were taken to a police station, where all 12 of the women were ordered to strip naked and were kept in an open room in full view of a number of policemen, who made obscene gestures and comments. Several of the women said they were beaten by police officers. . . .

In many countries policemen use sexual harassment and threats of rape as an interrogation tactic. The interrogators may be after something specific, like information or a signature on a confession, or they may simply want to frighten the victim and other local women. Rose Ann Maguire was arrested in July 1991 in Northern Ireland and held for five days in Castlereagh interrogation centre. During questioning sessions, she was reportedly sexually harassed, physically abused and threatened with death. . . .

Dozens of Palestinian women and children detained in the Israeli-Occupied Territories have reportedly been sexually abused or threatened in sexually explicit language during interrogation. Fatimah Salameh was arrested near Nablus in July, 1990. Her interrogators allegedly threatened to rape her with a chair leg and told her they would photograph her naked and show the pictures to her family. 'They called me a whore and said that a million men had slept with me,' she said. Fatimah Salameh agreed to confess to membership in an illegal organization and was sentenced to 14 months' imprisonment.

In Turkey rape and sexual abuse are frequently used in attempts to extract possessions from both men and women during interrogation. . . .

Some women are raped or sexually abused because they happen to be the wives, mothers, daughters or sisters of men the authorities cannot capture. These women become substitutes for the men in their families and government agents torture and abuse them to punish and shame their male relatives or to coerce these men into surrendering.

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Pregnant women who are tortured or held in inhumane conditions face the additional threat of suffering miscarriage or permanent injury. The special needs of pregnant women are recognized in international instruments such as the United Nations Standard Minimum Rules for the Treatment of Prisoners. Some governments not only ignore these needs, but take advantage of the vulnerability of pregnant women to inflict severe physical and emotional pain.

Wafa' Murtada was a 27-year-old civil engineer and nearly nine months pregnant when the Syrian authorities arrested her in September 1987. The authorities apparently suspected her husband, Yahya Murtada, of belonging to a banned opposition group and tried to extract the names of his associates from her through torture. Wafa' Murtada gave birth in prison and lost her child, apparently because of the torture. She was held without charge or trial until her recent release from Fara' Falastin detention centre in Damascus.

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Some governments pursue policies that result in persistent human rights violations against people of particular ethnic or national origin. Indigenous peoples, who are often denied civil and political rights, have little recourse against the governments that allow these violations to occur. Those who work on their behalf have also been attacked. . . .

All government agents who encourage, condone or participate in the rape of women in their custody should be brought to justice. Yet many of the perpetrators go free because their victims are too terrified or ashamed to file a complaint. Some women try to obliterate the memory of the assault; others feel degraded and fear that they would be shunned or abandoned if they reveal what has been done to them. In some traditional societies raped women are thought to be tainted or defiled, and the economic and social pressures to conceal a rape can be considerable: if a married woman is raped, her husband may exercise his right to desert her; a single woman who has been raped may no longer be seen as fit for marriage. . . .

Many rape victims are threatened with additional violence if they complain to anyone about the attack. . . .

And some governments maintain legislation making it possible for the victims of rape to be charged with criminal offences. Under Pakistan's Hudood Ordinance, women convicted of extra-marital sexual relations—including rape and adultery—can be sentenced to be publicly whipped, imprisoned or stoned to death. In August 1989 two nurses were raped at gunpoint by three interns in a Karachi hospital. One of the victims tried to file a complaint and was herself charged with admitting to sexual intercourse. As a result of the charges she has lost her job and her marital engagement has been broken off. 'No one else can ever know how I feel inside,' she said. 'I may seem all right on the outside but inside I feel as if I no longer exist.'

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AMERICAS WATCH, CRIMINAL INJUSTICE: VIOLENCE AGAINST WOMEN IN BRAZIL

(1991), at 12.

. . .

I. INTRODUCTION

In April of this year, Americas Watch, together with the Women's Rights Project of Human Rights Watch, travelled to Brazil to assess the response of the Brazilian government to the problem of domestic violence. This report contains the findings of that mission. It focuses on wife-murder, domestic battery and rape. It constitutes the first report of the newly formed Women's

Rights Project of Human Rights Watch which monitors violence against women and discrimination on the basis of sex throughout the world.

The crime of domestic violence is not unique to Brazil. According to recent United Nations reports, it exists in all regions, classes and cultures. Women all over the world and from all walks of life are at risk from violence in the home, usually at the hands of their husband or lover. Although the exact number of abused women will probably never be known, available information indicates unequivocally that domestic violence is a common and serious problem in developed and developing countries alike.

Although domestic violence is common and widespread, it has traditionally been perceived as a private, family problem, beyond the scope of state responsibility. Indeed, in the past husbands have had the legal right to punish or even kill their wives with impunity. Only gradually changing social attitudes and increased reporting have propelled the problem into the public eye. And as the nature and severity of violence in the home has become evident, so has the responsibility of governments to prosecute such abuse as they would any other violent crime.

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Moreover, female victims still have little reason to expect that their abusers—once denounced—will ever be punished. A police chief in Rio de Janeiro told Americas Watch that to her knowledge, of more than 2,000 battery and sexual assault cases registered at her station in 1990, not a single one had ended in punishment of the accused. The São Luis women's police station in the northeastern state of Maranhão reported that of over 4,000 cases of physical and sexual assault registered with the station, only 300 were ever forwarded for processing and only two yielded punishment for the accused.

Brazil's criminal law is part of the problem. In the Brazilian Penal Code, rape is defined as a crime against custom rather than a crime against an individual person—society rather than the female victim is the offended party. Most other sex crimes are deemed crimes only if the victim is a 'virgin' or 'honest' woman. If a woman does not fit this 'customary' stereotype, she is likely to be accused of having consented to the crime and it is unlikely to be investigated. Moreover, pursuit of these cases by law depends on the initiative of the victim, not the state; if at anytime she desists from prosecution the case will be dropped. Of over 800 cases of rape reported to the São Paulo women's police stations from 1985 to 1989, less than 1/4 were ever investigated.

Marital rape, in particular, is severely under-reported and least likely to be prosecuted. While marital rape theoretically is included within the general prohibition against rape, in practice it is not commonly viewed by the courts as a crime. Under the Brazilian Civil Code, the refusal of sexual relations is cause for legal separation. According to several attorneys with whom Americas Watch spoke, when a husband uses violence to compel his wife to have sexual relations, it is viewed by the courts as enforcing the wife's conjugal

obligations, not as rape. As a result, rape in the home, with the exception of incest, is almost never punished.

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II. BACKGROUND

A. The Role of the Women's Movement

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Women's increased economic and political power coupled with the development of autonomous and state-affiliated women's institutions, enabled the women's movement to press for fundamental changes in the state's response to gender-specific violence. In 1985, women's groups, together with the state council on women, persuaded São Paulo's opposition party mayor to establish a woman's police station, staffed entirely by women and dedicated solely to crimes of violence against women, excluding homicide, which was not viewed as a gender-specific crime. By late 1985, eight women's police stations (*Delegacias De Defesa Da Mulher*, hereafter *delegacias*) had opened in the state of São Paulo, and by 1990 there were 74 throughout the country.

The women's *delegacias* represented an integrated approach to the problem of domestic violence. They were designed to investigate gender-specific crimes, and to provide psychological and legal counseling. The female police officers (*delegadas*) were to receive training in all aspects of domestic violence, from its psychological impact to the legal remedies available to the victim. . . .

. . .

In 1984, women's rights advocates secured Brazil's adoption of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), although with several reservations.[20] In 1986, the women's movement held a national constitutional forum to draft a list of recommendations for consideration by the Constituent Assembly, which was elected in the 1986 congressional elections to take up the task of writing a new Brazilian Constitution. . . .

The new Constitution, enacted in 1988, reflects many of the national women's movement's demands. In particular, Article 226, Paragraph 8 provides that 'the state should assist the family, in the person of each of its members, and should create mechanisms so as to impede violence in the sphere of

[20] Brazil entered reservations regarding the sections of the Convention that guarantee the equal rights of men and women to choose their residence and domicile, to have equal rights to enter into marriage, during marriage and at its dissolution, and to have the same personal rights, including the right to choose a family name. Brazil also entered reservations to the Convention article according the same rights 'for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property. . . .'

its relationships.' Similar provisions have been adopted in state constitutions throughout Brazil.

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Yet, there is still a long way to go. Changes in political and economic power since the onset of the new republic have diminished the scope and effectiveness of initiatives launched in the euphoria of the early years. . . .

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B. Domestic Violence: Statistical Evidence

. . . A marked difference emerged in the nature of violence suffered by women as opposed to men. For Brazilian men, murder and physical abuse primarily involve acquaintances or strangers and occur outside the home. For Brazilian women, the opposite is true. The 1988 census showed that men were abused by relatives (including spouses) only ten percent of the time, while women are related to their abuser in over half of the cases of reported physical violence.

. . .

. . . Examples of physical abuse cited in a 1989 study of violence against women in the state of Pernambuco included beating, tying up and spanking, burning the genitals and breasts with cigarettes, strangulation, inserting objects in the victim's vagina (such as bottles and pieces of wood) and throwing alcohol and fire on the victim. The study also noted repeated physical abuse of pregnant women in which the aggressors 'aimed for the womb, breasts and vagina.'

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NOTE

An article entitled *Failed by Law, Women Seek Bodyguards*, the *New York Times*, April 3, 1992, p. A10, reported on the opening of a bodyguard agency in Milwaukee, Wisconsin to protect physically abused women inside and outside their homes against attacks by men such as estranged lovers. The bodyguards were working in connection with a local women's group, the Task Force on Battered Women, one of whose coordinators stated: 'Domestic violence is not a priority with the police or with the courts here or anywhere else in the country. So we're getting a professional bodyguarding agency to do what the system is not doing: protecting battered women.'

The article describes a scene among women being trained to fill out forms to file for restraining orders against those threatening them.

> The women sitting around the scarred table were black, white and Hispanic. They were middle-aged and barely out of their teens. Two were

pregnant. All said they were scared. 'I don't see what purpose this serves,' one woman said, looking over the restraining order form. 'If he's going to get you, he's going to get you.' 'That's what I'm afraid of,' someone else said. 'But we have to do something.'

CEDAW COMMITTEE, VIOLENCE AGAINST WOMEN

General Recommendation No. 19, Eleventh Sess. No. 1, 1992
UN Doc. A/47/38, 1 Int. Hum. Rt. Rep. 25 (No. 1, 1994).

. . .

Background

1. Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.

. . .

4. The Committee concluded that not all the reports of States parties adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms. The full implementation of the Convention required States to take positive measures to eliminate all forms of violence against women.
5. The Committee suggested to States parties that in reviewing their laws and policies, and in reporting under the Convention, they should have regard to the following comments of the Committee concerning gender-based violence.

General comments

6. The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.
7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention. These rights and freedoms include:

(a) The right to life;
(b) The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
(c) The right to equal protection according to humanitarian norms in time of international or internal armed conflict;

(d) The right to liberty and security of person;
(e) The right to equal protection under the law;
(f) The right to equality in the family;
(g) The right to the highest standard attainable of physical and mental health;
(h) The right to just and favourable conditions of work.

8. The Convention applies to violence perpetrated by public authorities. Such acts of violence may breach that State's obligations under general international human rights law and under other conventions, in addition to breaching this Convention.
9. It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

Comments on specific articles of the Convention

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Articles 2(f), 5 and 10(c)

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.
12. These attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects rather than as individuals. This in turn contributes to gender-based violence.

. . . .

Article 11

17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

Article 12

19. States parties are required by article 12 to take measures to ensure equal access to health care. Violence against women puts their health and lives at risk.

20. In some States there are traditional practices perpetuated by culture and tradition that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children and female circumcision or genital mutilation.

. . .

Article 16 (and article 5)

22. Compulsory sterilization or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children.

23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. . . .

Specific recommendations

24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends:

(a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act;

(b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention;

(c) States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence;

(d) Effective measures should be taken to ensure that the media respect and promote respect for women;

(e) States parties in their report should identify the nature and extent of attitudes, customs and practices that perpetuate violence against women, and the kinds of violence that result. They should report the measures that they have undertaken to overcome violence, and the effect of those measures;

(f) Effective measures should be taken to overcome these attitudes and practices. States should introduce education and public information programmes to help eliminate prejudices which hinder women's equality;

. . .

(k) States parties should establish or support services for victims of family violence, rape, sex assault and other forms of gender-based violence, including refuges, specially trained health workers, rehabilitation and counselling;

. . .

(m) States parties should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures such as illegal abortion because of lack of appropriate services in regard to fertility control;

. . .

COMMENT ON INTERNATIONAL INSTRUMENTS ON VIOLENCE AGAINST WOMEN

In 1993, the General Assembly adopted a Declaration on the Elimination of Violence against Women.[21] The Preamble asserted that the Declaration would 'strengthen and complement' the process of effective implementation of CEDAW, and recognized that violence against women 'is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women.' Violence is 'one of the crucial social mechanisms by which women are forced into a subordinate position.'

Violence against women covers (Article 1) 'gender-based violence . . . whether occurring in public or in private life.' Under Article 2, it includes (a) violence in the family, marital rape, female genital mutiliation and 'other traditional practices harmful to women,' (b) similar violence within the general community,

[21] UN Doc. A/48/629, reprinted in 33 Int. Leg. Mat. 1050 (1994).

including sexual harassment at work, and (c) violence 'perpetrated or condoned by the State, wherever it occurs.'

Article 4 provides that states 'should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to' elimination of violence. The state is to adopt measures, especially in education (para. j), 'to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.'

To date only one treaty directly addresses this issue. In June 1994, the Organization of American States adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (effective March 1995, with two ratifications).[22] Like the UN Declaration, its preambular paragraphs recognize that violence against women is 'a manifestation of the historically unequal power relations between women and men'. The substantive provisions and the definition of the Convention's reach echo provisions in the Declaration.

This Convention is, however, more explicit in recognizing the broad scope and nature of violence, encompassing (Article 2) 'physical, sexual and psychological violence.' Article 3 makes explicit a woman's rights 'to be free from violence in both the public and private sphere.'

States agree (Article 7) 'to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence.' These duties include due diligence in investigating and imposing penalties for violence, and the establishment of effective legal procedures including protective measures for women.

NOTE

In 1994, the UN Economic and Social Council (Decision 1994/254) endorsed the resolution of the UN Commission on Human Rights (Resolution 1994/45) to appoint for a three-year term a special rapporteur on violence against women, its causes and consequences. The special rapporteur is empowered to engage in field missions either independently or jointly with other rapporteurs and working groups; to seek and receive information from governments, other treaty bodies, specialized agencies of the UN and NGOs; and to consult with the CEDAW Committee in the course of her investigations.

[22] 33 Int. Leg. Mat. 1534 (1994).

SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, PRELIMINARY REPORT

Commission on Human Rights, E/CN.4/1995/42, 22 Nov. 1994.

[The following excerpts from the Preliminary Report of Radhika Coomaraswamy are taken from sections entitled 'Historically unequal power relations,' and 'Cultural ideology.']

49. . . . [V]iolence against women is a manifestation of historically unequal power relations between men and women. Violence is part of a historical process and is not natural or born of biological determinism. The system of male dominance has historical roots and its functions and manifestations change over time. The oppression of women is therefore a question of politics, requiring an analysis of the institutions of the State and society, the conditioning and socialization of individuals, and the nature of economic and social exploitation. The use of force against women is only one aspect of this phenomenon, which relies on intimidation and fear to subordinate women.

50. Women are subject to certain universal forms of abuse . . . . It is argued that any attempt to universalize women's experience is to conceal other forms of oppression such as those based on race, class or nationality. This reservation must be noted and acknowledged. And yet it must be accepted that there are patterns of patriarchal domination which are universal, though this domination takes a number of different forms as a result of particular and different historical experiences.

. . .

54. The institution of the family is also an arena where historical power relations are often played out. On the one hand, the family can be the source of positive nurturing and caring values where individuals bond through mutual respect and love. On the other hand, it can be a social institution where labour is exploited, where male sexual power is violently expressed and where a certain type of socialization disempowers women. Female sexual identity is often created by the family environment. The negative images of the self which often inhibit women from realizing their full potential may be linked to familial expectation. The family is, therefore, the source of positive humane values, yet in some instances it is the site for violence against women and a socialization process which may result in justifying violence against women.

. . .

57. In the context of the historical power relations between men and women, women must also confront the problem that men control the knowledge systems of the world. Whether it be in the field of science, culture, religion or language, men control the accompanying discourse. Women have been excluded from the enterprise of creating symbolic systems or interpreting

historical experience. It is this lack of control over knowledge systems which allows them not only to be victims of violence, but to be part of a discourse which often legitimizes or trivializes violence against women. . . .

. . .

64. The ideologies which justify the use of violence against women base their discussion on a particular construction of sexual identity. The construction of masculinity often requires that manhood be equated with the ability to exert power over others, especially through the use of force. Masculinity gives man power to control the lives of those around him, especially women. The construction of femininity in these ideologies often requires women to be passive and submissive, to accept violence as part of a woman's estate. Such ideologies also link a woman's identity and self-esteem to her relationship to her father, husband or son. An independent woman is often denied expression in feminine terms. In addition, standards of beauty, defined by women, often require women to mutilate themselves or damage their health, whether with regard to foot binding, anorexia nervosa and bulimia. It is important to reinvent creatively these categories of masculinity and femininity, devoid of the use of force and ensuring the full development of human potential.

. . .

67. Certain customary practices and some aspects of tradition are often the cause of violence against women. Besides female genital mutilation, a whole host of practices violate female dignity. Foot binding, male preference, early marriage, virginity tests, dowry deaths, sati, female infanticide and malnutrition are among the many practices which violate a woman's human rights. Blind adherence to these practices and State inaction with regard to these customs and traditions have made possible large-scale violence against women. States are enacting new laws and regulations with regard to the development of a modern economy and modern technology and to developing practices which suit a modern democracy, yet it seems that in the area of women's rights change is slow to be accepted.

QUESTIONS

1. Consider paras. 6 and 7 of the General Recommendation, p. 938, *supra*. How many of the enumerated rights in para. 7 are stated in CEDAW? Do you view these paragraphs as an application, elaboration, or expansion of the provisions of CEDAW?

2. In what ways is the state involved in the acts and practices described in paras. 11, 12, 20 and 21? Does the General Recommendation suggest that those perpetrating the described acts—sexual harassment, family violence, female circumcision—are themselves violating the Convention?

3. The Preliminary Report of the Special Rapporteur states in para. 64 (on ideologies justifying violence against women) that it is 'important to reinvent creatively these categories of masculinity and femininity.' From this perspective, how would you draft a governmental program for sharply reducing violence against women? What function would the criminal law serve? Other types of laws?

E. THE PUBLIC–PRIVATE DIVIDE: DISCRIMINATION AND VIOLENCE BY NON-GOVERNMENTAL ACTORS

Earlier materials in this chapter sometimes described abuse of women not by state ('public') but by non-governmental ('private') actors and action. This theme—the relevance of the public–private divide—inevitably surfaces with respect to women's rights, as much as, if not more than, with respect to other human rights fields.

The distinction between these two terms or concepts is stated in different ways. In the preceding paragraph, it had to do with the nature or character of the actor (governmental or non-governmental). From other perspectives, the distinction concerns different spheres of life and action. The 'private' is frequently associated with the home, family, domestic life. The 'public' is identified with the interactions of a working life: salaried employment, business, professions, the give and take of the market, being 'out in the world'.

The following readings examine some of the issues presented by opposition of private and public:

- the practical, political and ideological significance of the divide;
- the shifting boundary line between the two as conceptions of their significance and content change;
- the degree to which human rights instruments should require states parties to regulate non-governmental (private) conduct; and
- the degree to which non-governmental actors should themselves become directly subject to duties under international human rights law and liable for their violation.

The readings start with what has become a classic judicial opinion in international human rights because of its clarification of a state's duty with respect to violence committed by non-governmental actors, and with questions by Meron about the effects of CEDAW on the realm of the private. The further readings by contemporary feminists suggest the importance of keeping clear

the different meanings of private and public, as well as the need to distinguish between the conception of 'privacy' and certain definitions of the private–public divide.

VELASQUEZ RODRIGUEZ CASE

Inter-American Court of Human Rights, 1988
Ser. C, No. 4, 9 Hum. Rts L. J. 212 (1988).

[The facts relevant to this case, and portions of the opinion of the Inter-American Court of Human Rights, are set forth at p. 650, *supra*. In a nutshell, a petition against Honduras was received by the Inter-American Commission of Human Rights, alleging that one Velásquez was arrested without warranty by national security units of Honduras. Knowledge of his whereabouts was consistently denied by police and security forces. Velásquez had disappeared. Petitioners argued that through this conduct, Honduras had violated several articles of the American Convention on Human Rights. After hearings and conclusions, the Commission referred the matter to the Inter-American Court of Human Rights, whose contentious jurisdiction had been recognized by Honduras. The Court concluded that Honduras had violated the Convention.

In the excerpts below, the Court addresses the issue of just what the obligations of Honduras were under the Convention. Was Honduras obligated only to 'respect' individual rights and not directly violate them, as by torture or illegal arrest? Or was Honduras obligated to take steps, within reasonable limits, to protect people like Velásquez from seizure even by non-governmental, private persons? In an earlier portion of the opinion, the Court had found that the Honduran state was implicated in the arrest and disappearance, and that the acts of those arresting Velásquez could be imputed to the state. In the present excerpts, the Court reviews that information, and considers what might be the responsibility of Honduras even if the seizure and disappearance of Velásquez were caused by private persons unconnected with the government.]

161. Article 1(1) of the Convention provides:

> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms. . . .

. . .

164. Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act

imputable to the State, which assumes responsibility in the terms provided by the Convention itself.

165. The first obligation assumed by the States Parties under Article 1(1) is 'to respect the rights and freedoms' recognized by the Convention. . . .

166. The second obligation of the States Parties is to ['ensure'] the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.

. . .

169. According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. . . .

170. This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority. Under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.

. . .

172. Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

. . .

174. The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.

175. This duty to prevent includes all those means of a legal, political,

administrative and cultural nature that promote the safeguard of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, as they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures. . . .

. . .

177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner. . . . Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

178. In the instant case, the evidence shows a complete inability of the procedures of the State of Honduras, which were theoretically adequate, to ensure the investigation of the disappearance of Manfredo Velásquez and the fulfillment of its duties to pay compensation and punish those responsible, as set out in Article 1(1) of the Convention.

179. As the Court has verified above, the failure of the judicial system to act upon the writs brought before various tribunals in the instant case has been proven. Not one writ of habeas corpus was processed. No judge had access to the places where Manfredo Velásquez might have been detained. The criminal complaint was dismissed.

180. Nor did the organs of the Executive Branch carry out a serious investigation to establish the fate of Manfredo Velásquez. There was no investigation of public allegations of a practice of disappearances nor a determination of whether Manfredo Velásquez had been a victim of that practice. The Commission's requests for information were ignored to the point that the Commission had to presume, under Article 42 of its Regulations, that the allegations were true. . . .

. . .

182. The Court is convinced, and has so found, that the disappearance of Manfredo Velásquez was carried out by agents who acted under cover of public authority. However, even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the Convention, which obligated it to guarantee Manfredo Velásquez the free and full exercise of his human rights.

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THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS

(1986), at 60.

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. . . [Article 1 of the] Convention on the Elimination of All Forms of Discrimination Against Women clearly extends the prohibition of discrimination to private life. . . .

The provisions of the Convention on the Elimination of All Forms of Discrimination Against Women apply to a broad range of activities: unintentional as well as intentional discrimination is prohibited (as indicated by the 'effect' clause); private as well as public actions are regulated (as indicated by the phrase 'any other field'). By proscribing practices which have the effect of discriminating against women, the Convention guards against the use of facially neutral criteria as a pretext for discrimination, for instance the use of height and weight requirements which are not related to the requirements of the job and which tend to exclude women as a group. The 'effects' standard avoids the difficulties inherent in proving specific discriminatory motive. The prohibition of unintentional discrimination is necessary to achieve systemic change, because policies undertaken without discriminatory motive may perpetuate inequalities established by prior acts of purposeful discrimination. . . .

The definition of discrimination against women does not prohibit certain distinctions *per se*, but only when they have the purpose or the effect of denying women the enjoyment of human rights and fundamental freedoms on a basis of equality with men. . . . [T]he Committee on the Elimination of Racial Discrimination has tended to regard all ethnic distinctions as suspect, unless made in the context of affirmative action, without engaging in a substantive inquiry as to whether they have in fact had an adverse effect on the enjoyment of 'rights'. If the parties to the Convention on the Elimination of All Forms of Discrimination Against Women and the Committee established under Art. 17 follow a similar approach, a further expansion in the reach of the Convention would result. . . .

It is not clear whether it was appropriate to extend the field of application of the Convention to encompass even private, interpersonal relations (except, of course, when the conduct which is challenged takes forms customarily regulated pursuant to the police power). It is certainly true that discrimination against women in personal and family life is rampant and may obviate equal opportunities which may be available in public life. There is danger, however, that state regulation of interpersonal conduct may violate the privacy and associational rights of the individual and conflict with the principles of freedom of opinion, expression, and belief. Such regulation may require invasive state action to determine compliance, including inquiry into political and religious beliefs. Attempts to regulate discrimination in interpersonal conduct

may invite abuse of the discretion vested in the State by the broad language of Art. 1.

. . .

[Article 5 of the Convention] mandates regulation of social and cultural patterns of conduct regardless of whether the conduct is public or private. Coupled with the broad and vague language of the preambular sentence discussed above ('all appropriate measures'), para. (a) might permit States to curtail to an undefined extent privacy and associational interests and the freedom of opinion and expression. Moreover, since social and cultural behaviour may be patterned according to factors such as ethnicity or religion, state action authorized by para. (a) which is directed towards modifying the way in which a particular ethnic or religious group treats women may conflict with the principles forbidding discrimination on the basis of race or religion.

The danger of intrusive state action and possible violation of the rights of ethnic or religious groups might have been mitigated by limiting state action to educational measures. Social and cultural patterns of conduct could be regulated by the substantive provisions which govern actual practices in a particular field, for example employment practices, without loss of substantive rights under the Convention.

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ELIZABETH SCHNEIDER, THE VIOLENCE OF PRIVACY

23 Conn. L. Rev. 973 (1992), at 974.

. . .

Historically, the dichotomy of 'public' and 'private' has been viewed as an important construct for understanding gender. The traditional notion of 'separate spheres' is premised on a dichotomy between the 'private' world of family and domestic life (the 'women's' sphere), and the 'public' world of marketplace (the 'men's' sphere).

. . .

Although a dichotomous view of the public sphere and the private sphere has some heuristic value, and considerable rhetorical power, the dichotomy is overdrawn. The notion of a sharp demarcation between public and private has been widely rejected by feminist and Critical Legal Studies scholars. There is no realm of personal and family life that exists totally separate from the reach of the state. The state defines both the family, the so-called private sphere, and the market, the so-called public sphere. 'Private' and 'public' exist on a continuum.

Thus, in the so-called private sphere of domestic and family life, which is

purportedly immune from law, there is always the selective application of law. Significantly, this selective application of law invokes 'privacy' as a rationale for immunity in order to protect male domination. For example, when the police do not respond to a battered woman's call for assistance, or when a civil court refuses to evict her assailant, the woman is relegated to self-help, while the man who beats her receives the law's tacit encouragement and support. Indeed, we can see this pattern in recent legislative and prosecutorial efforts to control women's conduct during pregnancy in the form of 'fetal' protection laws. These laws are premised on the notion that women's childbearing capacity, and pregnancy itself, subjects women to public regulation and control. Thus, pregnant battered women may find themselves facing criminal prosecution for drinking liquor, but the man who battered them is not prosecuted.

The rhetoric of privacy that has insulated the female world from the legal order sends an important ideological message to the rest of society. It devalues women and their functions and says that women are not important enough to merit legal regulation.

. . .

The tension between public and private also is seen in the issue of what legal processes are available to battered women, and the social meaning of those processes to battered women, in particular, and to society at large. Over the last several years, the range of legal remedies has expanded and there has been an explosion of statutory reforms. For example, there are civil remedies, known as restraining orders or orders of protection. These are court orders with flexible provisions that a battered woman can obtain to stop a man from beating her, prevent him from coming to the house, or evict him from the house. There are also criminal statutes that provide for the arrest of batterers, either for beating or for violation of protective orders. Although there remain serious problems in the enforcement and implementation of these orders, the fact that such formal legal processes exist is evidence of a developing understanding of the public dimension of the problem. By giving battered women remedies in court there is, at least theoretically, public scrutiny, public control and the possibility of public sanction.

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CATHERINE MacKINNON, ON TORTURE: A FEMINIST PERSPECTIVE ON HUMAN RIGHTS

in Kathleen Mahoney and P. Mahoney (eds.), Human Rights in the Twenty-First Century 21 (1993).

Torture, with accompanying disappearance and murder, is widely recognized as a core violation of human rights. Inequality on the basis of sex is equally

widely condemned, and sex equality affirmed as a core human rights value and legal guarantee, both nationally and internationally. My question is, given these two facts, why is torture on the basis of sex in the form of rape, domestic battering, and pornography not seen as a violation of human rights?

The purpose of this paper is to illustrate the way the realities of women's condition illuminate what must be included within the concept of human rights unless it is implicitly assumed that women are a lesser form of human life. My argument is that law and policy—national as well as international—and society must be held to human rights standards when torture, violence, assault and other forms of inequality are sex-based, just as much as when they are based on anything else.

Internationally, torture has a recognized profile. . . . Verbal abuse, humiliation, and making the victim feel worthless are part of the necessary degradation. Often torture victims are selected and specifically tortured as members of a social group. . . .

There is also international consensus on what torture does to a human being. It is recognized that people break and change under such extreme pressure, studied under the rubrics of brainwashing, post-traumatic stress and the Stockholm Syndrome. Long-term consequences to survivors are both mental and physical. Many victims disassociate to survive and find the response hard to reverse. What one learns about life from being tortured, and what one has to do to survive it when others do not, makes being alive unbearable for some. Suicide can result even years later.

It is also generally recognized that the usual purpose of torture is to control, intimidate, or eliminate those who insult or challenge or are seen to undermine a regime. Torture is thus imagined to be political, although it often seems that its political overlay is a facilitating pretext for the pure exercise of sadism, which is a politics in itself.

When these things happen, human rights are deemed violated. These recognitions delineate a standard for acknowledging atrocities.

With this framework in mind, consider the following accounts.

[The author recounts in detail terrifying, unspeakable and ongoing acts of savagery, sadism and humiliation against three women by men—one man a pimp, the other two husbands. The accounts, stressing sexual brutality and (by any standard) torture leaving permanent physical and psychic injuries, were based on statements by two of the women involved and, in one case, on newspaper sources.]

In the accounts by these women, *all the same things happen* as happen in the Amnesty International accounts of torture, except that they happen in homes in Nebraska or in pornography studios in Los Angeles rather than prison cells in Chile or detention centres in Turkey. But the social and legal responses to their experiences are not the same. Torture victims are not generally asked, 'How many like you are there?', as if it is not important and we do not have

to worry about it if it happened only to you, or a few like you. Torture is not generally attributed to some sick individual and dismissed as exceptional. With torture, one doesn't hear that maybe the increase is just an increase in reporting, as if a constant level of such abuse would be acceptable. Billions of dollars are not made selling pictures of what is regarded as torture, nor is torture as such generally regarded as sexual entertainment. Never is a victim of torture asked, didn't you really want it?

A simple double standard is at work here. What fundamentally distinguishes torture, understood in human rights terms, from the events these women have described is that torture is done to men as well as to women. Torture is regarded as politically motivated not personal; the state is involved in it. I want to ask why the torture of women by men is not seen as torture, why it is not seen as politically motivated, and what is the involvement of the state in it?

Women comprise half the human race. . . .

. . .

Why isn't this political? The abuse is neither random nor individual. The fact that you may know your assailant does not mean your membership in a group selected for violation is irrelevant to your abuse. This abuse is systematic and group-based. It defines the quality of community life and the distribution of power in society. It would seem that something is not considered political if it is done to women by men, especially if it is considered to be sex. Then, it is not considered political or even violent because what is political is when men control and hurt and use other men, persons who are deserving of dignity, on some basis men have decided is deserving of dignity, like political ideology. So their suffering has the dignity of politics and is called torture. . .

A reason often given or implicit in considering atrocities to women not human rights violations, politically or legally, is that they do not involve acts by states. They happen between non-state actors, in civil society, unconscious and unorganized and unsystematic and undirected and unplanned. They do not happen by virtue of state policy. International instruments (and national constitutions) control only state action.

But the state is not all there is to power. To act as if it is produces an exceptionally inadequate definition for human rights when so much of the second class status of women, from sexual objectification to murder, is done by men to women prior to express state involvement. If 'the political' is to be defined in terms of men's experiences of being subjected to power, it makes some sense to centre its definition on the state. But if one is including the unjust power involved in the subjection of half of the human race by the other half—male dominance—it makes no sense whatsoever to define power exclusively in terms of what the state does. The state is only one instrumentality of it. To fail to see this is pure gender bias. Usually, this bias flies under the flag of privacy, so that those areas which are defined as inappropriate for state involvement, where the

discourse of human rights is irrelevant, are those 'areas in which the majority of the world's women live out their days.' Moreover, the fact that there is no single state or organized group expressly dedicated to this pursuit does not mean that all states are not more or less dedicated to it on an operative level or that it is not a deep structure of social, political, and legal organization.

Actually, though, the state is deeply and actively complicit in all the abuses mentioned. . . .

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. . . The abuse of women I described does not pretend to be official. But the cover-up, the legitimization, and the legalization of the abuse is. It is done with official impunity and legalized disregard. The abuse is systematic and known, the disregard is official and organized, and the effective governmental tolerance is a matter of policy.

Legally, the pattern is one of national and international guarantees of equality coexisting with massive rates of rape and battering and traffic in women through pornography effectively condoned by law. Some progressive international human rights bodies are beginning to inquire into some dimensions of these issues under equality rubrics—none into pornography, some into rape and battering. Still, rape is more likely to look like a potential human rights violation when it happens in official custody. A woman's human rights are deemed violated because the state was an instrumentality of the rape. The regular laws and their regular everyday administration are not seen as official state involvement in legalized sex inequality. . . .

. . .

Why are there no human rights standards for tortures of women as a sex? Why are these atrocities not seen as sex equality violations? . . .

. . .

. . . [T]o act consistent with equality guarantees is to move to end sex inequality through law. Wherever the law reinforces gender hierarchy, it violates legal equality guarantees in national constitutions and in international covenants as well.

. . . We need to look at unenforced laws: those that exist but virtually nothing is ever done with them, such as the law against battering, which can make violence women's only survival option. This violates women's human rights. We need to look at the wrong laws: the laws that don't fit the violation, have nothing to do with what really happens to women, such as the law of self-defense, the law of rape, and the law of obscenity in most places. They violate women's human rights. All these are affirmative state acts or positive omissions. To go deeper, we also need to look at those areas where there are no laws at all for the harms women experience in society because we are women, such as most of the harms of pornography. Women are human there, too. Women's human rights are being violated there, too.

If, when women are tortured and disappear because we are women, the law recognized that a human being had her human rights violated, the term 'rights' would begin to have something of the content to which we might aspire, and the term 'woman' would, to paraphrase Richard Rorty, begin to be 'a name for a way of being human'.

KAREN ENGLE, AFTER THE COLLAPSE OF THE PUBLIC/PRIVATE DISTINCTION: STRATEGIZING WOMEN'S RIGHTS

in Dorinda Dallmeyer (ed.), Reconceiving Reality: Women and International Law (1993), at 143.

. . .

Central to the critiques of international law have been analyses of the public/private distinction. They generally take one of two forms. Either women's rights advocates argue that public international law, and particularly human rights theory, is flawed because it is not really universal. That is, because international law excludes from its scope the private, or domestic sphere—presumably the space in which women operate—it cannot include them. Or advocates argue that international law does not really exclude the private, but rather uses the public/private divide as a convenient screen to avoid addressing women's issues.

Those who take the first approach, then, take for granted that public international law in its present form cannot enter what they see as the private sphere. For women to be included, they maintain, international law must be reconceptualized to include the private.

Those who take the second approach, on the other hand, assume that doctrinal tools are present in international law—particularly in human rights law—to accommodate women. The public/private dichotomy, they assert, is both irrational and inconsistently applied. According to this second approach, the human rights regime and states are disingenuous in their claim that they do not enter the private sphere. The private sphere is entered all the time, for example, through regulation of the family, or the ability to impute to states the acts of non-state actors in disappearance cases. Moreover, these critics argue, a state's failure to protect rights in the private sphere is not distinguishable from direct state action. Finally, they point out that the human rights regime applies a double standard when talking about women. The international legal regime would never argue, for example, that it could not intervene to ensure that states end certain forms of 'private' violence, such as cannibalism or slavery.

. . .

Concentrating too much on the public/private distinction excludes important parts of women's experiences. Not only does such a focus often omit

those parts of women's lives that figure into the 'public,' however that gets defined, it also assumes that 'private' is bad for women. It fails to recognize that the 'private' is a place where many have tried to be (such as those involved in the market), and that it might ultimately afford protection to (at least some) women.

. . .

. . . [The critiques of the private–public distinction] make us think of the unregulated private as something that is necessarily bad for women. We rarely look at the ways in which privacy (even if only because it seems the best available paradigm) is seen by at least some women to offer them protection. A number of examples immediately come to mind, each of which centers on women's bodies and, not surprisingly, on women's sexuality. The language of privacy, and sketching out zones of privacy, many would argue, is our best shot at legally theorizing women's sexuality. In United States legal jurisprudence, the First Amendment has been used to a similar end as often seen in the debates about pornography.

Examples of where 'the private' is sometimes seen to have liberating potential for women are abortion (which is most obvious to us in the United States); battering; the protection of 'alternative' sexual lifestyles; prostitution; right to wear the veil as protection from sexual harassment; right to participate in *or be free of* clitoridectomies, sati, breast implants, the wearing of spike-heeled shoes. Failure to focus on these issues affecting women's relationships to our bodies obscures the ways that many women see their lives.

. . . [T]he critiques often prevent us from taking seriously women who claim not to want the regulation or protection of international law. Arguments about 'culture,' particularly those that attempt to use claims of cultural integrity or community to maintain practices that some women might find abhorrent, get transformed into arguments about the private. That is, women's rights advocates often treat these arguments as though they are yet another manifestation of the mainstream legal regime's exclusion of the private or women (or both) at all costs. As a result, advocates either ignore those women who defend practices they see as an important part of their culture, or assume that such women are replete with false consciousness.

. . .

. . .[T]he critiques often lead us to conspiracy theories. Our exclusion indicates that they're all out to get us. We point out that *they* don't include *us* in the mainstream, that *they* give *us* our own marginal institutions and then ensure that the institutions lack enforcement mechanisms, that *they* don't really care about *us* or take us seriously. We rarely ask, though, who *they* are, who *we* are, and why they're out to get us. We also fail to notice that others are singing a similar tune to our own. Those who argue for economic and social rights, for example, seem to feel just as isolated and outside as women's advocates do. In fact, sometimes it seems that international law, particularly

human rights law, has been built by its own criticism. That is every time some group or cause feels outside the law, it pushes for inclusion, generally through a new official document. The vast proliferation of human rights documents, then, is as much a testament to exclusion as it is to inclusion.

. . .

QUESTIONS

1. How do you assess the 'danger of intrusive state action' to which Meron refers? Do such dangers as may appear to you stem from the degree to which (a) CEDAW regulates private or non-governmental actors and acts, (b) requires changes in cultural attitudes and customary practices, or both?

2. Is a state party to CEDAW required to take measures against a television series on a privately owned network that sympathetically portrays the women who figure in its story as financially dependent on men, as homekeepers, and as persons caring for the family without outside work or career ambitions? If so, under what provisions of CEDAW, and what measures?

3. Two radically different conceptions are presented in the readings of how violence against women by non-state actors leads to the conclusion that the relevant state has violated international human rights. (1) The state fails to act reasonably through the processes of the criminal law to protect against violence, to punish the violators, and to deter further violence. (2) There is no division of state and society or culture, no satisfactory way of distinguishing between the public and private with respect to the exercise of power against women. In this context, private power is public power. The state is deeply implicated in cultural attitudes that foster violence, and can meet its human rights duties only by changing those attitudes. It is not a matter of patching up criminal laws or enforcement here or there, but of transforming deep structures of beliefs and behavior.'

   a. Is this an accurate description of the readings? If not, how would you formulate the different conceptions at work?

   b. Are both conceptions, one or the other, or neither one, appropriate for a human rights treaty on women's rights?

4. 'CEDAW is more of a long-run political platform or program than a human rights treaty concerned with equal protection.' Do you agree? If so, what follows from it?

COMMENT ON CONFLICTS BETWEEN CEDAW AND RELIGIOUS AND CUSTOMARY LAWS AND PRACTICES

The potential for conflict between the objectives of the Convention and states' religious and customary laws and practices has become a salient concern. Readings in Chapter 4 by An-Na'im on *Human Rights in the Muslim World*, p. 210, *supra*, and about female circumcision, p. 240, *supra*, illustrate some of those laws and practices.

The concern about serious conflict has grown in recent years with the increasing power and prominence of fundamentalist religious groups, many of which actively oppose the transformative impetus of the human rights movement for women. A common feature of such groups is their commitment to the maintenance of traditional gender roles. The practices expressing those roles are often defended in terms of sex role 'complementarity' or 'equity,' in contrast with the preeminent CEDAW principle of equality. These divergent paths are illustrated in a less dramatic way by the 'benign neglect' shown so far by many states parties of basic provisions of the Convention—for example, of Articles 2(f) and 5(a) that require parties to take 'all appropriate measures' to modify customary practices constituting discrimination.

This conflict between women's rights as elaborated in the Convention and the customary or religious law in many states parties assumes a large significance since the control and influence over women of customary law may exceed that of modern secular law, particularly in non-Western states.[23] Such law and practice often govern crucial matters including marriage, divorce, child custody, maintenance, inheritance, succession, and the ownership and control of property. In addition, cultural or religious norms may influence the availability of family planning information and devices, as well as the scope and character of reproductive rights.

In states without a clear distinction between religious and secular law, women may be subject to discrimination in formal legal processes including criminal cases. The law, for example, may distinguish between the legal capacity of men and women as witnesses and as to matters of proof and corroboration in cases of sexual assault. Recall the reservations to CEDAW at p. 920, *supra*, particularly those of Bangladesh, Egypt and Iraq to the provisions of Article 2 insofar as it relates to issues governed by the Islamic Shari'a.

Even where states have not entered reservations to Articles 2(f) or 5(a), serious obstacles remain to practical implementation of the Convention.[24] A government may find it difficult to disregard the sentiments of politically powerful groups or segments of society that wish to maintain religious or customary

[23] A survey of these issues appears in Donna Sullivan, Gender Equality and Religious Freedom: Toward a Framework for Conflict Resolution, 24 N.Y.U.J. Int. L. & Politics 795 (1992).

[24] Abdullahi An-Na'im, State Responsibility under International Human Rights Law to Change Religious and Customary Beliefs, in Rebecca Cook (ed), Human Rights of Women: National and International Perspectives 167 (1994).

law. States may deny that certain practices, such as male land tenure or female genital mutilation, contravene CEDAW's provisions. Assuming that a state recognizes its obligations to change some customary norms and practices, its motivation to bring about that change will depend on that change's relation to other state objectives and on the depth of the socio-cultural roots of the practices. Indeed, the state might not possess the necessary influence or power to proceed. Authority may be divided among the central government and regional or ethnic leaders. The supervision and enforcement of some customary laws may rest not with the state but with another body, such as a religious court or officials.

Finally, secular remedies, even where available, may be of limited utility if women face the difficult choice of accepting customary practices or risking (in some cases certain) exclusion from the communities from which they also derive support.

QUESTIONS

1. How do you assess the argument of states parties entering reservations to CEDAW that principles of religious freedom are fundamental to the human rights movement and validate their decisions? Can such an argument be based on the provisions of CEDAW itself? Consider the precise phrasing and relevance of Article 18 of the UDHR and Article 18 of the ICCPR.

2. How do you assess the argument of states entering reservations that respect for diversity, for cultural relativism over a dogmatic and alien universalism, ought to prevail with respect to contested matters of customary and religious norms and practices?

3. In the light of the readings in this Section E, what can we determine about effective strategies for implementing Convention rights in relation to conflicting religious and customary laws and practices?

a. What financial and institutional resources should states parties be expected to commit to changing or eliminating social or customary norms and practices that are detrimental to women? What tactics and methods should be employed?

b. Should priorities be established, given the recognition that not all can be done at once and that progressive realization is inevitable? What matters should have top priority?

c. How could the state act to reduce or eliminate the risks faced by women from their own communities if they break from community practices that they and the CEDAW Committee view as denials of rights?

COMMENT ON THE REGULATORY REACH OF HUMAN RIGHTS TREATIES

This Comment calls attention to comparable provisions of several treaties that require states to develop programs and regulation in order to eliminate certain ideas and social practices and to substitute for them other ideas and practices.

(1) CEDAW is not the only human rights instrument with aspirations to a deep transformation of social life. It is simply more explicit and forceful about those aspirations. Articles 5 and 10(c) are the two preeminent provisions that state general transformative goals. Compare them with provisions of two associated instruments: (i) Article 24(d) of the CEDAW Committee's General Recommendation No. 19, p. 938, *supra*, and (ii) Article 4 of the UN Declaration on the Elimination of Violence against Women, p. 941, *supra*.

(2) The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) also states broad transformative goals. Some of its provisions in Articles 1, 2 and 5 on state regulation of discrimination by private or non-governmental groups, appear in the Comment at p. 778, *supra*. Article 2(e) states:

> Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

Article 7 of CERD provides:

> States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups. . . .

(3) Recall that the United States, when it ratified the ICCPR and CERD, entered reservations on the following analogous provisions in the two treaties.

(a) *Article 20(2) of the ICCPR* provides that '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.' A commentator's interpretation of this provision appears at p. 771, *supra*.

(b) Under *Article 4 of CERD*, States Parties undertake to adopt measures 'designed to eradicate all incitement to, or acts of' racial discrimination; to declare a punishable offense 'all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination' or acts of violence; to prohibit organizations 'which promote and incite racial discrim-

ination'; and to 'recognize participation in such organizations or activities as an offence punishable by law . . . .'

CEDAW does not by its terms require states parties to prohibit and make criminal the advocacy or dissemination of ideas. It does refer in numerous articles, including Article 5, to the obligation of parties to 'take all appropriate measures,' including legislation, to effectuate the aim of the given article.

QUESTIONS

1. 'It is a proper function of human rights treaties to require or prohibit defined conduct by the state, including requiring the state to regulate non-governmental conduct like discrimination in employment that is offensive to the treaty's principles. It is not a proper function to regulate citizens or impose penalties on them for the ideas they may hold and may wish to persuade others to hold.'

a. Do you agree or disagree? Why?

b. Compare from this perspective CERD and CEDAW. From the statement's perspective, is one or the other convention subject to criticism?

c. How might you explain two salient differences between CERD and CEDAW: a strong Article 5 in CEDAW, which unlike CERD has no provision making advocacy of particular ideas a criminal offense?

F. PARTICIPATION OF WOMEN IN POLITICAL INSTITUTIONS AND LIFE

Low political participation and a low level of representation of a group in political institutions surely contribute to marginalization on the political agenda of that group's issues and interests. Such has traditionally been the case for women.

Consider some statistical information. 'In some countries, women are still not allowed to vote. . . . [I]n 1980, they made up just over 10% of the world's parliamentarians and less than 4% of national cabinets. In 1993, only six countries had women as heads of government.'[25] The following percentages[26] refer to the seats in parliament (or equivalent legislative body) occupied by women in 1992: Finland 39%, Norway 38%, Netherlands 23%, Cuba 23%, China 21%, Tanzania 11%, U.S.A. 10%, U.K. 9%, Russia 9%, India 7%, Mexico 7%, France 6%, Peru 6%, Kenya 3%, Egypt 2%.

[25] United Nations Development Programme, Human Development Report of 1993, 25.
[26] United Nations Development Programme, Human Development Report for 1994, 144.

A recent UN study[27] reports that high levels of economic development do not appear to increase automatically the number of women in political life. For example, the number of women elected to the national legislative bodies in Japan remains well below 10%. The collapse of the Communist states in Eastern Europe has coincided with a dramatic decline in the number of women in elected positions—and in the region which formerly had the highest rate of representation by women. It is not then surprising that the CEDAW Committee looks favourably upon specific programs to improve this situation, such as targets for the numbers of women in the civil service and in legislative bodies.

The problem of representation of course affects international as well as national institutions, perhaps particularly within the international human rights system given its goals of political participation. Hence the readings begin with a criticism of the international legal order before turning to the organs of national governments.

HILARY CHARLESWORTH, C. CHINKIN AND S. WRIGHT, FEMINIST APPROACHES TO INTERNATIONAL LAW

85 Am. J. Int. L. 613 (1991), at 621.

III. THE MASCULINE WORLD OF INTERNATIONAL LAW

In this section we argue that the international legal order is virtually impervious to the voices of women and propose two related explanations for this: the organizational and normative structures of international law.

The Organizational Structure of International Law.

The structure of the international legal order reflects a male perspective and ensures its continued dominance. The primary subjects of international law are states and, increasingly, international organizations. In both states and international organizations the invisibility of women is striking. Power structures within governments are overwhelmingly masculine: women have significant positions of power in very few states, and in those where they do, their numbers are minuscule. Women are either unrepresented or underrepresented in the national and global decision-making processes.

. . .

International organizations are functional extensions of states that allow them to act collectively to achieve their objectives. Not surprisingly, their structures replicate those of states, restricting women to insignificant and subordinate roles. Thus, in the United Nations itself, where the achievement of

[27] Women in Politics and Decision-Making in the Late Twentieth Century (1992).

nearly universal membership is regarded as a major success of the international community, this universality does not apply to women.

Article 8 was included in the United Nations Charter to ensure the legitimacy of women as permanent staff members of international organizations. Article 8 states: 'The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.' . . .

In reality, women's appointments within the United Nations have not attained even the limited promise of Article 8. The Group on Equal Rights for Women in the United Nations has observed that 'gender racism' is practiced in UN personnel policies 'every week, every month, every year.'

Women are excluded from all major decision making by international institutions on global policies and guidelines, despite the often disparate impact of those decisions on women. . . .

The silence and invisibility of women also characterizes those bodies with special functions regarding the creation and progressive development of international law. Only one women has sat as a judge on the International Court of Justice and no woman has ever been a member of the International Law Commission. . . .

Despite the common acceptance of human rights as an area in which attention can be directed toward women, they are still vastly underrepresented on UN human rights bodies. The one committee that has all women members, the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the monitoring body for the Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention), has been criticized for its 'disproportionate' representation of women by the United Nations Economic and Social Council (ECOSOC). When it considered the CEDAW Committee's sixth report, ECOSOC called upon the state parties to nominate both female and male experts for election to the committee. Thus, as regards the one committee dedicated to women's interests, where women *are* well represented, efforts have been made to decrease female participation, while the much more common dominance of men in other United Nations bodies goes unremarked. . . .

Why is it significant that all the major institutions of the international legal order are peopled by men? Long-term domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while 'women's concerns' are relegated to a special, limited category. Because men generally are not the victims of sex discrimination, domestic violence, and sexual degradation and violence, for example, these matters can be consigned to a separate sphere and tend to be ignored. The orthodox face of international law and politics would change dramatically if their institutions were truly human in composition: their horizons would widen to include issues previously regarded as domestic—in the two senses of the word. Balanced representation in international organizations of nations of differing economic structures and power

has been a prominent theme in the United Nations since the era of decolonization in the 1960s. The importance of accommodating interests of developed, developing and socialist nations and of various regional and ideological groups is recognized in all aspects of the UN structure and work. This sensitivity should be extended much further to include the gender of chosen representatives.

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CONSIDERATION BY CEDAW OF COUNTRY REPORTS: POLITICAL PARTICIPATION

UN Doc. A/48/38, 28 May 1993.

[The following excerpts bearing on political participation of women are taken from the CEDAW Committee's annual report to the General Assembly. In each case, the excerpts are from the summary record of the Committee's consideration of the part of the country reports that is directed to Article 7 of the Convention addressing political participation. The participants are, in the discussion, the representative of the reporting country and the members of the Committee.]

FRANCE

329. The representative said that French women had not obtained a share of power in 1945 when they had been given the right to vote, but rather in the 1970s when the process of dissociation between sexuality and procreation had been accomplished through the adoption of the contraception and abortion laws. She said that contraception and abortion were the true revolutions of the twentieth century, constituting not a power-sharing between women and men, but a transfer of power from men to women. Women alone could decide on maternity, they could determine whether they chose to live with the child's father, to be married and to recognize the father's rights. They alone currently had the power in the family under the law.

330. The representative said that the French mentality was still influenced by the Napoleonic Code, which had given women an inferior position in society. Considerable strides had been made in general, but women continued to suffer from that heritage. . . ,

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339. The representative said that women in France were still excluded from the political arena. That backlog was a heritage from the past as the French Revolution had not encompassed gender issues, and women had obtained the right to vote very late. In the French Parliament only 5 per cent of the deputies were women. The reason why there were more French women in the European Parliament than in the National Assembly was that voting was done on the

basis of lists and the European Parliament was not of such political concern. Women were still excluded from political participation in spite of such dynamic steps as appointing women to six out of 45 ministers' posts or a woman as prime minister.

340. Asked whether similar actions as those undertaken to combat sexual violence would initiate progress, the representative said that the political activity of women depended on the political determination of the parties. Candidates for elections were nominated by the party officials. One way of enabling more women to obtain political power would be to establish positive discrimination procedures; however, such measures were not popular with the French people.

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KENYA

113. The Committee wished to know what the Women's Bureau was doing to increase awareness of the need to place women in higher positions, whether the KANU party [the official government party] had a special programme to encourage women to participate in politics at the local and national levels, and whether women had the same financial support as men for their electoral campaigns. With regard to women in politics, the representative explained that the awareness-creation of the democratization process among women had produced encouraging results during the elections on 29 December 1992. Initially, 80 women had showed interest in representative leadership. Eliminations at the party preliminaries had left 20 women to compete for leadership against their male counterparts for 188 parliamentary seats. Six of them had been elected to the Seventh Parliament, the highest number of women since independence. The only woman elected within KANU had been appointed as Assistant Minister in the Ministry of Culture and Social Services.

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SOUTH KOREA

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424. The Committee noted that in the last National Assembly, only six out of a total of 299 deputies were women, whereas in the election of 24 March 1992, the number of female parliamentarians had further dropped to three. Members asked what was preventing women from attaining high positions and what had been done to ensure their equal representation. The representative said that in the Thirteenth National Assembly for the term 1988–1991, all the parliamentarians had been elected in the national electoral districts. However, no female candidates in the local electoral districts had been successful. Since the composition of the members of parliament depended on the political parties and three of the four main parties had merged, the number of female parliamentarians representing the parties in the electoral districts had accordingly decreased.

425. Concerning public affairs, she said that the level of women in politics and in decision-making had not changed significantly. Women were poorly represented in decision-making positions in the Government. . . .

SWEDEN

508. Regarding legislation that would ensure a certain proportion of women in the lists of candidates for popular election, the representative stated that such legislation did not exist. However, many political parties had internal rules or practices on the nomination of women.

509. Asked about whether Sweden still promoted the 'Fifty–Fifty' campaign as seen in some international forums, the representative stated that the goal remained the same, although the Government could not impose a certain behaviour on political parties. The Government was only responsible for certain areas (boards of public bodies, committees, working groups etc.). In order to affect the political parties, public opinion needed to be created. Generally, women remained active in political life; all political parties had their own women's organizations.

510. The representative gave a positive answer to a question concerning the current target of attaining 30 per cent of women on public bodies. On committees and at the regional level, the number was slightly under 30. The next goal was 40 per cent by 1995. . . .

511. Asked about the efforts of employers' and employees' organizations to increase the number of women in decision-making bodies, the representative mentioned that general activity had risen in that field. She referred to training and projects, which were aimed at both encouraging women to seek higher positions and bringing about a change in attitude. Special reference was made to the Swedish Trade Union Confederation, which had created a large network and acted successfully as a pressure group contributing to an increased visibility of the problem.

NOTE

An article in the *New York Times*, Dec. 31, 1993, at A4, *Frenchwomen Say 'It's Time to Be a Bit Utopian,'* reports that a group of French women were working toward the goal of requiring that seats in the lower house of the French Parliament be shared equally by men and women. Several weeks earlier, Michel Rocard, head of France's Socialist opposition, said that he would head his party's ticket in coming elections for the European Parliament only if it nominated an equal number of men and women as candidates.

> Olivier Duhamel, a well-known political scientist, nonetheless warned that sexual parity in representation introduced the notion of quotas, with the risk that the old and young or ethnic and religious groups might eventually also claim a right to be equally represented in Parliament.

An article in *The Economist*, March 18, 1995, p. 51, noted that the socialist candidate in the French presidential elections that were about to take place (who ultimately lost) had said that if elected he would change the electoral system to give women a quota of about 30% in local-government elections chosen by proportional representation.

> The Socialist government tried to introduce a quota system (with the share at 25%) for the local elections in 1982. The idea was ruled unconstitutional on the ground that it discriminated between men and women. To get around that, Mr. Balladur has promised to put the constitutional changes required by his proposal to a referendum this autumn.

QUESTIONS

1. Would you support a proposed law (assume its constitutionality under a state legal system and its consistency with international human rights) requiring that a stated percentage of a legislative body consist of women? Would your answer depend on the percentage—say, 15% or 30% or 50%? Would it depend on the length of time of the law's effectiveness, on the level of government involved, on other factors?

2. Would your reaction be the same for a proposed law stating percentages for a judiciary, or for heads of cabinet departments?

3. What advantages and disadvantages do you see in such laws?

PART F

CURRENT TOPICS

Drawing on the framework of Chapters 1–12, Part F examines several additional human rights topics. There is indeed no shortage of topics that could be employed with advantage to complete the coursebook. Human rights has become a pervasive concern, as in children's rights, issues of refugees and asylum or humanitarian intervention. It offers a fresh perspective on many global issues, such as the bearing of human rights on population control, environment, or religious movements.

Among such rich possibilities, we have selected three topics that explore more briefly than did Chapter 13 issues of current importance for the human rights movement: self-determination and autonomy regimes, international crimes and criminal tribunals, and the relation between development and human rights.